UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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JOELLEN ROBERTS, WAYNE ROBERTS, JOSEPH ROBERTS and JAMES ROBERTS,

Plaintiffs,

v.

ORANGE GLO, ORANGE GLO INTERNATIONAL INC., APPEL CO., CHURCH & DWIGHT, CHURCH & DWIGHT CO., INC., and DOES 1 through 50, inclusive,

Defendants.

CIV. NO. 2:14-000421 WBS DAD

MEMORANDUM AND ORDER RE: MOTION TO DISMISS

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I. Factual and Procedural History

Plaintiffs Joellen, Wayne, Joseph, and James Roberts reside in their home outside the Marysville area in the Eastern District of California. (First Am. Compl. ("FAC") ¶ 9 (Docket No. 8); Pls.' Opp'n at 2 (Docket No. 19).) Joellen purchased Orange Glo, a product manufactured by defendant Church & Dwight

Co., Inc., (FAC ¶ 11), for the purpose of polishing and conditioning a family piano and organ, (id. ¶ 9). Plaintiffs allege the Orange Glo bottle specifically stated that it could be used on floors. (Id.) Accordingly, Joellen applied the product to the hardwood floor in the entryway of her home with a mop. (Id.) The next morning, she slipped and fell while walking through the entryway. (Id. ¶ 10.) Her husband Wayne and two sons Joseph and James were home at the time and allegedly heard her crash to the ground. (Id. ¶ 37.)

Plaintiffs' FAC alleges state law claims against defendant Church & Dwight Co., Inc., for strict products liability, failure to warn, breach of implied warranty, negligence, and negligent misrepresentation.[1] Plaintiffs also bring claims for loss of consortium on behalf of Wayne and for negligent infliction of emotional distress for harm suffered by Wayne, Joseph, and James as result of contemporaneously perceiving the incident. Defendant now moves to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). In the alternative, defendant moves to dismiss the second claim for failure to warn, third claim for breach of implied warranty, fifth claim for negligent misrepresentation, and seventh claim for negligent infliction of emotional distress pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (Def.'s Mot. (Docket No. 13).) The court

[1] Plaintiffs originally brought this action against multiple defendants. However, plaintiffs voluntarily dismissed defendants Orange Glo, Orange Glo International, Inc., Appel Co., and Church & Dwight. (Docket No. 9.) The only remaining defendant is Church & Dwight Co., Inc.

will not address plaintiffs' breach of warranty claim, which plaintiffs agree to abandon, (see Pl.'s Opp'n at 2).

II. Venue

Rule 12(b)(3) authorizes a court to dismiss an action for improper venue. Fed. R. Civ. P. 12(b)(3); see also 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."). Plaintiffs have the burden of proving that venue is proper in the district in which the suit was initiated. Munns v. Clinton, 822 F. Supp. 2d 1048, 1079 (E.D. Cal. 2011) (England, J.) (citing Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 496 (9th Cir. 1979)).

Venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). This provision "does not require that a majority of the events have occurred in the district where suit is filed, nor does it require that the events in that district predominate." Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131, 1136 (N.D. Cal. 2000).

While plaintiffs did not assert a statutory basis for venue in the FAC, plaintiffs do allege that a substantial part of the events giving rise to their tort claims occurred in the Eastern District of California. According to the FAC, both the retail establishment where Joellen Roberts purchased Orange Glo and the Roberts family home where the alleged slip-and-fall and subsequent injuries occurred are located within this district.

(FAC ¶¶ 9, 11.) Because venue is proper under § 1391(b)(2), the court will deny defendant's motion to dismiss for improper venue.

II. Failure to State a Claim

On a Rule 12(b)(6) motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). To survive a motion to dismiss, a plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a plaintiff pleads facts that are "merely consistent with a defendant's liability," it "stops short of the line between possibility and plausibility." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

A. Negligent Misrepresentation

Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." The issue of whether Rule 9(b)'s heightened pleading standard applies to a claim for negligent misrepresentation under California tort law has divided the federal circuits as well as district courts in California. Cutler v. Rancher Energy Corp., Civ. No. 8:13-906 DOC JPR, 2014 WL 1153054, at *3 (C.D. Cal. Mar. 11, 2014) (citing cases). While it has not decided the issue, the Ninth Circuit has held that "only allegations . . . of fraudulent conduct must satisfy

the heightened pleading requirements of Rule 9(b)." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003).[2] "Because the California tort of 'negligent misrepresentation' has a critically different element from the tort of 'fraud,' analyzing negligent misrepresentation under Rule 9(b) is contrary to both the express language and policy of the statute." Petersen v. Allstate Indem. Co., 281 F.R.D. 413, 417 (C.D. Cal. 2012). Accordingly, the court will not apply a heightened pleading standard to plaintiffs' claim for negligent misrepresentation and will instead inquire whether plaintiffs state a plausible claim for relief under Iqbal.

To state a claim for negligent misrepresentation, a plaintiff must allege: (1) a misrepresentation of a past or existing material fact; (2) without reasonable ground for believing it to be true; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1201 n.2 (9th Cir. 2001); Apollo Capital Fund, LLC v. Roth Capital Partners, LLC, 158 Cal. App. 4th 226, 243 (2d Dist. 2007).

Plaintiffs' allegations, taken as true, support all five elements. Plaintiffs allege defendant misrepresented on the product's bottle that Orange Glo was appropriate for use on

[2] The cases cited by defendant in support of applying 9(b) to negligent misrepresentation claims pre-date Vess. See Glen Holly Entm't, Inc. v. Tektronix, Inc., 100 F. Supp. 2d 1086 (C.D. Cal. 1999); U.S. Concord, Inc., v. Harris Graphics Corp., 757 F. Supp. 1053 (N.D. Cal. 1991). Several more recent cases cite both Glen Holly and U.S. Concord, see, e.g., Neilson v. Union Bank of Cal., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003), but without considering Vess.

hardwood floors, (FAC ¶ 9), because in fact the product allegedly caused an unsafe and slippery condition when applied as instructed, (id. ¶ 30). If Orange Glo causes hardwood floors to be slippery as indicated by plaintiffs, then it can be inferred defendant lacked a reasonable ground for believing Orange Glo was safe for use on that surface. By placing such a misrepresentation on the product's label, it is plausible that defendant intended to induce the consumer's reliance on the information and that Joellen's reliance was justified. Lastly, in satisfaction of the fifth element, plaintiffs allege Joellen slipped and fell as a result of her reliance on this representation. (Id. ¶¶ 14-16). Having sufficiently alleged all five elements, plaintiffs assert a plausible claim for negligent misrepresentation.

B. Failure to Warn

Defendant argues plaintiffs' second claim for "failure to warn" should be dismissed because it is not distinguishable from plaintiffs' strict products liability and negligence claims. (Def's Mot. at 5.) Consequently, it argues, the claim is "duplicative." (Id.) Plaintiffs clarify that their second claim for "failure to warn" articulates a theory of strict liability and "specifically pleads that defendant failed to warn that the product, when properly used, could create a slippery condition and cause serious injury." (Pls.' Opp'n at 3.)

Although "failure to warn" is a murky subject in California law, it appears defendant is correct that there is no "failure to warn" claim apart from one in negligence or strict products liability. See Oxford v. Foster Wheeler LLC, 177 Cal.

App. 4th 700, 717 (1st Dist. 2009) (noting "the two types of failure to warn claims" in negligence and strict products liability are not mutually exclusive). However, the court is aware of no authority for the proposition that where a plaintiff pleads as separate "claims" what are in fact two legal theories supporting a single claim, one of those theories is subject to dismissal. Because defendant does not attack the sufficiency of plaintiffs' supporting allegations, the court will deny defendant's motion with respect plaintiffs' claim for "failure to warn" in strict products liability.

C. Negligent Infliction of Emotional Distress

Similarly, defendant argues plaintiffs' seventh claim fails as a matter of law because it is not distinguishable from plaintiffs' fourth claim for negligence. (Def.'s Mot. at 8); see Dillon v. Legg, 68 Cal.2d 728 (1968).

Dillon provides a basis for holding a defendant liable for the injuries sustained by a bystander to an accident caused by that defendant's negligence. See Dillon, 68 Cal. 2d at 740-41. Dillon "addressed the question of duty in circumstances in which a plaintiff seeks to recover damages as a percipient witness to the theory of another." Christensen v. Superior Court, 54 Cal. 3d 868, 884 (1991). Plaintiff asserts a claim for negligence based on Dillon, alleging Wayne, Joseph, and James were percipient witnesses to Joellen's accident. (Compl. ¶ 37.)

Recovering for emotional distress as a bystander requires proving elements that are different from a negligence claim. In addition to proving a defendant was negligent, a plaintiff must show she was closely related to the victim;

present at the time of injury; aware of the injury; and as a result suffered emotional distress. See Cal. Jury Instr. Civ. 12.83 ("Bystander Recovery of Emotional Distress"). Additionally, "negligent infliction of emotional distress," or "NIED," is often alluded to as a stand-alone claim in negligence. See, e.g., Thomas-Lazear v. F.B.I., 851 F.2d 1202, 1206 (9th Cir. 1988) ("Thomas-Lazear attempts to fashion the slander and libel claims into a claim for negligent infliction of emotional distress . . . ."); Moon v. Guardian Postacute Servs., Inc., 95 Cal. App. 4th 1005, 1011 (1st Dist. 2002) (noting it is uncertain which persons may be considered 'closely related' "for the purposes of an NIED claim"). NIED is thus properly pled as a claim in tort. Accordingly, the court does not find plaintiffs' claim unsustainable as a matter of law. Because defendant does not argue that plaintiffs' allegations are insufficient to sustain a claim for negligence on a Dillon-based theory, the court will deny defendant's motion to dismiss that claim.

IT IS THEREFORE ORDERED that defendant's motion to dismiss be, and the same hereby is, DENIED with respect to claims two ("failure to warn"), five ("negligent misrepresentation"), and seven ("negligent infliction of emotional distress"), and GRANTED with respect to claim three ("implied warranty").

Dated: November 4, 2014

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE