SHAEFFER v. SUN PACIFIC, INC., et al.

DEMURRER TO SECOND AMENDED COMPLAINT

FILED
Superior Court of California
County of Los Angeles
APR 18 2018
Sherri R. Carter, Executive Officer/Clerk
By _____, Deputy
V. Jaime

Date of Hearing: **April 9, 2018**
Department: 11 (formerly 308)
Case No.: BC654207

RULING

After argument, the court took the matter under submission. The court now rules as follows:

The demurrer is SUSTAINED WITHOUT LEAVE TO AMEND in its entirety.

Plaintiff's Request for Judicial Notice is GRANTED.

BACKGROUND

This is a putative class action filed by Plaintiff Michelle Shaeffer ("Plaintiff"), individually, and on behalf of all U.S. purchasers of Cuties 100% Tangerine Juice with the phrase "No Sugar Added" on its label[1] sold by Defendant Califia Farms, LLC ("Defendant").

The operative Second Amended Complaint ("SAC") alleges that the "No Sugar Added" claim violates Food and Drug Administration ("FDA") regulations pertaining to nutrient content claims on food labels, as well as state regulations that wholly adopt the FDA regulations. See SAC, ¶2. Specifically, the SAC alleges that:[2]

(1) The Cuties juice does not resemble and substitute for a food that normally contains added sugars in violation of 21 C.F.R. §101.60(c)(2)(iv).[3]"

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1 An image of the label is depicted in ¶4 of the SAC.

2 See SAC, ¶30.

3 This section provides that "[t]he terms 'no added sugar,' 'without added sugar,' or 'no sugar added' may be used only if . . . [t]he food that it resembles and for which it substitutes normally contains added sugars."

(2) The Cuties juice label does nor bear a statement that the juice is not "low calorie" or "calorie reduced" in violation of 21 C.F.R. §§101.2(d)(1),[4] 101.60(c)(2)(v),[5] and 101.13.[6]

(3) The Cuties juice label does not bear a statement directing consumers' attention to the nutrition panel for further information on sugar and calorie content in violation of 21 C.F.R. §101.60(c)(2)(v).[7]

Based on the above, the SAC asserts the following causes of action:

- Violations of Unfair Competition Law ("UCL") (Business & Professions Code §17200, *et seq.*)
- Violations of False Advertising Law ("FAL") (Business & Professions Code §17500, *et seq.*)
- Violations of Consumers Legal Remedies Act ("CLRA") (Civil Code §1750, *et seq.*)

Defendant demurs to all three causes of action in the SAC.

DISCUSSION

A. Argument #1: Plaintiff has not alleged facts showing that a reasonable consumer is likely to be misled or deceived by the "No Sugar Added" statement on the Cuties label as required by the UCL, FAL, and CLRA

Citing primarily to Rubenstein v. The Gap, Inc. (2017) 14 Cal.App.5th 870, review denied (Nov. 29, 2017), Defendant contends that Plaintiff has not pled facts meeting the reasonable consumer standard. See Demurrer, §IV.B.

Upon further consideration of the parties' papers and oral arguments, the Court agrees with Defendant.

In Rubenstein, a consumer brought UCL, FAL, and CLRA claims against The Gap, Inc. ("Gap") based in part on its naming practices—i.e., use of the names "Gap" and "Banana Republic" in factory store names and factory store clothing labels. See Rubenstein, *supra*, 14 Cal.App.5th at 873. According to the plaintiff, use of the names communicated to the public

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[4] This section provides in full: "Except as provided by §§ 101.9(j)(13) and (j)(17) and 101.36(i)(2) and (i)(5), all information required to appear on the principal display panel or on the information panel under this section shall appear on the same panel unless there is insufficient space. In determining the sufficiency of the available space, except as provided by §§ 101.9(j)(17) and 101.36(i)(5), any vignettes, designs, and other nonmandatory label information shall not be considered. If there is insufficient space for all of this information to appear on a single panel, it may be divided between these two panels, except that the information required under any given section or part shall all appear on the same panel. A food whose label is required to bear the ingredient statement on the principal display panel may bear all other information specified in paragraph (b) of this section on the information panel."

[5] This section provides that "[t]he terms 'no added sugar,' 'without added sugar,' or 'no sugar added' may be used only if . . . [t]he product bears a statement that the food is not 'low calorie' or 'calorie reduced' (unless the food meets the requirements for a 'low' or 'reduced calorie' food) and that directs consumers' attention to the nutrition panel for further information on sugar and calorie content."

[6] This section sets forth general principles regarding nutrient content claims.

[7] The text is quoted in FN5, above.

that the factory store items were previously for sale, or of the same quality as those sold, in traditional "Gap" and "Banana Republic" stores. Id. at 873-74. In the context of analyzing whether the plaintiff had alleged a "fraudulent" business practice under the UCL, the Court of Appeal preliminarily noted that "the likelihood of deception is often too fact-intensive to decide on the pleadings," but "courts can and do sustain demurrers on UCL claims when *the facts alleged fail as a matter of law to show such a likelihood.*" Id. at 877 (italics supplied). It then stated that the case before it was "such a case." Id.

The Court of Appeal explained that the pleading alleged no statement by Gap regarding the retail history or quality of factory store items, and that Gap's use of its own brand names was "not likely to deceive a reasonable consumer for the simple reason that a purchaser is still getting a Gap or Banana Republic item." Id. It further explained that there were no facts to support the allegation that "[r]easonable consumers believe outlet stores sell products that were previously available for purchase at retail stores," and "a consumer for whom the retail history of factory store items is material can ask Gap employees about this." Id. In regards to the quality of factory store items, it stated that a reasonable consumer would inspect them prior to purchase or could return them after purchase if they turned out to be unsatisfactory. Id.

Similar to Rubinstein, the facts pled in the SAC fail as a matter of law to show a likelihood of deception. The "No Sugar Added" statement on the Cuties juice makes no representation other than the truthful fact that the Cuties juice has no sugar added. Like the plaintiff in Rubinstein, Plaintiff unreasonably attaches certain qualities to the Cuties juice nowhere to be found on the label. Further, to the extent Plaintiff was concerned about the sugar content of the Cuties juice, Plaintiff could have easily checked the nutrition label, which lists the total grams of sugar contained in the product. Considering the entire context of the packaging, the "No Sugar Added" statement on the Cuties juice is not deceptive. See Hill v. Roll Intern. Corp. (2011) 195 Cal.App.4th 1295, 1304-05.

Plaintiff's reliance on Williams v. Gerber Products Co. (9th Cir. 2008) 552 F.3d 934 is misplaced. True, the Ninth Circuit Court of Appeals in Williams rejected the notion "that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box." See Williams, *supra*, 552 F.3d at 939. But the packaging of the Gerber Fruit Juice Snacks that was at issue in Williams had several features likely to deceive a reasonable consumer. For example, the product was called "fruit juice snacks" and the packaging pictured different fruits such as oranges, peaches, strawberries, and cherries, potentially suggesting that those fruits or their juices were contained in the product. Id. at 936, 939. Under those circumstances, the Ninth Circuit Court of Appeals was correct that the onus was not on the consumer to check the ingredient list to correct Gerber's potential deception. Unlike in Williams, the "No Sugar Added" statement on the front of the packaging is true, and Plaintiff is not being expected to check the nutrition label to correct a misleading representation on the front of the packaging.

For the above reasons, the demurrer based on Argument #1 is SUSTAINED WITHOUT LEAVE TO AMEND.

The Court adds that Plaintiff has not adequately pled violations of the "unlawful" prong of the UCL. First, Plaintiff has not sufficiently stated a claim based on a violation of §101.60(c)(2)(iv). According to Plaintiff, the "No Sugar Added" statement violates §101.60(c)(2)(iv) because "Cuties Juice does not resemble and substitute for a food that normally contains added sugars." See SAC, ¶50. The problem with Plaintiff's allegation is that it very narrowly defines the category of food Cuties juice resembles and for which it substitutes to be "100% tangerine juice" only. Id., ¶53. The Court disagrees with such a restrictive interpretation of the FDA regulation defining a "substitute" food,[8] and instead, interprets it to include all fruit juices, which Plaintiff cannot truthfully allege to not normally contain added sugars. Second, as will be discussed below, Plaintiff cannot show that she relied on Defendant's alleged violation of 101.60(c)(2)(v) (i.e., failure to include the statement that the Cuties juice was not "low calorie" or "calorie reduced").

B. Argument #2: The CLRA claim fails for the additional reason that Plaintiff has not alleged how the truthful "No Sugar Added" statement misrepresents the Cuties juice

The CLRA claim alleges that "[b]y failing to disclose and concealing the true and actual nature of Cuties Juice from Plaintiff and prospective CLRA Sub-Class Members," Defendant violated the following subdivisions of Civil Code §1770:[9]

- (a)(5) ("Representing that goods . . . have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have . . . ."),
- (a)(7) ("Representing that goods . . . are of a particular standard, quality, or grade . . . if they are of another.")
- (a)(9) ("Advertising goods . . . with intent not to sell them as advertised.")

"[P]aragraphs (5), (7) and (9) of subdivision (a) of Civil Code section 1770 proscribe material omissions in certain situations." See Gutierrez v. Carmax Auto Superstores California (2018) 19 Cal.App.5th 1234, 1257, as modified on denial of reh'g (Feb. 22, 2018). "[A]n omission is actionable under the CLRA if the omitted fact is (1) 'contrary to a [material] representation actually made by the defendant' or (2) is 'a fact the defendant was obliged to disclose.'" Id. One situation in which the duty to disclose exists is "when the defendant makes partial representations that are misleading because some other material fact has not been disclosed." Id. at 1258. "In the context of the CLRA, a fact is 'material' if a reasonable consumer would deem it important in determining how to act in the transaction at issue." Id.

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[8] See 21 C.F.R. §101.13(d) ("A 'substitute' food is one that may be used interchangeably with another food that it resembles, i.e., that it is organoleptically, physically, and functionally (including shelf life) similar to, and that it is not nutritionally inferior to unless it is labeled as an 'imitation.'").

[9] See SAC, ¶75.

The SAC alleges that the FDA forbids the use of "No Sugar Added" claims unless "[t]he product bears a statement that the food is not 'low calorie' or 'calorie reduced' (unless the food meets the requirements for a 'low' or 'reduced calorie' food) and that directs consumers' attention to the nutrition panel for further information on sugar and calorie content," but that the Cuties juice label makes a "No Sugar Added" claim without complying with these requirements. See SAC, ¶¶26(v), 30(b) and (c), 31, 71 ("re-alleg[ing] and incorporat[ing] by reference each and every allegation contained in the preceding paragraphs"). As Defendant persuasively argues, omission of the information that the Cuties juice was not "low calorie" or "calorie reduced" is not material because Plaintiff has never alleged in the three iterations of the pleading (and cannot now truthfully allege) that calorie content was material to her purchasing decision. Instead, Plaintiff alleges that she "wanted to purchase tangerine juice because her children enjoy eating fresh tangerines" (¶13), and "Defendants' 'No Sugar Added' claim was the most important factor to Plaintiff in making her purchase decision, in part because she is diabetic" (¶14).

For these reasons, the demurrer based on Argument #2 is SUSTAINED WITHOUT LEAVE TO AMEND.

C. Argument #3: Plaintiff has not alleged facts to show standing under the UCL, FAL, and CLRA

Standing under the UCL and FAL requires a plaintiff to "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury,* and (2) show that that economic injury was the result of, i.e., *caused by,* the unfair business practice or false advertising that is the gravamen of the claim." See Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 322 (italics in original). Standing under the CLRA requires a plaintiff to have "suffer[ed] any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770." See Civil Code §1780(a).

Defendant contends that Plaintiff still has not alleged facts showing that she reasonably relied on the "No Sugar Added" statement to her detriment. See Demurrer, §IV.C.

Defendant's contention is well-taken. Plaintiff cannot allege detrimental reliance because the "No Sugar Added" statement is truthful and Plaintiff purchased a product as was accurately represented on the label—i.e., tangerine juice with no sugar added. The label made no health claims and merely states that the Cuties juice has "No Sugar Added;" it is Plaintiff's own unreasonable inference from the "No Sugar Added" statement that the Cuties juice was healthier than competing brands of tangerine juice.

As Plaintiff cannot allege an economic injury caused by her reliance on Defendant's truthful "No Sugar Added" statement, the demurrer based on Argument #3 is SUSTAINED WITHOUT LEAVE TO AMEND.