UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MATT DASH,

Plaintiff,

-against-

SEAGATE TECHNOLOGY (US) HOLDINGS, INC.,

Defendant.

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MEMORANDUM AND ORDER

CV 13-6329

(Wexler, J.)

APPEARANCES:

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WEXLER, District Judge:

Before the Court is Defendant's motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56. Plaintiff opposes the motion, asserting that genuine issues of material fact exist that warrant a trial of this action. For the following reasons, Defendant's motion is granted.

BACKGROUND

This is a false advertising action under New York's General Business Law that arises out of Plaintiff's purchase of an external computer hard drive manufactured by Defendant, which Plaintiff alleges did not transfer files as fast as the speed claimed on the packaging. Plaintiff, Matt Dash, is an amateur photographer who takes very high definition photographs, resulting in large computer files. LaCie S.A. ("LaCie") is a manufacturer of computer hard drives and other devices used to transfer and store electronic data. Defendant Seagate Technology (US) Holdings, Inc. ("Seagate") is a United States corporation, incorporated in Delaware and based in California, that manufactures and markets computer disk drives. La Cie is an Oregon-based indirect subsidiary of Seagate Technology Public Limited Company, which is the indirect parent of Defendant Seagate. The relevant facts, which are largely undisputed, are taken from the parties' Local Civil Rule 56.1 Statements, unless otherwise noted.

On August 2, 2013, Plaintiff purchased a LaCie Rugged Thunderbolt external hard drive (the "Drive"), which has a 1 terabyte capacity and is within the first version line of the drive, from an Apple Store in Garden City, New York, for $199.95. The Drive possesses two interfaces, which is the manner through which an external device, such as a hard drive, communicates with a computer: Thunderbolt and USB 3.0. At the time Plaintiff purchased the

Drive, Thunderbolt was the fastest interface on the market, theoretically capable of transferring up to 10 gigabits per second ("Gb/s"), which is twice as fast as the USB 3.0 interface's maximum speed of 5 gigabits per second.

Every interface has overhead and other inherent limitations that limit the interface from achieving its theoretical maximum transfer speed. Few, if any, individual drives are capable of sending or receiving 10 gigabits of data per second. As a result, in actuality, there is often a substantial difference between (a) the theoretical maximum data transfer rate of a particular interface; and (b) the average speed at which a particular external hard drive is actually capable of transferring data via that interface. Conversely, if an interface is slower than the rate of the drive it is attached to, the interface will constrain the drive's performance and limit the rate at which data can be transferred to or from the drive.

The first models within the first version line of the Drive were released to the public in September 2012. Five models of the first version drive were manufactured, differing in storage capacity, whether they were solid state drives or hard disk drives, and with respect to the drives' data transfer speeds.

The packaging of the Drive changed over time, with three different box designs being used for the first version line of drives. The second of those three designs - for drives manufactured between late July 2012 and late February 2013 - accompanied the Drive Plaintiff purchased. The packaging on the Drive Plaintiff purchased contained textual and graphical statements regarding the transfer speed of the Drive's two interfaces, including a heading for "Interface Transfer Rates" that stated "Thunderbolt™ up to 10 Gb/s" and "USB 3.0 up to 5 Gb/s." The packaging also contained a speedometer graphic with the text "10 Gb/s" on the

speedometer itself and the text "shocking speeds up to 10 Gb/s" accompanying the speedometer. The packaging did not contain any reference to the Drive's transfer speed.

Within twenty-four to forty-eight hours of purchasing the Drive, Plaintiff discovered that the Drive did not transfer files at 10 Gb/s as he expected. Thereafter, Plaintiff commenced the within litigation, asserting claims for deceptive marking practices under Section 349 and 350 of the New York General Business Law, as well as common law fraud. The Court previously dismissed Plaintiff's fraud claim, as well as denied his motion for class certification.

DISCUSSION

I. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden is on the moving party to establish the lack of any factual issues. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The very language of this standard reveals that an otherwise properly supported motion for summary judgment will not be defeated because of the mere existence of some alleged factual dispute between the parties. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Rather, the requirement is that there be no "genuine issue of material fact." Id. at 248.

The inferences to be drawn from the underlying facts are to be viewed in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986). When the moving party has carried its burden, the party opposing summary judgment must do more than simply show that "there is some metaphysical doubt as to

the material facts." Id. at 586. In addition, the party opposing the motion "may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing there is a genuine issue for trial." Anderson, 477 U.S. at 248.

When considering a motion for summary judgment, the district court "must also be 'mindful of the underlying standards and burdens of proof' . . . because the evidentiary burdens that the respective parties will bear at trial guide district courts in their determination of summary judgment motions." SEC v. Meltzer, 440 F. Supp. 2d 179, 187 (E.D.N.Y. 2006) (quoting Brady v. Town of Colchester, 863 F.2d 205, 211 (2d Cir. 1988)) (internal citations omitted). "Where the non-moving party would bear the ultimate burden of proof on an issue at trial, the burden on the moving party is satisfied if he can point to an absence of evidence to support an essential element of the non-movant's claim." Meltzer, 440 F. Supp. 2d at 187.

II. New York General Business Law Sections 349 and 350

To recover under Section 349 of the New York General Business Law, Plaintiff must demonstrate that Defendant "has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) [P]laintiff suffered injury as a result of the allegedly deceptive act or practice." City of New York v. Smokes-Spirits.com, Inc., 12 N.Y.3d 616, 621 (2009). A "deceptive act or practice" has been defined as a "representation or omission[] . . . likely to mislead a reasonable consumer acting reasonably under the circumstances." Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 26 (1995). Such a finding may be determined as a matter of law. See id.; see also Fink v. Time Warner Cable, 714 F.3d 739, 741 (2d Cir. 2013) ("It is well settled that a court may determine as a matter of law that

an allegedly deceptive advertisement would not have misled a reasonable consumer."). "The 'standard for recovery under [New York General Business Law Section 350], while specific to false advertising, is otherwise identical to section 349.'" Oscar v. BMW of N. Am., LLC, No. 09 Civ. 11, 2011 U.S. Dist. LEXIS 146395, at *20 (S.D.N.Y. Dec. 20, 2011) (quoting Goshen v. Mut. Life Ins. Co., 98 N.Y.2d 314, 324 n.1 (2002)).

"The legal test for liability under §§ 349 and 350 of the New York General Business Law is the same as the test for violation of § 43(a) of the Lanham Act." Johnson & Johnson - Merck Consumer Pharm. Co. v. Smithkline Beecham Corp., No. 91 Civ. 0960, 1991 U.S. Dist. LEXIS 13689, at *24 (S.D.N.Y. Sept. 30, 1991), aff'd, 960 F.2d 294 (2d Cir. 1992) (citing cases); see also Mimedx Group, Inc. v. Osiris Therapeutics, Inc., No.16 Civ. 3645, 2017 U.S. Dist. LEXIS 114105, at *36 (S.D.N.Y. July 21, 2017) (stating that "claims under New York General Business Law §§ 349 and 350 are analyzed using the same standard as . . . Lanham Act claims"); Rexall Sundown, Inc. v. Perrigo Co., 651 F. Supp. 2d 9, 20 (E.D.N.Y. 2009) (noting that §§ 349 and 350 claims are "analyzed under the same substantive standard as . . . Lanham Act claims"). "Where, as here, a plaintiff's theory of recovery is premised upon a claim of implied falsehood," Johnson & Johnson v. Smithkline Beecham Corp., 960 F.2d at 297, meaning the "advertisement is not literally false, but rather is ambiguous or implicitly false," New Sensor Corp. v. CE Distrib, LLC, 303 F. Supp. 2d 304, 316 (E.D.N.Y. 2004), "a plaintiff must demonstrate, by extrinsic evidence, that the challenged [advertisement] tends to mislead or confuse customers." Johnson & Johnson, 960 F.2d at 297; see also Rexall Sundown, 651 F. Supp. 2d at 23 ("It is well settled that, when bringing suit on a theory of implied falsity, a plaintiff must provide extrinsic evidence to support a finding that consumers do take away the misleading message alleged."). Typically, this is

accomplished through the use of a consumer survey. See id. at 298; see also New Sensor Corp., 303 F. Supp. 2d at 316 (holding that "a plaintiff can only establish a claim of false advertising through a survey"); Hilton Int'l Co., Inc. v. Hilton Hotels Corp., 888 F. Supp. 520, 538 (S.D.N.Y. 1995) (finding false advertising claim fails where the advertisement was not literally false and there was no survey to establish implied falsity). Plaintiff disputes this requirement but offers no case law in support. (Pl. Mem. of Law in Opp'n 13.)

Here, Plaintiff offers no extrinsic evidence whatsoever. Rather, the only evidence upon which Plaintiff relies is his own subjective deposition testimony, in which he testified that he found the Drive's packaging to be misleading. There is nothing in Plaintiff's motion papers to suggest that any "reasonable consumers" other than Plaintiff found the Drive's packaging to be misleading, which is required to recover under Sections 349 and 350.

Conversely, Defendant offers two consumer surveys conducted by Dr. Itamar Simonson, a Professor of Marketing at the Graduate School of Business at Stanford University:

(1) a survey of prospective purchasers of the Drive to (a) assess their purchase criteria and behavior with respect to external hard drives; and (b) test whether displaying a different speed on the speedometer graphic than that which appeared on the package purchased by Plaintiff affects the likelihood of purchase; and

(2) a survey of current owners of the Drive to (a) assess owners' satisfaction with the drive in general and with its data-transfer speed, in particular; and (b) assess why owners purchased the Drive. (Simonson Decl. ¶ 4 and Ex. 1, annexed thereto.)

The survey conducted of prospective purchasers found that the speed indicated on the speedometer graphic contained in the Drive's packaging does not affect prospective purchasers'

decision whether to purchase the Drive,[1] and, in general, data transfer speed is not a critical factor in purchasers' decisions.[2] (Simonson Decl. ¶ 6 and Ex. A, annexed thereto.) In addition, the survey of current owners of the Drive found that those surveyed are very satisfied with the Drive generally and with its speed in particular.[3] (Simonson Decl. ¶ 5 and Ex. 1, annexed thereto.) Even among those current owners surveyed who indicated they were dissatisfied with the Drive overall, not one respondent attributed their dissatisfaction to the Drive's speed. (Simonson Decl. Ex. 1.)

Plaintiff has offered nothing to rebut the extrinsic consumer survey evidence submitted by Defendant. As such, there are no material issues of fact with respect to Plaintiff's claims of implied falsity under Sections 349 and 350 of the New York General Business Law. Accordingly, Defendant's motion for summary judgment is granted.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is granted. The Clerk of the Court is directed to enter judgment in favor of Defendant and to mark this action closed.

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[1] Those surveyed that were shown a graphic indicating a maximum speed of 110 MB/s - the representation Plaintiff asserts should be on the Drive's packaging - were actually slightly more likely to purchase the Drive than those who were shown the packaging that Plaintiff purchased, which contained the speedometer graphic stating 10 Gb/s. (Simonson Decl. Ex. 1.)

[2] Only thirteen percent of prospective purchasers stated that speed was a factor they consider when purchasing a particular hard drive. (Simonson Decl. Ex. 1.)

[3] 24.5 percent of those surveyed cited the Drive's high speed as one of the things they liked about the Drive. (Simonson Decl. Ex. 1.)

SO ORDERED:

Dated: Central Islip, New York
February 23, 2018

LEONARD D. WEXLER
United States District Judge