Sheppard v Bumble & Bumble, LLC
2018 NY Slip Op 31666(U)
July 16, 2018
Supreme Court, New York County
Docket Number: 157611/2013
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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LAURA SHEPPARD,

Plaintiff,

DECISION & ORDER
Index No. 157611/2013
Mot. Seq: 003
ARLENE P. BLUTH, JSC

-against-

BUMBLE AND BUMBLE, LLC, ESTEE LAUDER INC., and THE ESTEE LAUDER COMPANIES INC.,

Defendants.

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The motion by defendants for partial summary judgment is granted and the cross-motion for partial summary judgment by plaintiff is denied.

Background

This action arises out of alleged second and third degree burns suffered by plaintiff on her scalp after she received highlighting treatment from a colorist who worked for defendant Bumble and Bumble, LLC ("Bumble"). The burns purportedly caused a patch of hair to fall out and a permanent bald spot.

On May 5, 2013, plaintiff went to a salon operated by Bumble to get her hail colored. Plaintiff testified that she had been getting her hair colored blond every six to eight weeks for at least 17 years before the accident happened (plaintiff's tr at 15). Plaintiff contends that about 15 minutes after the colorist put foils in her hair, she felt a small "pinprick" of pain in her head that soon became very severe (*id.* at 42-43).

Plaintiff says she told the colorist it was burning and tried to remove the foils from her hair but the colorist told her not to and that it would ruin the coloring (*id.* at 45). Plaintiff went over to a sink and the colorist began to run cold water over her hair (*id.* at 45-46). Eventually, the colorist was able to remove the foils after they cooled off (*id.* at 46). After the foils were removed, plaintiff continued getting her hair colored, although she told the colorist that she was still in pain and could not handle heating up the foils that were put in her hair (*id.* at 51-52). Plaintiff then got her hair cut by another employee at Bumble (*id.* at 55).

After leaving the salon, plaintiff walked from 56th Street to 86th Street to an urgent care center (*id.* at 59-60). Plaintiff claims that her hair started to fall out after using medicine (a thick white paste called Silvadene) prescribed by the doctor she saw that day (*id.* at 64). Plaintiff eventually sought treatment from a number of doctors over the next few weeks before finally going to the burn unit of the hospital, where she was told she needed a skin graft (*id.* at 64-71). Plaintiff thinks that her burns were caused by "the chemical that heated up the foils and it was the foils that burned me (*id.* at 78-79).

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the

non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Corporate Entities

Defendants move to dismiss plaintiff's claims against defendants Estee Lauder, Inc. and The Estee Lauder Companies Inc. (collectively, the "Estee Lauder Defendants"). Defendants contend that the Estee Lauder Defendants had nothing to do with plaintiff's accident and that the individuals involved worked for Bumble. The Estee Lauder Defendants are "related" companies: The Estee Lauder Companies Inc. is a parent corporation of Bumble and Estee Lauder, Inc. is a sister company. Defendants argue that the Estee Lauder Defendants are separate companies and there is no reason to ignore these entities' corporate structure.

In opposition, plaintiff contends that these defendants should remain in the case because emails show evidence of direct management of Bumble, the colorist had to sign both a code of conduct and a

confidentiality agreement with defendant The Estee Lauder Companies Inc. and the products used to color plaintiff's hair were manufactured by Estee Lauder.

"[O]n occasion, the courts will disregard the separate legal personality of the corporation and assign liability to its owners where necessary to prevent fraud and achieve equity. But, such liability can never be predicated solely upon the fact of a parent's corporation's ownership of a controlling interest in the shares of its subsidiary. At the very least, there must be direct intervention in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored" (*Billy v Consol. Mach. Tool Corp.*, 51 NY2d 152, 163, 432 NYS2d 879 [1980] [internal quotations and citations omitted]).

Here, plaintiff failed to raise an issue of fact with respect to whether the Estee Lauder Defendants exert complete control over Bumble to the extent that Bumble's corporate formalities are ignored. Emails sent after the incident inquiring about plaintiff's accident does not demonstrate that these defendants control Bumble's operations (*see* NYSCEF Doc. No. 112). Neither does signing a code of conduct or a Confidentiality Agreement.

And the issue of who made the products has no significance because the colorist did not simply apply a product made by the Estee Lauder Defendants. The colorist made her own formula (Wiebalk tr at 59-61). She also admitted that it was one of the first times she had used that particular enlightener (*id.* at 64). The fact is that because it was up to the colorist to mix certain products to achieve the desired color for plaintiff, there is no basis to hold the Estee Lauder Defendants liable. The Estee Lauder Defendants did not instruct the colorist how to mix the chemicals that day or how to apply it to plaintiff's hair.

And the affidavit of plaintiff's purported cosmetology expert insists that plaintiff's injuries were the result of the colorist applying two "forms of incompatible bleach to the scalp, namely Aveda and Clairol and then . . . another product– Shades EQ" (NYSCEF Doc. No. 144, ¶ 7). Obviously, it is *plaintiff's* theory that improper mixing of the chemicals caused the burns rather than the products themselves. Accordingly, the claims against the Estee Lauder Defendants are severed and dismissed.

Strict Liability

Defendants also move for summary judgment dismissing plaintiff's claim for strict liability. Defendants insist that plaintiff's purported injuries arose out of Bumble's provision of a service rather than a product and that strict liability does not apply to service providers. Defendants insist that the hair coloring products had no role in plaintiff's accident.

Plaintiff cross-moves for summary judgment on the issue of strict liability. Plaintiff submits the affidavits of Dana Persico (a purported expert in the field of cosmetology) and Dr. Douglas Monasebian, both of whom claim that it was the chemical compound of the hair coloring products that caused plaintiff's burns.

"While there is no question that strict liability for injury due to a defective product may be imposed on a beauty parlor operator, the injured party, in order to prevail under that theory, must prove, *inter alia*, that the allegedly defective product was the cause of the injuries sustained. The cornerstone rule in products liability is that proof of mere injury furnishes no rational basis for inferring that the product was defective for its intended use. The plaintiff must demonstrate, at a minimum, that her injuries are the direct result of the product applied to her hair, and that those products are the sole

possible cause of those injuries" (*Olsovi v Salon DeBarney*, 118 AD2d 839, 840, 500 NYS2d 325 [2d Dept 1986]).

As an initial matter, defendants' claim that plaintiff is improperly changing her theory of liability is misplaced. Defendants offer a strained interpretation of plaintiff's deposition and the case detail report to claim that plaintiff initially asserted (before the instant motion) that it was the foil that caused the burns rather than the chemicals. Calling the burn a "chemical" or a "thermal" burn has nothing to do with plaintiff's alleged version of events which is that she began to feel a burning sensation as the colorist was putting in the foils. Whether those chemicals directly burned plaintiff's scalp or reacted with the foil– which then burned plaintiff's scalp– is insignificant for purposes of this motion.

Nevertheless, defendants' motion is granted because there is no basis to find that the products themselves were defective and caused plaintiff's injuries. This is evidenced most clearly in the affidavit of plaintiff's cosmetology expert who claims that the colorist– by mixing incompatible forms of bleach– caused plaintiff's burns (*see* NYSCEF Doc. No. 144, ¶ 7). In order to defeat defendants' motion to dismiss the strict liability claim, plaintiff would have to raise an issue of fact about whether the products were the sole cause of her injuries. That is not the case here, where the colorist created the combination of chemicals to use in plaintiff's hair.

For these same reasons, plaintiff's cross-motion for summary judgment on its strict liability claim is denied.[1]

[1]Plaintiff's cross-motion was not untimely– it was direct related to defendants' *timely* motion for summary judgment.

The breach of warranty claim is also severed and dismissed because it is inapplicable to this case. The colorist had no duty to warn plaintiff about possible burns where the colorist testified that she never had a client experience this type of discomfort while coloring their hair or knew about any other customer experiencing this issue (Wiebalk tr at 82-83). And, as stated above, plaintiff's apparent theory of the case is that the colorist improperly mixed hair products, not that the products themselves were defective. A breach of warranty claim cannot stand under these circumstances.

Summary

Strict liability arises where the product is the alleged cause of the accident. It is not available where a plaintiff alleges that a defendant improperly mixed products and that this combination caused plaintiff's injuries. Plaintiff does not allege, for instance, that the colorist mixed the chemicals according to instructions accompanying the products. Instead, plaintiff contends that the colorist decided how to prepare the mixture and that she did something wrong– that theory requires this Court to dismiss plaintiff's strict liability and breach of warranty claims.

Accordingly, it is hereby

ORDERED that the branch of defendants' motion for partial summary judgment seeking to dismiss defendants Estee Lauder, Inc. and The Estee Lauder Companies Inc. is granted and all claims against these defendants are severed and dismissed; and it is further

ORDERED that the branch of defendants' motion for summary judgment dismissing plaintiff's strict liability and breach of warranty claims is granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

Dated: July 16, 2018
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH
J.S.C.