

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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AMEDEO FERRONE and JOYCE FERRONE

Plaintiffs,

-against-

MEMORANDUM & ORDER

97 CV 5669

BROWN & WILLIAMSON TOBACCO CORPORATION
and BROWN & WILLIAMSON TOBACCO
CORPORATION AS SUCCESSOR IN INTEREST TO
THE LIABILITIES OF THE AMERICAN TOBACCO
COMPANY,

Defendants.

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GLASSER, United States District Judge:

BACKGROUND

Plaintiff Amedeo Ferrone began smoking "Lucky Strikes" brand cigarettes in the late 1940s and continued to smoke these cigarettes until late 1996, when he was diagnosed with cancer of the larynx.¹ Plaintiff Joyce Ferrone is Amedeo's wife. Plaintiffs argue that Amedeo's cancer is directly and proximately caused by his long-term consumption of "Lucky Strikes" cigarettes.

Defendant Brown & Williamson Tobacco Corporation ("Brown and Williamson") is a Delaware corporation authorized to do business in the State of New York. Its principal place of business is at 1500 Brown and Williamson Tower, Louisville, Kentucky. The American

¹For purposes of this motion, the facts alleged in plaintiffs' complaint are assumed to be true.

Tobacco Company (“ATC”) is a Delaware Corporation that is authorized to do business in New York and whose principal place of business is in Stamford, Connecticut. ATC was purchased by Brown and Williamson and merged into Brown and Williamson; Brown and Williamson has succeeded to the liabilities of ATC. During all times relevant to the present action, Brown & Williamson or ATC manufactured and distributed tobacco products under the brand names of Kool, Blair, Raleigh, Barclay, Viceroy, Lucky Strike, Pall Mall, Tareyton, and Bull Durham.

In October of 1997, plaintiffs filed a complaint against defendant alleging several causes of action: Fraud and Misrepresentation Prior to 1969; Fraud and Misrepresentation Subsequent to 1969; Concerted Action to Commit Fraud and Intentional Misrepresentation Prior to 1969; Concerted Action to Commit Fraud and Intentional Misrepresentation Subsequent to 1969; Strict Liability, Defective Design, Failure to Warn, and Failure to Test; Negligence; Undertaking of and Wilful Failure to Perform a Special Duty; Breach of Express and Implied Warranties; and Loss of Consortium.

Defendant now moves, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss. Each of defendant’s arguments will be discussed in turn.

DISCUSSION

Motion to Dismiss Standard

On a motion to dismiss, the factual allegations of the complaint must be accepted as true, and the complaint must be liberally construed and its allegations considered in the light most favorable to plaintiffs. Morin v. Trupin, 711 F. Supp. 97, 103 (S.D.N.Y. 1989) (citing Dwyer v. Regan, 777 F.2d 825, 828-29 (2d Cir. 1985) and Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). “A motion to dismiss will be granted only if it appears to be certain that the plaintiff is entitled to

no relief under any set of facts which could be proved in support of the claim made.” Id. (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). “A motion to dismiss is addressed solely to the face of the pleadings, and ‘[t]he court’s function . . . is not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient.’” Tinlee Enterprises, Inc. v. Aetna Casualty & Surety Co., 834 F. Supp. 605, 607 (E.D.N.Y. 1993) (quoting Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985)).

Preemption of Plaintiffs’ Post-1969 Fraudulent Concealment Claims

Defendant argues that the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-40 (1994) (“the Act” or “the Labeling Act”), preempts state law claims based on fraudulent concealment. Section 1331 of the Act, entitled “Congressional declaration of policy and purpose,” states that “[i]t is the policy of Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health.” The Act goes on to mandate certain uniform labels on cigarette packaging and preempts all State regulation of tobacco advertising. “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.” Id. at § 1334(b).

The controlling decision that addresses the scope of the preemption provision of the Act is Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (plurality opinion). First, Cipollone held that the Labeling Act can preempt common law rules. Id. at 523 (Scalia and Thomas, JJ., concurring in relevant part). Cipollone then set forth a test to determine whether a particular common law claim is preempted:

[W]e must fairly but — in light of the strong presumption against pre-emption — narrowly construe the precise language of § 5(b) and we must look to each of petitioner’s common-law claims to determine whether it is in fact pre-empted. The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a “requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,” giving that clause a fair but narrow reading.

Id. at 523-24 (Scalia and Thomas, JJ., concurring in relevant part).

Here, plaintiffs’ second cause of action alleges intentional fraud based both on false representations and concealment of material facts. Cipollone held that claims of fraud by intentional misstatement are not preempted by the Act because they “are predicated not on a duty ‘based on smoking and health’ but rather on a more general obligation: the duty not to deceive.”

Id. at 528-29 (Blackmun, Kennedy, and Souter, JJ., concurring in the judgment in relevant part).

Therefore, plaintiffs’ claims of post-1969 affirmative misrepresentations are not barred by the Act.

As to plaintiffs’ allegations of fraudulent concealment, a similar claim was alleged in Cipollone. The Supreme Court in discussing this allegation stated:

Section 5(b) pre-empts only the imposition of state-law obligations ‘with respect to advertising or promotion’ of cigarettes. Petitioner’s claims that respondents concealed material facts are therefore not pre-empted insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion. Thus, for example, if state law obliged respondents to disclose material facts about smoking and health to an administrative agency, § 5(b) would not pre-empt a state-law claim based on a failure to fulfill that obligation.

Id. at 528 (emphasis added).

Although here many of plaintiffs’ claims are based on allegations that the defendant failed to disclose material facts, plaintiffs do not allege that the defendant was under any duty to

disclose such facts “through channels of communication other than advertising or promotion,” and this court knows of none. Therefore, this court finds that those claims of plaintiffs that are based on failure to disclose are pre-empted. As one district court has noted in discussing pre-emption and the Labeling Act, courts

must look beyond the descriptive label a plaintiff attaches to a claim in determining whether or not the claim is preempted. If a plaintiff could assert a duty inconsistent with the Labeling Act merely by styling it ‘fraudulent suppression,’ the preemption provision of the Labeling Act would be deprived of any meaningful application. Regardless of the label attached to it, a plaintiff’s claim based upon alleged duty of defendants to provide to consumers more information regarding smoking and health than is required by the Labeling Act is preempted.

Lacey v. Lorillard Tobacco Co., 956 F. Supp. 956, 963 (N.D. Ala. 1997).

Therefore, to the extent that each of plaintiffs’ causes of action rely on post-1969 failure to disclose material facts, they are dismissed with prejudice.

Fraudulent Misrepresentation

Although plaintiffs’ claims of affirmative misrepresentation are not pre-empted by the Labeling Act, defendant argues that such claims should nevertheless be dismissed because they are not pleaded with sufficient particularity. This court agrees.

Rule 9(b) of the Federal Rules of Civil Procedure provides that “in all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” The particularity requirement of the Rule is designed to promote three goals: “(1) to provide a defendant with fair notice of the plaintiff’s claim, (2) to protect a defendant from harm to his or her reputation or goodwill, and (3) to reduce the number of strike suits.” Cosmas v. Hassett, 886 F.2d 8, 11 (2d

Cir. 1989). In order to meet the requirements of Rule 9(b), “the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.” Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993).

Here plaintiffs’ complaint, although lengthy, lacks the specificity required by Rule 9(b). Plaintiffs make only general statements regarding the allegedly false representations made by defendant. In their opposition to this motion, plaintiffs cite to paragraphs 12, 35, 36, and 56 to support their contention that they have pleaded fraud with particularity. Paragraph 12 states:

[Amedeo Ferrone] was drawn to smoking Defendants’ cigarettes in his teen years due to Defendants’ massive advertising directed toward teenagers, and their total failure to warn as to the lethal and addictive quality of their product. He specifically relied upon defendant’s advertising, defendant’s public relations messages, and upon defendant’s false and misleading statements in determining to smoke and in continuing to smoke. Indeed, whatever information plaintiff saw as to the dangers of smoking over the years . . . was neutralized and rendered an ineffective warning and impotent information because of defendant’s campaign countering said health warnings and information which campaign was designed and which campaign had the actual effect of keeping existent smokers smoking, and preventing smokers from quitting smoking. Mr. Ferrone tried to stop smoking on many occasions, but because of defendant’s campaign of false and misleading information and because of his addiction to cigarettes, he was unable to do so.

Paragraphs 35 and 36 state:

35. The health-claim advertising campaigns were patently false, misleading, deceptive and fraudulent. These campaigns were disseminated nationally in popular magazines, press, radio and television and were calculated to induce non-smokers to commence smoking and to induce smokers to continue their addiction. These campaigns had their intended and desired effect upon plaintiff. More specifically, the combination of these campaigns, in conjunction with plaintiff’s addiction to defendants’ cigarettes, cause plaintiff to continue to smoke despite numerous health warnings.

36. During the 1950’s, the Defendants and other tobacco companies

employed yet another method of deception in manufacturing and advertising sales to counter the “health scare” — the “Filter Derby” and “Tar Wars”. The Defendants and other tobacco companies manufactured filtered cigarettes that were advertised with explicit and/or implicit warranties of the tar/nicotine content and health claims. The Defendants’ and other tobacco companies’ health claims and claims as to effectiveness of the filters in removing tar and nicotine were knowingly deceptive when made, and were made with reckless disregard for the health risks to cigarette smokers. Plaintiff relied upon these campaigns and believed that filtered cigarettes were safe and/or safer.

Paragraph 56 states:

On January 4, 1954, Defendants and other tobacco companies announced the formation and purpose of TIRC, with a full page newspaper advertisement entitled “A Frank Statement to Cigarette Smokers.” The statement appeared in 448 newspapers across the nation, reaching circulation of 43,245,000 in 268 cities. Plaintiff read and specifically relied upon this article. This article and other similar false information, in conjunction with plaintiff’s addiction to defendants’ cigarettes, caused plaintiff to continue to smoke despite numerous health warnings, and caused plaintiff to discount such health warnings.

Clearly, none of these allegations put defendant on notice as to the specific statements that plaintiffs contend were untrue. Nor is it possible to discern who made the statements, or when and where the statements were made as required to sufficiently plead fraud. Compare this to a similar case from the Southern District of Florida, Wolpin v. Philip Morris, Inc., 974 F.

Supp. 1465, 1471 (S.D. Fla. 1997):

In the instant case, Plaintiff has plead[ed] fraud, deception, and misrepresentation with particularity. . . . Plaintiff provides one hundred and seventy-seven other paragraphs comprising thirty-five pages detailing dates, names of publications, impact on Plaintiff and the public, names of persons involved, and even direct quotes from documents, meetings, and hearings. Unlike the plaintiff in Sonnenriech, who claimed that the alleged conspirators’ concealment of their acts precluded her from pleading all the relevant acts . . . Plaintiff in the instant case has presented sufficient information to plead fraud, deception, and misrepresentation with particularity.

Plaintiffs’ claims of fraud must be dismissed with leave to replead. See Alcito v. Imcera Group,

Inc., 47 F.3d 47, 54-55 (2d Cir. 1995) (“Leave to amend should be freely given especially where dismissal of the complaint [is] based on Rule 9(b).”).

Concerted Action Claims

Defendant asserts that plaintiffs have failed to allege a cause of action based on “concerted action” because they have not alleged an agreement by defendant and others to commit a tortious act. Under New York law, the theory of concerted action “provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in ‘a common plan or design to commit a tortious act.’” Rastelli v. Goodyear Tire Co., 79 N.Y.2d 289, 296, 591 N.E.2d 222, 224, 582 N.Y.S.2d 373, 375 (N.Y. Ct. of Appeals 1992) (quoting Hymowitz v. Lilly & Co., 73 N.Y.2d 487, 506, 541 N.Y.S.2d 941, 539 N.E.2d 1069). “The elements of concerted action are 1) an understanding express or tacit to participate in a common plan or design to commit a tortious act and 2) that each defendant acted tortiously and 3) that one of the defendants committed an act which constitutes a tort in pursuance of the agreement.” Cresser v. American Tobacco Co., 174 Misc.2d 1, 7, 662 N.Y.S.2d 374, 379 (N.Y. Sup. 1997) (internal quotation marks omitted).

Plaintiffs, as already discussed, have failed to sufficiently plead the underlying intentional tort of fraud and misrepresentation. Furthermore, the alleged conspiracy allegations of the complaint are also insufficiently pleaded. Plaintiffs have cited to paragraphs 24, 33, 35, 39, 46, 47, 47(c), 48-62, 73-77 of their complaint in support of their assertion that concerted action is sufficiently pleaded. A careful reading of the complaint shows, however, that plaintiffs have not alleged facts that evince the existence of an agreement among tobacco manufacturers to commit a tortious act. Plaintiffs do assert that “defendants” acted jointly to form the Council for Tobacco

Research and the Tobacco Institute and that these organizations pursued a public relations campaign to reassure consumers that their use of tobacco products was indeed safe. Plaintiffs nevertheless do not assert that the defendant in this case entered into any agreement with any other entity to commit fraud or intentional misrepresentation. Nor do plaintiffs attribute any specific conduct in this regard to the defendant. For these reasons, plaintiffs' allegations must also be dismissed.

Plaintiffs' Remaining Claims

Plaintiffs' fifth cause of action alleges strict liability, defective design, failure to warn, and failure to test. Plaintiffs' claims alleging failure to warn

are pre-empted to the extent that they rely on a state-law 'requirement or prohibition . . . with respect to advertising or promotion.' Thus, insofar as claims under [the] failure-to-warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted. The Act does not, however, pre-empt [plaintiffs'] claims that rely solely on [defendant's] testing or research practices or other actions unrelated to advertising or promotion.

Cipollone, 505 U.S. at 524. Furthermore, defendant has not challenged the sufficiency of plaintiffs' strict liability, failure to test, and defective design. Since these claims are not pre-empted by the Labeling Act, they are not dismissed.

The sixth, seventh, and eighth causes of action are for negligence, "undertaking of and wilful failure to perform a special duty," and breach of express and implied warranties, respectively. Defendant has not challenged the sufficiency of these claims nor are these claims pre-empted by the Labeling Act; therefore, these causes of action also remain. Finally, since not all of the other of plaintiffs' claims have not been dismissed, plaintiffs' claim for loss of consortium is still viable.

CONCLUSION

Plaintiffs' post-1969 claims that are based on fraudulent concealment are dismissed.

Plaintiff's claims for fraud and intentional misrepresentation are dismissed with leave to replead.

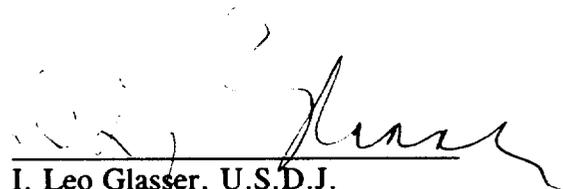
Plaintiff's claims that are based on concerted action are dismissed with leave to replead.

Plaintiffs' claims based on strict liability, defective design, failure to test, negligence, "undertaking of and wilful failure to perform a special duty," and breach of express and implied warranties remain. Plaintiffs' failure to warn claim remains to the extent that they do not rely on allegations that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings and to the extent that they rely on pre-1969 activities.

Plaintiffs' claim for loss of consortium also remain.

SO ORDERED.

Dated: September ^{25th}, 1998
Brooklyn, New York


I. Leo Glasser, U.S.D.J.

A copy of the foregoing Memorandum and Order was this day sent to:

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