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Purposes of Claim of Unconscionable Violation of Deceptive Trade Practices

Cheramie v. HBB, LLC

United States Court of Appeals, Ninth Circuit. | November 18, 2013 | --- Fed.Appx. --- (Approx. 4 pages)

NOTICE: Publication in West's Federal Reporter, 5th Ed., Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3) United States Court of Appeals, Ninth Circuit.

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V.

HBB, LLC, a Tennessee limited liability company, Defendant–Appellee.

No. 12–55148. | Argued and Submitted Oct. 11, 2013. | Filed Nov. 18, 2013.

Synopsis

Background: Purchaser brought diversity class action against manufacturer of brownies that contained melatonin alleging, inter alia, that manufacturer failed to inform consumers about the serious side effects stemming from the excessive quantity of melatonin in the brownies, in violation of California statutes that prohibited deceptive advertising and unfair business practices. The United States District Court for the Central District of California, Manuel L. Real, P.J., dismissed the action. Purchaser appealed.

Holdings: The Court of Appeals held that:

- 1 a reasonable consumer was not likely to be deceived by manufacturer's advertising concerning side effects stemming from melatonin contained in its brownies, and thus, purchaser failed to state a claim against manufacturer for deceptive advertising, but
2 remand was warranted to allow purchaser an opportunity to file an amended complaint.

Affirmed in part; reversed in part; and remanded.

Kleinfeld, Senior Circuit Judge, filed concurring opinion.

West Headnotes (2)

Change View

- 1 Antitrust and Trade Regulation Labeling and Packaging
A reasonable consumer was not likely to be deceived by manufacturer's advertising concerning side effects stemming from melatonin contained in its "relaxation" brownies, and thus, purchaser failed to state a claim against manufacturer for deceptive advertising under California law; purchaser's complaint alleged that packaging for the brownies described the product as a relaxation agent, disclosed the presence and quantity of melatonin in each serving and the relevant serving size, and warned consumers about the risk of drowsiness, and purchaser admitted that research regarding the safety and side effects of melatonin consumption and the proper dosage was inconsistent and inconclusive. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.
2 Federal Courts Amendment as to Parties or Pleading
Following District Court's denial of purchaser's request for leave to amend and dismissal of products liability action against manufacturer of "relaxation" brownies that contained melatonin, remand was warranted to allow purchaser an

opportunity to file an amended complaint, where District Court had provided no explanation for denying the request to amend, and it was possible for purchaser to allege facts sufficient to state a claim for relief under California law that would survive a motion to dismiss.

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, [Manuel L. Real](#), District Judge, Presiding. D .C. No. 2:11–CV–06549–R–AJW.

Before [KLEINFELD](#) and [CHRISTEN](#), Circuit Judges and [SEDWICK](#), District Judge.*

Opinion

MEMORANDUM**

*1 Plaintiff–Appellant Lee Cheremie (“Cheremie”) appeals the district court’s dismissal, without leave to amend, of his diversity class action against DefendantAppellee HBB, LLC (“HBB”) pursuant to [Rules 12\(b\)\(6\)](#) and [9\(b\) of the Federal Rules of Civil Procedure](#). We review the dismissal of Cheremie’s claims de novo. [Mendiondo v. Centinela Hosp. Med. Ctr.](#), 521 F.3d 1097, 1102 (9th Cir.2008).

1 Cheremie’s complaint alleges that HBB failed to inform consumers about the serious side effects stemming from the excessive quantity of melatonin in HBB’s Lazy Cakes product, and thus alleges that he was misled by HBB into buying an unsafe product that he otherwise would not have bought, causing him economic damage, in violation of various California statutes that prohibit deceptive advertising and unfair business practices. The reasonable consumer standard applies to Cheremie’s statutory claims, [Williams v. Gerber Products Co.](#), 552 F.3d 934, 938 (9th Cir.2008), and forecloses them, for his complaint makes it impossible for him to demonstrate that a reasonable consumer was “likely to be deceived” by the Lazy Cakes product in the manner alleged, *id.* at 938–39. The complaint alleges that the Lazy Cakes packaging describes the product as a relaxation agent, discloses the presence and quantity of melatonin in each serving and the relevant serving size, and warns consumers about the risk of drowsiness. More tellingly, he admits that research regarding the safety and side effects of melatonin consumption and the proper dosage is inconsistent and inconclusive. Under the facts as alleged, Cheremie has not stated a plausible claim of deception. Cheremie’s statutory claims were properly dismissed under [Rule 12\(b\)\(6\)](#).

Cheremie’s common law claims were also properly dismissed. For the reasons articulated above, Cheremie fails to adequately plead the necessary element of misrepresentation or nondisclosure needed to support a fraud or fraudulent concealment claim. [Robinson Helicopter Co. v. Dana Corp.](#), 34 Cal.4th 979, 990, 22 Cal.Rptr.3d 352, 359, 102 P.3d 268 (2004) (stating that the elements of a fraud claim include a showing of a false representation, concealment, or nondisclosure); [Tietsworth v. Sears](#), 720 F.Supp.2d 1123, 1132–33 (N.D.Cal.2010) (citing [Hahn v. Mirda](#), 147 Cal.App.4th 740, 748, 54 Cal.Rptr.3d 527, 532 (Ct.App.2007)) (noting that under California law a fraudulent concealment claim must include an allegation that defendant intentionally concealed or suppressed a material fact with the intent to defraud consumers). As to his negligent misrepresentation claim, Cheremie fails to allege any affirmative representations by HBB. [Mitsui O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc.](#), 913 F.Supp.2d 780, 789 (N.D.Cal.2012) (citing [Lopez v. Nissan N. Am., Inc.](#), 201 Cal.App.4th 572, 596, 135 Cal.Rptr.3d 116, 136 (Ct.App.2011)) (holding that a negligent misrepresentation claim under California law requires an affirmative representation and cannot be based on nondisclosures).

*2 The law concerning unjust enrichment in California is unclear. See, e.g., [Nordberg v. Trilegiant Corp.](#), 445 F.Supp.2d 1082, 1099–1101 (N.D.Cal.2006). The weight of authority

indicates that “[u]njust enrichment is not a cause of action, just a restitution claim.” *Hill v. Roll Int'l Corp.*, 195 Cal.App.4th 1295, 1307, 128 Cal.Rptr.3d 109, 118 (Ct.App.2011). A claim for restitution may be recognized in the absence of a valid express contract, such as when a contract “is unenforceable or ineffective for some reason” or when a quasi-contract is implied in law. *McBride v. Boughton*, 123 Cal.App.4th 379, 388, 20 Cal.Rptr.3d 115, 121–22 (Ct.App.2004). But here, Cheremie cannot plead this theory because he does not dispute that a valid contract was formed. See, e.g., *Klein v. Chevron U.S.A., Inc.*, 202 Cal.App.4th 1342, 1388, 137 Cal.Rptr.3d 293, 330–31 (Ct.App.2012); *Chapman v. Skype Inc.*, No. B241398, 2013 WL 5502960, at *8–9 (Cal.Ct.App. Oct.4, 2013).

2 The district court denied Cheremie’s request for leave to amend. We review the denial for abuse of discretion. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir.1987). Here, the district court provided no explanation for denying the request to amend. Such a denial is subject to reversal for abuse of discretion. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003). In the absence of an explanation, it is not otherwise apparent to this court that amendment would be futile. See *Roth v. Garcia Marquez*, 942 F.2d 617, 628–29 (9th Cir.1991) (noting that when it is readily apparent that an amendment would be futile, the district court need not state its reasons for denying leave to amend). On remand Cheremie should be allowed an opportunity to file an amended complaint, for it may be possible for him to allege facts sufficient to state a claim for relief under California law that would survive a motion to dismiss.

AFFIRMED in part, REVERSED in part, and REMANDED. Each party shall bear its own costs on appeal.

KLEINFELD, Senior Circuit Judge, concurring:

I agree that we should affirm the dismissal and remand with leave to amend. I write separately only to clarify one proposition. Cheremie may be able to plead that the defendant sold a sleep aid while falsely marketing it as a relaxation aid. That may be a good claim under state law.¹

Sleep and relaxation are different. People may relax by playing golf, paddling a canoe, or having cocktails with friends. Nobody sleeps while swinging a club or paddling a canoe, and ideally guests do not retire for a nap at a cocktail party. Melatonin is a hormone the body secretes, and the brownies contain, to promote sleep.

The reason I concur in the dismissal is that I am not entirely sure what Cheremie has pleaded, because the complaint is not “simple, concise, and direct” as required by [Federal Rule of Civil Procedure 8\(d\)](#). The complaint contains implausible allegations about the dangerous and “life threatening” side effects of the brownies. I cannot tell whether Cheremie is pleading that a sleep aid was sold deceptively as a relaxation aid, or that the melatonin brownies are dangerous to health and are not labeled as such. The facts pleaded would not support the latter claim.

*3 Accordingly, I concur.

Footnotes

- * The Honorable John W. Sedwick, Senior United States District Judge for the District of Alaska, sitting by designation.
- ** This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36–3\(a\)](#).
- 1 California Unfair Competition Law, [Cal. Bus. & Prof.Code § 17200](#); California False Advertising Law, [Cal. Bus. § Prof.Code § 17500](#); and California Consumers Legal Remedies Act, [Cal. Civ.Code § 1770](#).

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