

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 07-21221-CIV-ALTONAGA/BROWN

RENEE BLASZKOWSKI, *et al.*,
individually and on behalf of
others similarly situated,
Plaintiffs,

vs.

MARS, INCORPORATED, *et al.*,
Defendants.

**NATURA PET PRODUCTS, INC.'S MOTION FOR SUMMARY JUDGMENT
AGAINST PLAINTIFF SUSAN PETERS PURSUANT TO RULE 56**

Defendant Natura Pet Products, Inc. (“Natura”) hereby moves for the Court to grant summary judgment in favor of Natura and against Plaintiff Susan Peters (“Plaintiff” or “Peters”) pursuant to Federal Rules of Civil Procedure Rule (“Rule”) 56 and Local Rule 7.5 on the following grounds:

There are no material facts to be tried with respect to the claims pled by Peters against Natura. Undisputed evidence demonstrates that Plaintiff cannot prevail on her claims against Natura because she cannot carry her burden of production that she ever purchased or used products manufactured or distributed by Natura Pet Products, Inc. Accordingly, Natura is entitled to summary judgment against Susan Peters.

Natura’s motion is based on the following memorandum, the accompanying Declaration of Kristen E. Caverly dated October 20, 2008, Declaration of Ronn Walters dated October 20, 2008, Declaration of Jonathan Brunk dated September 26, 2008, Declaration of Shawn Salis dated September 22, 2008, and the Request for Judicial Notice, any reply papers which may be submitted, and any other argument or evidence which may be permitted by the Court.

MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiff Susan Peters, whose legal name is really Susan Jones,¹ has lied about purchasing and feeding her pets food manufactured or distributed by Natura Pet Products, Inc. Peters could never have purchased and fed her pets Natura products because the stores where she claims to have made her purchases have never sold any Natura products. Peters claims that she purchased Natura products must be disregarded as wholly uncredible in light of the unequivocal declarations from PETCO, PetSmart and Natura which are submitted with this motion. Without being able to create a genuine issue of material fact as to whether she purchased or was damaged by a product manufactured or distributed by Natura, Peters has no standing to pursue any of the claims she alleges. Natura is entitled to summary judgment against plaintiff Peters pursuant to Federal Rule of Civil Procedure 56(c) (“Rule 56(c”).

II. FACTUAL BACKGROUND

Peters filed a Fourth Amended Complaint (the “Complaint”) on April 11, 2008 asserting claims against Natura for (i) fraudulent misrepresentation and concealment, (ii) negligent misrepresentation, (iii) violation of FDUTPA, (iv) negligence, (v) strict liability, (vi) injunctive relief, (ix) unjust enrichment. *See* Fourth Amended Complaint [D.E. 349]. Peters does not allege in the Complaint that she purchased or used products manufactured or distributed by Natura [Fourth Amended Complaint at 3, ¶ 5 [D.E. 349]], but she does in a filing on May 21, 2008 entitled Pet Food Products Purchased by Plaintiffs [D.E. 290-2 at 19] and in her interrogatory responses.

On August 25, 2008, counsel for Defendant Natura deposed Peters. As she had already done in her interrogatory responses, Peters testified at deposition that she purchased several varieties of Natura products from only PetSmart and/or PETCO. (*See* Declaration of Kristen E. Caverly, Oct. 20, 2008, ex. A (Deposition of Susan Peters, Aug. 25, 2008, 55:15-23; 58:16-19;

¹ Peters admits that her legal name is Susan Beth Jones. (Declaration of Kristen E. Caverly, Oct. 20, 2008, ex. A (Deposition of Susan Peters, Aug. 25, 2008, 11:1-13:8).) Plaintiff Susan Peters does not exist.

63:12-65:11; 74:10-74:16; 77:22-78:22; 80:25-81:4; 104:1-105:17; 112:14-113:9; 215:20-216:20; 248:7-11) & ex. B (interrogatory response.) When asked why she had not included in the Fourth Amended Complaint an allegation that she purchased products manufactured or distributed by Natura during the class period, Peters responded that she believed she had an implied claim against Natura because she had alleged purchases at PETCO and PetSmart. (*See* Caverly Decl., ex. A (Peters Dep. 126:13-127:12).)

Peters' testimony as to the location of her purchases was unequivocal. For example:

Q Which of the seven Natura products that you purchased did you buy from PetSmart?

A I don't know.

Q Which of the seven products that you purchased did you buy from PetCo?

A I don't know.

Q Other than PetSmart and PETCO, have you ever purchased a Natura manufactured or distributed product from any other store?

A I don't believe so.

(Caverly Decl., ex. A (Peters Dep. 64:16-25).)

Similarly,

Q After you purchased the California Natura[sic] supplements from PetSmart, when was the next time that you purchased a Natura product?

A It would have been on the cusp of 2006-2007....

...

Q Where did you go to purchase the products?

A We shopped at both PetSmart and PetCo and that would be in Independence....

...

Q When you ran out of all of the Natura products that you had purchased at the end of 2007 [sic], beginning of 2006 [sic], you never bought any more, correct?

A That's right.

(Caverly Decl., ex. A (Peters Dep. 63:12-64:2; 74:10-13); *see also* Caverly Decl., ex. A (Peters Dep. 112:14-21 (discussing interrogatory responses).)

Peters' sworn interrogatory responses and her deposition testimony that she purchased Natura products in 2006 and/or 2007 cannot possibly be true and must be disregarded. Peters could not possibly have purchased products manufactured or distributed by Natura at PETCO or PetSmart because neither retailer has ever sold those products at any of its stores nationwide. (*See* Declaration of Shawn Salis, Sept. 22, 2008 (PETCO does not sell Natura products); Declaration of Jonathan Brunk, Sept. 26, 2008 (PetSmart does not sell Natura products); Declaration of Ronn Walthers, Oct. 20, 2008 (neither PETCO nor PetSmart have sold Natura products in the last 5 years).) Since Peters' clearly never got Natura products from PETCO or PetSmart, she cannot credibly maintain that she ever fed Natura products to her pets. (*See* Caverly Decl., ex. A (Peters Dep. 74:10-16 (admittedly never fed any Natura products other than those allegedly purchased at PetSmart and PETCO).)

III. LEGAL ARGUMENT

Peters cannot prevail on any of the six causes of action alleged against Natura in the Complaint because she never purchased or fed Natura products to her pets. No reasonable jury could find in favor of Peters at trial. Accordingly, Natura's motion for summary judgment against Peters should be granted.

A. Standard On Summary Judgment.

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor. *Haves v. City of Miami*, 52 F. 3d 918, 921 (11th Cir. 1995) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986)). “A mere ‘scintilla’ of evidence supporting the opposing party’s position will not suffice; there must be enough of a showing that the jury could reasonably find for that party.” *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). Furthermore, where there has been “a complete failure of proof concerning an essential element of the nonmoving party’s case,” all other facts are rendered immaterial. *Celotex v. Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

B. Plaintiff’s Claims Require the Purchase or Use of Natura Products.

Plaintiff’s claims for fraudulent misrepresentation and concealment, negligent misrepresentation, violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), negligence, strict liability, and unjust enrichment share one common predicate – Peters must show that she purchased or used Natura products to her detriment. If Peters did not purchase or use Natura products, Peters has no damages and no standing to challenge Natura’s advertising, allege negligence or product liability, or to seek disgorgement of profits or injunctive relief. *See Rollins v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006) (actual damage is element of FDUTPA claim); *see also Specialty Beverages LLC v. Pabst Brewing Co.*, 537 F.3d 1165, 1180-81 (10th Cir. 2008) (reliance and damages are required elements of fraud and misrepresentation under Oklahoma law); *Johnson v. Hillcrest Health Ctr., Inc.*, 70 P.3d 811, 816 (Okla. 2003) (injury to plaintiff is element of negligence claim); *Teel v. Public Service Co. of Oklahoma*, 767 P.2d 391, 398 (Okla. 1985) (unjust enrichment claim requires enrichment coupled with injustice); *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900, 914-15 (Okla. 1965) (strict liability for product defect requires injury to person).

IV. CONCLUSION

Peters cannot produce a scintilla of credible evidence to support her claims pled against Natura. To the contrary, the evidence clearly shows that Peters could not have and never did use or purchase Natura products. The pleadings, court filings, discovery, and accompanying declarations show that there is no genuine issue as to any material fact regarding Plaintiff's claims pled against Natura. Based upon the foregoing and pursuant to Rule 56(c), Natura requests that the Court grant summary judgment in favor of Natura on all claims brought by plaintiff Susan Peters, and grant Natura such other relief as this Court may deem fit and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the counsel so indicated on the attached Service List.

s/Michael M. Giel

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