SUPREME COURT OF THE STATE OF NEW YORK
COURTY OF NEW YORK
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DAVID MATT,

Plaintiff,

-against-

PRET A MANGER (USA) LIMITED, PRET 140 BROADWAY, INC, and DAMASCUS BAKERY,

Defendants.

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Index No. 155556/14
Motion Sequence 001/002

DECISION AND ORDER

HON. SHERRY KLEIN HEITLER

In this personal injury action, defendants Pret A Manger (USA) Ltd., Pret 140 Broadway, Inc. (Pret A Manger), and Damascus Bakery (Damascus) (collectively, Defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety.[1] In the alternative Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Plaintiff David Matt (Plaintiff) opposes both motions, arguing that Defendants' failure to warn him of the foreseeable dangers associated with their food products caused his injuries. For the reasons set forth below, Defendants' motions are granted.

Plaintiff alleges that he was injured on September 11, 2015 when he purchased and ate an "Avocado and Roasted Corn Salsa Flatbread" sandwich from the Pret A Manger store located at 1410 Broadway in Manhattan. Plaintiff is allergic to sesame and asserts that the bread component of the sandwich contained sesame or sesame oil which caused him to suffer a severe allergic reaction. Plaintiff commenced this action by filing a summons and complaint on July 5, 2016. The complaint alleges that Defendants violated New York common law by negligently manufacturing, distributing, and selling products that were not reasonably safe because they did not contain a

[1] Motion Sequence numbers 001 and 002 are consolidated for disposition herein.

warning that they contained sesame. Plaintiff also alleges that Defendants failed to comply with statutory and regulatory provisions relating to the labeling of food products.[2] Specifically, Plaintiff's response to Defendants' demand for a Bill of Particulars alleges that they failed to comply with 21 USC § 343,[3] 21 CFR §§ 101.18,[4] 101.3,[5] 102.5,[6] and 110.93,[7] and NY Agriculture and Markets Law §§ 199-a,[8] 200,[9] and 201.[10]

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[2] See Damascus' moving papers, exhibit A.

[3] 21 USC 343(a) provides that "[a] food shall be deemed to be misbranded . . . If (1) its labeling is false or misleading in any particular, or (2) in the case of a food to which . . . [21 USCS § 350] applies, its advertising is false or misleading in a material respect or its labeling is in violation of . . . [21 USCS § 350(b)(2)].

[4] 21 CFR 101.18(a) provides that "[a]mong representations in the labeling of a food which render such food misbranded is a false or misleading representation with respect to another food or a drug, device, or cosmetic."

[5] 21 CFR 101.3(a)(b) provide that:

"(a) The principal display panel of a food in package form shall bear as one of its principal features a statement of the identity of the commodity.

(b) Such statement of identity shall be in terms of:
(1) The name now or hereafter specified in or required by any applicable Federal law or regulation; or, in the absence thereof,
(2) The common or usual name of the food; or, in the absence thereof,
(3) An appropriately descriptive term, or when the nature of the food is obvious, a fanciful name commonly used by the public for such food."

[6] 21 CFR 102.5(a) provides that "[t]he common or usual name of a food, which may be a coined term, shall accurately identify or describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients. The name shall be uniform among all identical or similar products and may not be confusingly similar to the name of any other food that is not reasonably encompassed within the same name. Each class or subclass of food shall be given its own common or usual name that states, in clear terms, what it is in a way that distinguishes it from different foods."

[7] This section appears to have been removed.

[8] Agriculture and Market Law 199-a(1) provides that "[n]o person or persons, firm, association or corporation shall within this state manufacture, compound, brew, distill, produce, process, pack, transport, possess, sell, offer or expose for sale, or serve in any hotel, restaurant, eating house or other place of public entertainment any article of food which is adulterated or misbranded within the meaning of this article."

[9] Agriculture and Market Law 200(1) provides that "[f]ood shall be deemed to be adulterated . . . [i]f it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this subdivision if the quantity of such substance in such food does not ordinarily render it injurious to health."

[10] Agriculture and Market Law 201(1) provides that "[f]ood shall be deemed to be misbranded . . . [i]f its labeling is false or misleading in any particular."

Plaintiff was deposed on April 4, 2017.[11] Among other things, Plaintiff testified that he has known about his allergy to sesame since he was a child and often carries an Epipen and Benadryl with him as a precaution. On the date of the incident, however, he had neither. Plaintiff entered the Pret A Manger store in question and chose the Avocado and Roasted Corn Salsa Flatbread, believing it to be the healthiest pre-made sandwich available. He had about three bites of the sandwich in the store before having an allergic reaction (Matt Deposition pp. 17-20, 30, 38-39). Plaintiff did not recall whether he spoke to a Pret A Manger employee before selecting his sandwich and did not recall if he asked anyone before consuming the sandwich if it contained sesame (*id* at 31, 36):

Q: So, did you speak with anyone at Pret before selecting the sandwich?
A: I don't remember if I spoke to anyone before selecting the sandwich. I can't recall.

* * * *

Q. So, before consuming the sandwich on September 11, 2015, did you ever speak with any employees of Pret A Manger about its ingredients?
A. I can't recall, to be honest.
Q. Did you ever ask anyone before consuming the sandwich if it contained sesame seeds?
A. Again, I can't recall, but that's my typical routine, but I can't recall.

After noticing that he was having an allergic reaction Plaintiff threw away the rest of the sandwich and went to another store to purchase Benadryl. He then walked to a pre-planned meeting, but shortly after arriving left and took a cab to the hospital (*id.* at 39, 44-45, 50). After leaving the hospital he went back to the Pret A Manger store and checked the sandwich case to see whether the sandwich indicated that it contained sesame. It did not. He then asked a manager if she could tell him the ingredients. In response she handed him a booklet that was near the cash register. The booklet identified the sandwich as containing allergens such as shellfish and peanuts but not

[11] A copy of his deposition transcript is submitted as exhibit F to Damascus' moving papers (Matt Deposition).

sesame. Plaintiff could not recall whether he asked the manager whether the sandwich contained sesame (*id.* at 56-61).

Mr. David Mafoud was deposed on behalf of Damascus Bakery.[12] Mr. Mafoud, who is one of Damascus' owners, confirmed that they sell only one product to Pret A Manger, a "lavash" bread which Pret A Manger uses to make its Avocado and Roasted Corn Salsa Flatbread. At his deposition Mr. Mafoud was asked if he knew all of the ingredients in Damascus' lavash bread. He responded by reading from an "Ingredient Declaration" which he provides to customers, including Pret A Manger (Mafoud Deposition p. 14-15, 24-25):

Q. Below that there's a separate line that says, "Contains: Wheat, soy and sesame;" correct?

A. Correct.

Q. Can you explain why that line is separated out from the others?

A. We list and perhaps by FDA regulations, we are asked to list or call out any of the ingredients that could be classified as an allergin [sic]. Wheat and soy are classified as allergins in the U.S. In Canada sesame would be included as we really don't know where stores are, so we put what might be outside this country or at least the border country.

Q. To your understanding, sesame is not categorized as an allergin, a main allergin in the U.S.?

A. It's not one of the main eight . . .

* * * *

Q. So the reason why sesame would be listed is because when you are labeling your product, it needs to be labeled for both U.S. and international use? . . .

THE WITNESS: It needs to be there in the contained portion. If we were assured that the product would only be sold in U.S. stores, we would not need to put the word "sesame."

Q. You're aware of what the FDA regulations are with respect to food service providers?

A. Correct.

Q. Sesame is not one of the requirements of the FDA with respect to food service providers in the United States?

A. Correct.

Q. There are allergins [sic] that you are required to label in the United States?

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[12] A copy of Mr. Mafoud's June 15, 2017 deposition transcript is submitted as exhibit H to Damascus' moving papers (Mafoud Deposition)

A. Correct. . . .
Q. Sesame is not one of them?
A. Correct.

Pret A Manger's head of Food Development and Quality Assurance, Ms. Rosemary Willis, was deposed on May 26, 2017.[13] Ms. Willis testified that she is part of the team that investigates claims involving allergic reactions and that she was not aware of any previous reports of allergic reactions from Pret A Manger's Avocado and Roasted Corn Salsa Flatbread sandwich (Willis Deposition pp. 14-15). With respect to labeling, Ms. Willis explained that Pret A Manger uses something called a "Langer" ticket which lists the name of the product, the list of ingredients, and some nutritional information. The Langer ticket is displayed and attached to the refrigerator where the sandwiches are kept (*id.* at 18-19). While the Langer ticket for the Avocado and Roasted Corn Salsa Flatbread sandwich has been changed since Plaintiff's incident, it has never listed sesame as an ingredient. Ms. Willis explained that because Pret A Manger is a restaurant chain it does not fall under the scope of the Food and Drug Administration (FDA) and therefore is not required to list all of its ingredients or allergens at the point of sale (*id.* at 20-21). She also confirmed that Damascus has no control over what information is displayed in Pret A Manger's stores (*id.* at 37, 39-40).

Plaintiff filed a note of issue on September 1, 2017. Defendants then timely filed these motions, and the parties argued before me on January 8, 2018.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr.*

[13] A copy of Ms. Willis deposition transcript is submitted as exhibit G to Damascus' moving papers (Willis Deposition).

Corp., 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

"Given that failure-to-warn cases are governed by negligence principles, it is incumbent on the court . . . to decide whether an applicable legal duty exists." *Matter of New York City Asbestos Litig.*, 27 NY3d 765, 787 (2016). In determining whether a duty exists, the court "must not engage in a simply weighing of equities," but must instead "settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the parties, the identity of the person or entity best positioned to avoid the harm in question, the public policy served by the presence or absence of a duty and the logical basis of a duty." *Id.* at 787-88. Where a duty is found to exist, New York law is clear that "[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998). The manufacturer must also must warn of dangers arising from the product's "intended use or a reasonably foreseeable unintended use." *Lugo v LJN Toys*, 75 NY2d 850, 852 (1990).

In the case of allergic reactions, a manufacturer is required to warn only of those reactions that are "'common to [a] substantial number of possible users.'" *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 (1992) (quoting *Kaempfe v Lehn & Fink Prods. Corp.*, 21 AD2d 197, 201 [1st Dept 1964]). Thus, for there to be a duty to warn, a plaintiff must show: "(1) that [he] was one of a substantial number or an identifiable class of persons who were allergic to the

defendant's product, and (2) that defendant knew, or with reasonable diligence should have known, of the existence of such number or class of persons." *Kaempfe*, 21 AD2d at 201. An injury is not foreseeable if it "is due to some allergy or other personal idiosyncracy of the consumer, found only in an insignificant percentage of the population." *Id.* at 201

I. Damascus

Damascus has met its *prima facie* burden by showing that it disclosed all of the ingredients in its flatbread to Pret A Manger, including sesame, and that it had no control over Pret A Manger's labeling of its sandwiches. In opposition, Plaintiff has failed to raise a triable issue of fact. It is of no moment that Damascus knew sesame to be a regulated allergen in Canada, since, contrary to Plaintiff's position, this does impose upon Damascus a duty to warn ultimate consumers of its product here in New York, especially when it had no control over Pret A Manger's labeling practices. Also contrary to Plaintiff's papers, the sufficiency of Damascus' disclosure to Pret A Manger is not a question of fact to be decided by a jury since Pret A Manger concedes that it was aware the product contained sesame. The single case that Plaintiff cites against Damascus, *Anaya v Town Sports Intl.*, Inc., 44 AD3d 485 (1st Dept 2007), has to do with strict products liability based upon a design defect, and thus is entirely inapposite to the case at bar since Plaintiff cannot show that Damascus' flatbreads were tainted, adulterated, or otherwise defectively produced. Finally, Plaintiff does not refer to any of the statutes and regulations referred to in its bill of particulars, much less explain how Damascus violated them. Accordingly, Damascus' motion for summary judgment is granted.

II. Pret A Manger

From a regulatory perspective, there is no evidence that Pret a Manger violated any federal or state law pertaining to food labeling. Under the Food Labeling and Consumer Protection Act of 2004, food manufacturers must clearly identify any ingredients that can be classified as one of eight

major food allergens, including milk, eggs, fish, wheat, peanuts, tree nuts, shellfish, and soy.[14] The FDA does not deem sesame to be a major food allergen and does not require food manufacturers or retailers to list it as an ingredient on a food label. Since sesame is not considered to be a major food allergen, it cannot be said that Pret A Manger misbranded or falsely labeled its sandwich. As such, Plaintiff's reliance on the federal labeling guidelines (21 CFR §§ 101, *et seq.*) is misplaced.

The same reasoning applies to Plaintiff's claims that Pret A Manger violated New York State law. Since there is no evidence that the New York State Department of Health considers sesame to be an allergen, Plaintiff's contention that Pret A Manger misbranded its products or placed an unadulterated product into the stream of commerce is without merit.

With regard to Plaintiff's common-law argument, Pret A Manger may very well be in the best position to warn consumers about the contents of its sandwiches. But there is an absence of proof in this case that an "appreciable number" of Pret A Manger's consumers ever experienced a similar allergic reaction. *Kaempfe*, 21 AD2d at 201. Plaintiff's contention that sesame is regulated in Canada and possibly elsewhere does not change this result. What matters is whether sesame affects a substantial part of New York's population, or at least enough people to place Pret A Manger on notice that its consumers are being harmed by its products. Plaintiff has not made that showing here. These facts negate Plaintiff's claim that Pret A Manger had a duty to warn. Finally, Plaintiff's common-law negligence claim is barred by his own testimony that he did not seek to ascertain the sandwiches' full ingredient list before consuming it. In light of the foregoing, there are no grounds upon which a jury could determine that Pret A Manger is responsible for Plaintiff's injuries.

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[14] *See* 21 USC 321(qq) ("The term 'major food allergen' means any of the following . . . Milk, egg, fish (e.g., bass, flounder, or cod), Crustacean shellfish (e.g., crab, lobster, or shrimp), tree nuts (e.g., almonds, pecans, or walnuts), wheat, peanuts, and soybeans.")

The court has considered Plaintiff's remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is granted; and it is further

ORDERED that the complaint is dismissed.

The Clerk of the Court is directed to enter judgment and mark his records accordingly.

ENTER:

DATED: 1-31-18

SHERRY KLEIN HEITLER, J.S.C.