CENTER FOR SCIENCE IN THE PUBLIC INTEREST v. THE COCA-COLA COMPANY et al Doc. 55

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

LINDA FRANULOVIC, individually and on behalf of a class of persons,	)	CIVIL NO. 1:07-cv-00539-RMB-JS
Plaintiff,	)	CLASS ACTION
v.	)	
	)	Document Electronically Filed
THE COCA-COLA COMPANY,	)	
Defendant.	)	**Return date: October 5, 2007**

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

In her Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Plaintiff Linda Franulovic ("Plaintiff" or "Franulovic") misrepresents Defendant's theories for dismissal and, in an unpersuasive effort to diminish Defendant's legal arguments, resorts to repeatedly insulting Defendant's motion as "canned." Contrary to Plaintiff's assertions, her Complaint fails to satisfy the particularity requirements of FED. R. CIV. P. 9(b), as it does not plead that Plaintiff actually saw and was deceived by all of the allegedly deceptive statements identified in the Complaint – a necessary allegation under the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. § 56:8-1 *et seq*. This omission is made even more clear in Plaintiff's briefing, in which she merely alleges that "Franulovic read the quoted representations on the Enviga can's label in making her purchasing decisions." Pl.'s Mem. at 1 (emphasis added). Assuming that this Court finds Plaintiff's statement to be sufficiently particular, Plaintiff's Complaint nevertheless fails to state a claim to the extent that it relies on any marketing statements not contained on the Enviga can. Additionally, this Court should dismiss Plaintiff's Complaint to the extent that it relies on any marketing "puffery," any alleged failure to disclose certain scientific data, and any of Plaintiff's subjective feelings concerning the value of Enviga, because none of these claims are actionable under the CFA.

ARGUMENT AND AUTHORITY

I. PLAINTIFF'S CLAIM UNDER THE NEW JERSEY CFA MUST BE LIMITED TO STATEMENTS WHICH ACTUALLY DECEIVED PLAINTIFF AND WHICH ARE CHARACTERIZATIONS OF SPECIFIC PRODUCT ATTRIBUTES.

A. Plaintiff's CFA claim still fails to allege that Plaintiff was actually deceived by all of the allegedly misleading statements in Plaintiff's Complaint.

As noted in Defendant's initial briefing, New Jersey law is clear that Plaintiff must plead all elements of her CFA claim with particularity. *See, e.g., FDIC v. Bathgate*, No. 91-2779, 1993

WL 661961, at *2 (D.N.J. July 19, 1993), *aff'd* 27 F.3d 850 (3d Cir. 1994); *Zebersky v. Bed Bath & Beyond, Inc.*, No. CIVA 06-CV-1735 PGS, 2006 WL 3454993, at *4 (D.N.J. Nov. 29, 2006); *Naporano Iron & Metal Co. v. Am. Crane Corp.*, 79 F. Supp. 2d 494, 510-11 (D.N.J. 2000) . One essential element under the CFA is a "causal nexus" between Defendant's alleged misrepresentations and Plaintiff's ascertainable loss. *N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 176 (N.J. Super. Ct. App. Div 2003); *see also* N.J.S.A. § 56:8-19 (allowing a claim where a plaintiff's loss occurs "as a result" of an unlawful practice). In other words, Plaintiff must allege the specific statements made by Defendant which deceived her when she purchased Enviga. *See Fink v. Ricoh Corp.*, 839 A.2d 942, 976 (N.J. Super. Ct. L. Div. 2003) ("[T]he 'causal nexus' requirement requires proof that the prohibited act must in fact have misled, deceived, induced or persuaded the plaintiff to purchase defendant's product or service.") (emphasis added); *see also Kirtley v. Wadekar*, No. 05-5383, 2006 WL 2482939, at *3 (D.N.J. Aug. 25, 2006) (dismissing a CFA claim because the plaintiffs did not allege with particularity "exactly who bought exactly what product when, relying on what false representations made when by whom") (emphasis added); *Pacholec v. Home Depot USA, Inc.*, No. 06-CV-827, 2006 WL 2792788, at *2 (D.N.J. Sept. 26, 2006) (dismissing a CFA claim where the plaintiff did not allege "what was or was not said to him"); *Stephenson v. Bell Atl. Corp.*, 177 F.R.D. 279, 294 (D.N.J. 1997) ("[I]n the consumer context, the plaintiff must show that misrepresentations or nondisclosures 'induced the purchaser to buy.'"); *Chattin v. Cape May Greene, Inc.*, 524 A.2d 841, 853 (N.J. Super. Ct. App. Div. 1987) (holding that individuals who never observed the defendant's alleged misrepresentations could state no claim under the CFA).

In the present case, Franulovic attempts to muddle the requirement to plead the specific statements that deceived her by simply listing allegedly misleading statements, whether or not

she ever saw them. Thus, Plaintiff identifies around twenty of Defendant's marketing statements for Enviga, *see* Compl. ¶¶ 21—23, and then makes the blanket allegation that "Franulovic saw advertisements for Enviga and began drinking a can per day." Compl. ¶ 45. The only other information Plaintiff provides is her statement that she increased her consumption of Enviga after she "read the Enviga can label's representations about calorie burning." Compl. ¶ 46. Assuming that this statement satisfies the strictures of Rule 9(b), Plaintiff is admitting that she can only plead (in good faith) that the following advertising statements detailed on the Enviga can's label caused her to purchase Enviga:

- "The Calorie Burner."
- Enviga "increases your metabolism to gently increase calorie burning."
- Enviga gives "your body a little extra boost."
- The caffeine and EGCG in Enviga "invigorate your metabolism to burn calories."
- The caffeine alone "stimulates your body to enhance the calorie burning process."

Compl. ¶ 22. Since Plaintiff has therefore conceded that she was not actually deceived by at least fifteen other marketing statements identified in her Complaint – those listed in ¶¶ 21 and 23 – this Court should dismiss ¶¶ 21 and 23 of Plaintiff's Complaint for failure to plead any "causal nexus" to the advertising statements contained therein.

B. Statements that constitute "puffery" or are based on Plaintiff's own assessment of Enviga's value cannot supply the basis of Plaintiff's CFA claim.

"Puffery is an exaggeration or overstatement in broad, vague, and commendatory language." *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939 (3d Cir. 1993). Contrary to Plaintiff's assertion, Defendant has not claimed that all of its statements concerning Enviga constitute non-

actionable "puffery." Defendant does argue, however, that some particular statements alleged to be misleading are puffery and therefore cannot form the basis of Plaintiff's CFA claim.

New Jersey courts have held that advertising claims constitute mere puffery where they do not make specific representations of a product's characteristics. *See, e.g., Rodio v. Smith*, 123 N.J. 345, 352, 587 A.2d 621, 624 (1991) (advertising that "You're in good hands with Allstate" was mere puffery); *N.J. Citizen Action*, 842 A.2d at 177 (advertising that the medication Claritin can help a person "lead a normal nearly symptom-free life again" was puffery); *Bubbles N' Bows, LLC v. Fey Publ'g Co.*, No. 06-5391, 2007 U.S. Dist. LEXIS 60790, at *25 (D.N.J. Aug. 20, 2007) (cited by Plaintiff) (advertising that "the success of this business always has and always will rely on the satisfaction of our clients" and that "if the customer isn't smiling, fix it" was puffery). Similarly to these cases, the following statements about Enviga constitute mere puffery under New Jersey law because they involve matters of opinion rather than characterizations of "specific product attributes":

1. Drinking Enviga is "much smarter than following fads, quick-fixes, and crash diets." Compl. ¶ 23.[1]
2. Enviga "gives your body a little extra boost." Compl. ¶ 22.
3. Enviga contains the "powerful EGCG." Compl. ¶ 23.
4. "Enviga is the perfect refresher for you: everyday you do your bit to cut out or burn a few extra calories, Enviga is doing its little bit to help." Compl. ¶ 23.
5. "Be positive. Drink negative." Compl. ¶ 23.
6. "Invigorate your metabolism." Compl. ¶ 23.

In response, Plaintiff lists seventeen of Defendant's statements that she claims "are

[1] As noted in footnote 4 of Defendant's original brief, the alleged statement is also misquoted. The full sentence from the website that Plaintiff incorporated into her complaint reads: "It's a fact that incorporating balanced nutrition and more activity into your lifestyle is the best way to stay healthy – and much smarter than following fads, quick-fixes, and crash diets." *See* http://www.enviga.com/#Benefits (last viewed on September 27, 2007).

actionable misrepresentations of material fact," but she does not include on her list the above-detailed statements numbers 1, 2, 3, 5, and the first clause of number 4. Pl.'s Mem. at 8-9. Accordingly, because Plaintiff had conceded the "puffery" argument on those statements, this Court should dismiss Plaintiff's Complaint to the extent it relies on any of them. Additionally, this Court should dismiss statement number 6, and the second clause of number 4, because they too constitute "puffery."

Further, Plaintiff has not contested Defendant's argument that this Court should dismiss Plaintiff's CFA claim to the extent it relies on any of the following allegations:

- Defendant "advertis[ed] Enviga without having prior substantiation for all advertising claims." Compl. ¶ 59(a) (failure to disclose data).
- Defendant advertised Enviga without disclosing "that the minimal study evidence showed that Enviga had a desirable effect only on a discreet and minor segment of the population." Compl. ¶ 59(c) (failure to disclose data).
- "Enviga is expected to have a comparable effect on individuals over 35." Compl. ¶ 23 (failure to disclose data).
- Defendant "advertis[ed] Enviga without the material fact that one would have to drink three cans daily for as long as the person wanted to have whatever effect might occur." Compl. ¶ 59(d) (failure to disclose data).
- Defendant "[f]ail[ed] to disclose that it would be necessary to spend weeks drinking three cans of Enviga daily – at least 100 cans at an approximate cost of $150 – just to enjoy a possible loss of one pound." Compl. ¶ 59(e) (subjective belief that Enviga is too expensive).

Accordingly, because these statements are non-actionable, this Court should strike these allegations from Franulovic's Complaint. *See N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 177 (N.J. Super. Ct. App. Div. 2003) (rejecting argument that defendant violated the CFA for failing to disclose specific data about the product's effectiveness).

II. PLAINTIFF FAILS TO STATE A CLAIM IN COUNT II FOR ALLEGED VIOLATIONS OF THE NEW JERSEY FOOD AND DRUG LAWS.

As noted in Defendant's original brief, Plaintiff's allegations with respect to the New Jersey Food and Drug Laws ("FDL"), N.J.S.A. § 24:5-1 *et seq.* were not entirely clear. Plaintiff now concedes that she has no private right of action under the FDL and, therefore, her only claim in this case is for an alleged violation of the CFA. For the reasons stated in section I above, Plaintiff fails to state a claim under the CFA, which encompasses Plaintiff's allegations in count II.

Having conceded that she lacks a private right of action, Plaintiff nevertheless persists in pleading an alleged violation of the FDL as a separate count and argues that "Coke's violation of the Food and Drug Law's misbranding prohibition constitutes a deceptive act or practice under the CFA." The cases Plaintiff cites to support her argument are inapposite. Those cases involved one of two situations: (i) violations of statutes or regulations that were undisputed or established by administrative action, or (ii) statutes that provided plaintiff with a remedy and were, therefore, enforceable by the plaintiff. For example, in *Wozniak v. Pennella*, 862 A.2d 539, 547 (N.J. Super. Ct. App. Div. 2004), the parties did not dispute that the landlord violated the rent control regulations, and plaintiff was permitted to use that fact to argue that the landlord had violated the CFA. Similarly, in *Lemelledo v. Beneficial Mgmt. Corp. of America*, 674 A.2d 582, 588 (N.J. Super. Ct. App. Div. 1996), the applicable Consumer Loan Act regulations provided plaintiff a remedy, but the Court found the remedy to be incomplete, and plaintiff was permitted to argue that a violation of the Consumer Loan Act constituted a violation of the CFA.

Plaintiff's purported claim of misbranding under FDL does not present the same situation. Here, Plaintiff seeks to argue that Defendant's label, *if considered by the appropriate administrative agency* (here, the Department of Health) would be considered misbranded

because it is allegedly "false or misleading in any particular" under section 24:5-16 of the FDL. Of course, because Plaintiff concedes she has no authority to enforce the FDL, the applicable standard for what constitutes an allegedly false and misleading label must come from the CFA, and Plaintiff's argument collapses into a single claim. In other words, Plaintiff cites no authority that would permit her to circumvent the lack of a private right of action under the FDL by asking a jury to find an independent violation of the FDL and then using that violation to support a separate violation of the CFA. To the contrary, Plaintiff's authority presupposes either an uncontested violation or a finding by the appropriate agency, neither of which exists here. Accordingly, even assuming Plaintiffs' allegations were correct, Plaintiff is not entitled to ask the jury to establish a violation of the FDL, and count II should be dismissed.

CONCLUSION

Because Plaintiff cannot state a claim under the CFA for misrepresentations that she never encountered, or for statements that represent advertising "puffery," the vast majority of the allegedly fraudulent statements set forth in her Complaint should be dismissed. Plaintiff appears to concede as much, as she alleges only that she observed statements concerning calorie burning on the Enviga can's label, and as she does not claim that all of the statements identified in her Complaint are representations of material fact. Accordingly, Defendant requests the dismissal of Plaintiff's CFA claim to the extent it relies on anything other than the following four statements identified in ¶ 22 of her Complaint (i.e. the statements on the Enviga can's label that do not represent puffery):

- "The Calorie Burner."
- Enviga "increases your metabolism to gently increase calorie burning."
- The caffeine and EGCG in Enviga "invigorate your metabolism to burn calories."

- The caffeine alone "stimulates your body to enhance the calorie burning process."

Additionally, Defendant requests the dismissal of Plaintiff's allegations that are based on (i) Defendant's alleged failure to disclose certain data, and (ii) Plaintiff's subjective belief that Enviga is too expensive, because Plaintiff has not opposed Defendant's motion on these grounds.

Dated: September 27, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed with the Court the following documents: **Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss.** The foregoing documents have been served upon all counsel of record as listed on the docket of this Court via CM/ECF and served upon all the following parties via United States mail, postage prepaid:

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