[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. ANTHONY F. MARANO
Justice.

TRIAL/IAS PART 7
NASSAU COUNTY

Time-Cap Laboratories, Inc.,

Plaintiff,

-against-

MOTION #005
INDEX # 21667/09

Spirit Pharmaceuticals, L.L.C.

Defendant.

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Spirit Pharmaceuticals, L.L.C.

Third Party Plaintiff,

-against-

Reliable Products, Inc.,

Third Party Defendant

----------X

Spirit Pharmaceuticals, L.L.C.

Second Third Party Plaintiff

-against-

Cytec Industries, Inc.

Second Third Party Defendant

----------X

The following papers read on this motion:

Notice of Motion X
Cross Motion X
Reply..... X

Motion by Second Third Party Defendant Cytec Industries, Inc. pursuant to CPLR 3211 for an order dismissing the Second Third Party Complaint on the grounds that it fails to state a cause of action is granted in its entirety and the Second Third Party Complaint is dismissed. Cross-motion by Defendant/Second Third Party Plaintiff Spirit Pharmaceuticals, L.L.C. to replead is denied.

In the main action Time-Cap Laboratories, Inc. v. Spirit Pharmaceuticals, L.L.C., plaintiff seeks to recover damages incurred in a product recall which was the result of alleged negligence and breach of contract. Spirit seeks indemnity from third party defendant Reliable Products, Inc. and second third party defendant Cytec Industries, Inc.

Plaintiff Time-Cap contracted with defendant Spirit for the purchase of Docusate Sodium USP 85% / Sodium Benzoate 15% (DSS), a component element used by Time-Cap in the manufacture of a laxative product. Time-Cap alleges that the recall was necessitated by defective DSS which emitted a noxious odor.

Spirit alleges that second third party defendant Cytec used a spray drying process for the Ducosate Sodium which failed to abate its odor. Cytec has no contractual relation with any party in this action. It was engaged by non party Kalvik Laboratories, Ltd. located in India, which used the spray dried Docusate Sodium to manufacture DSS.

Spirit alleges that if Spirit is liable to Time-Cap for the odor which caused the product recall, then the seller, third party defendant Reliable, and the processor, second third party defendant Cytec, are obligated to indemnify.

Time-Cap commenced this action in October of 2009 asserting causes of action sounding in debt, breach of contract and products liability, later amended to include

negligence, breaches of the warranty of merchantability and of fitness for a particular purpose. The following facts alleged in the Amended Verified Complaint must be accepted as true (*Leon v. Martinez*, 84NY2d 83 [1994]). Time-Cap manufactures pharmaceutical products, one of which is laxative product (the product). Pursuant to contract defendant Spirit Pharmaceuticals, L.L.C. supplied Time-Cap with Docusate Sodium, a "raw material" used in the product. A number of Time-Cap customers complained that the laxative tablets emitted a noxious odor, resulting in a recall of the product. Time-Cap alleges that the cause of the noxious odor was the Docusate Sodium supplied by Spirit.

Spirit commenced the third party actions consisting of the following relevant allegations. Spirit alleges that if Time-Cap was caused to sustain damages then all such damages would have been caused or brought about by Reliable which placed the defective DSS product into the stream of commerce. Spirit also alleges that in or about 2007 Cytec "agreed to process a quantity of Docusate Sodium USP 85% /Sodium Benzoate 15% (the DSS)" for manufacturer Kalvik Laboratories, Private Limited. Spirit alleges that Cytec knew or should have known that the DSS would be used in products intended for human consumption.

Cytec moves to dismiss the Second Third Party Complaint and Spirit cross-moves to amend to assert a cause of action sounding in breach of express warranty and products liability, with bills of lading and purchase orders concerning the subject DSS annexed. The bills of lading indicate that the shipper is non party manufacturer Kalvik Laboratories Ltd. and the consignee is third party defendant Reliable. Time-Cap Purchase Order PO18043 indicates that Time-Cap's vendor is defendant Spirit, the product is DSS. The purchase order also indicates that a "new version" of DSS was brought in for testing, viz. in "liquid form from Kalvik in India and then spray dried by Cytek Industries in the United States". In sum, according to the pleadings and supporting papers, Time-Cap purchased DSS from Spirit (vendor) and Reliable was the "consignee" of shipments from India. Movant Cytek processed the product for Kalvik and had no contractual or other relationship with Reliable, Spirit or Time-Cap.

On a motion to dismiss pursuant to CPLR 3211, the pleading is afforded a liberal construction, the facts as alleged in the complaint are accepted as true, and plaintiff is accorded the benefit of every possible favorable inference. The only determination is "whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). Here the claims against Cytec fail to

state a cause of action in tort, contract or warranty by Spirit or Time-Cap.

With regard to the tort claims, it is well settled that "one cannot recover in tort for direct or consequential damages resulting from product malfunction unless the defect in the product created an unreasonable risk of harm" (*Niagara Mohawk Power Corp. v. Ferranti-Packard Transformers*, 201 AD2d 902, 903 [4th Dept1994]). Accordingly, Spirit fails to state a cause of action in negligence, as there is no claim that the odor created an unreasonable risk of harm.

The proposed claim in products liability is precluded by the economic loss doctrine of *Schiavone Construction Co. v. Elgood Mayo Corp.* (56 NY2d 667 [1982]. New York does not permit cause of action based on strict products liability against a remote manufacturer who made no representations to plaintiffs, who had no privity of contract with plaintiffs, and where the only claim by plaintiffs is that product failed to function properly and resulted in economic loss to plaintiffs (*Schiavone Const. Co. v. Elgood Mayo Corp. supra*). Plaintiff and defendant/third party plaintiff do not allege that DSS is unduly dangerous, an exception to the *Schiavone* rule, and all that is claimed is that the product itself was unsatisfactory because of an odor and thus caused the seller to incur costs of recall and consequential economic loss.

In *Schiavone*, when considering imposing products liability in the absence of personal injury or property damage Justice Silverman stated the rationale in a dissent which was adopted by the unanimously at the Court of Appeals:

> We think the economic ramifications of permitting a cause of action against the manufacturer . . . are so extensive and unforeseeable that it is better for the courts not to extend strict products liability to this area, leaving the owner of the product to its remedy based on its contract with the seller, and likewise leaving the seller to its remedies against the person from whom it bought the equipment based upon the contract between those parties. . . . There is room in the market for goods of varying quality, and if the purchaser buys goods which turn out to be below its expectations, its remedy should be against the person from whom it bought the goods, based upon the contract with that person.

(*Schiavone Const. Co. v. Elgood Mayo Corp*, 81 AD2d 221, 227-234, *affd* 56 NY2d 667 [1982] for the reasons stated in the dissenting opinion of Justice Samuel J. Silverman at the Appellate Division). Stated another way, "[i]n the case of . . . purely economic loss, there is no need to shift the loss to the manufacturer to be passed along to and shared by all consumers" (*Bellevue South Associates v. HRH Const. Corp.*, 78 NY2d 282, 293 [1991]).

To determine whether the claim falls within the exception to *Schiavone*, risk of harm analysis focuses on several factors, including "the nature of the defect, type of risk, and manner in which the injury occurred" (*Bellevue S. Assoc. v HRH Constr. Corp.*

78 NY2d 282, 293 [NY 1991]). Here no risk of injury is raised, merely an offensive odor which the drying process failed to remove from the Ducosate Sodium.. As noted by Court of Appeals a case of "economic disappointment" where the "bargained-for consideration" has failed to meet the expectations of the purchaser "the remedy lies in contract- law theories such as express and implied warranties, through which a contracting party can recover the benefit of its bargain, not in a tort-law doctrine that strictly assigns the loss to a remote manufacturer to be shared by all its customers" (*Bellevue S. Assoc. v HRH Constr. Corp.*, supra at 294-295). Accordingly, based on the above, there are no causes of action in negligence or products liability to support a claim for indemnification.

With respect to the claims in warranty, Spirit avers in the proposed amended second third party complaint that Cytec's website makes representations which constitute a sufficient basis for a claim in breach of express warranty and that "upon information and belief Cytec provided express written warranties to Kalvic" and that "upon information and relief Kalvik relied on Cytec's representations." Thus the proposed amendment adds a cause of action in express warranty to the original claims of implied warranty (see UCC § 2-315 - Implied Warranty: Fitness for Particular Purpose; UCC § 2-314 Implied Warranty: Merchantability). The proposed second third party complaint fails to state a cause of action in either implied or express warranty.

There is no question that privity is no longer required for breach of an express warranty "where express representations were made by a manufacturer to induce reliance by remote purchasers" (*Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 NY2d 5, 11 [1962]). However, with respect to express warranty, there must be an allegation of reliance. Here, there is no allegation that any of the parties to this action were aware of product representations on Cytec's website prior to the purchase of the product. Indeed, they were discovered only after the lawsuit was commenced. As such the alleged misrepresentations were not part of the bargain between the parties and cannot be relied upon as express warranties (*see, CBS Inc. v. Ziff-Davis Pub. Co.*, 75 NY2d 496, 503 [1990]).

Insofar as the new allegation of an express warranty to the non party manufacturer - there are no allegations that any of the parties to this action were aware of the purported warranties and thus they cannot establish reliance.

The causes of action for breach of implied warranties require privity. Spirit, and the remaining parties, lack privity with Cytec. Spirit avers that privity is no longer required for breach of warranty - including implied warranty, relying on *Codling v. Paglia* (32 NY2d 330 [1973]). This reliance is misplaced as the privity requirement which was abandoned in *Codling v. Paglia* applied to only personal injury or property damage, or dangerous products, the sort of damage long associated with tort. *Codling* held that pursuant to theories of breach of express warranty and strict products liability "the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages" (*Codling v. Paglia,* 32 NY2d 330 [1973]).

Privity is still required for implied warranty where the damage is to the product itself, the sort of damage associated with contract, i.e., the loss of benefit of the bargain and consequential damages. As Spirit is not in "privity" with Cytec, has sustained "economic loss" only, it may not recover on a claim of breach of implied warranty (*Arthur Jaffee Assoc. v. Bilsco Auto Serv.*, 89 AD2d 785, *affd* 58 NY2d 993 [1983] ["there being no privity between the purchaser and the defendant there can be no implied warranty"]). The privity rule is still in effect, and Cytec is entitled to dismissal of any cause of action alleging breach of implied warranties as

"the essential element of contractual privity between the parties [i]s clearly lacking" (*Parker v. Raymond Corp.*, 87 AD3d 1115, 1116 [2d Dept 2011]).

As the parties cannot support claims in contract, warranty or negligence against Cytec, the second third party action is dismissed.

Dated: 6/5/2012

J.S.C.

ENTERED
JUN 13 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE