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| Tanchez v Combe Inc. |
| 2020 NY Slip Op 31663(U) |
| May 26, 2020 |
| Supreme Court, New York County |
| Docket Number: 158896/2019 |
| Judge: Paul A. Goetz |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ

PART IAS MOTION 47EFM

Justice

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RONALD TANCHEZ AND KHOSRO EATEMADPOUR,
Plaintiffs,

- v -

COMBE INCORPORATED AND COMBE PRODUCTS INC.,
Defendants.

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| INDEX NO. | 158896/2019 |
| MOTION DATE | |
| MOTION SEQ. NO. | 001 |
| DECISION + ORDER ON MOTION | |

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6-14 were read on this motion to/for DISMISS.

Plaintiffs Ronald Tanchez and Khorso Eatemadpour commenced this action claiming injuries as a result of using Just For Men hair dye products in 2019. In their complaint, plaintiffs assert three causes of action sounding in strict products liability based on manufacturing defect, design defect and failure to warn. The remaining causes of action are for negligence, breach of express and implied warranty, negligent misrepresentation, fraud, and violation of New York General Business Law Sections 349 and 350. Defendants now move pursuant to CPLR 3211(a)(7) to dismiss the first cause of action for manufacturing defect, the seventh cause of action for negligent misrepresentation and fraud, and the eighth cause of action for violations of the General Business Law. Defendants also move pursuant to CPLR 3014 and 3024 for an order directing plaintiffs to replead and provide a more definite statement of the complaint and pursuant to CPLR 603 to sever the claims of the two named plaintiffs for trial.

In their motion, defendants first argue that plaintiffs should be required to correct and replead the complaint to include allegations regarding the specific Just for Men product(s) that each of them used, the dates of purchase, and the dates each plaintiff used the product(s). CPLR

3024 provides that “[i]f a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response, he may move for a more definite statement.” In determining whether a complaint is so defective that a defendant cannot reasonably be required to answer it, the court should consider whether it satisfies the requirements of CPLR 3013, which provides that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrence, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.”

Defendants argue that the allegations are deficient because plaintiffs do not even allege which Just for Men product(s) they allegedly used. However, defendants fail to explain the relevance of this fact to their ability to answer the complaint. For example, defendants do not seek to argue that the various products in the Just for Men product line contained different formulations or were manufactured by different parties. Although defendants vaguely argue that this information is relevant to issues of insurance coverage and a possible defense based on the statute of limitations, defendants fail to explain or articulate a basis for this argument. Plaintiffs’ allegations are sufficient to apprise defendants of the transactions intended to be proved, namely that plaintiffs used Just for Hair product(s) in 2019 and that as a result, they suffered injuries. To the extent that defendants seek an amplification of plaintiffs’ pleading, the proper remedy is to serve a demand for a bill of particulars. *See Cooper v. Van Cortlandt Assoc.*, 54 A.D.2d 545 (1st Dep’t 1976).

Next, defendants argue that plaintiffs’ first cause of action based on an alleged manufacturing defect should be dismissed because plaintiffs fail to allege any facts to support this claim. “A manufacturing defect claim is premised on the relevant product being defective because it was not manufactured as designed.” *Goldin v. Smith & Nephew Inc.*, 2013 WL 1759575, at *2

(S.D.N.Y. 2013) (citing *Reed v. Pfizer Inc.*, 839 F.Supp.2d 571, 577 [E.D.N.Y. 2012]). “Under New York law, to plead and prove a manufacturing flaw under either negligence or strict liability, the plaintiff must show that a specific product unit was defective as a result of some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction, and that the defect was the cause of plaintiff’s injury. Thus, a manufacturing defect claim is properly dismissed if a plaintiff has not alleged that the particular product administered to her had a defect as compared to other samples of that product.” *Id.* (internal citations and quotations omitted). Here, not only do plaintiffs fail to allege any specific facts regarding the alleged defects in manufacturing, they fail to even identify the product(s) at issue. *Id.*; *see also Rose v. Gelco Corp.*, 261 A.D.2d 381, 382 (2d Dep’t 1999). Further, plaintiffs fail to specifically allege that their injuries were caused by this alleged manufacturing defect, as opposed to the design defect and the formulation of the product generally. Complaint, paras. 91-99. Accordingly, the first cause of action will be dismissed.

Next, defendants argue that plaintiffs’ fraud claim should be dismissed because the allegations lack the necessary specificity required by CPLR 3016. In order to state a cause of action for fraud, plaintiffs must allege (1) a material misrepresentation of a fact; (2) defendants’ knowledge of its falsity; (3) intent to induce reliance; (4) plaintiffs’ justifiable reliance on the misrepresentation; and (5) damages. *Eurycleia Partners LP v. Seward & Kissel LLP*, 12 N.Y.3d 553, 559 (2009). Further, under the specificity requirements of CPLR 3016, plaintiffs must state in detail the circumstances constituting the alleged fraud. “Although there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege basic facts to establish the elements of the cause of action.” *Eurycleia*, 12 N.Y.3d at 559 (internal quotations and citations omitted); *see also Head v. Emblem Health*, 156 A.D.3d 424, 424 (1st Dep’t 2017).

Other than quoting a general statement from defendants regarding the efficacy of the product, plaintiffs fail to allege any facts to support their fraud claim. Complaint, para. 142. Indeed, the complaint lumps the allegations regarding each individual plaintiff together, without distinguishing or identifying any facts regarding the circumstances of the alleged fraud. Accordingly, this cause of action must be dismissed. Likewise, plaintiffs' claim for negligent misrepresentation must be dismissed as plaintiffs fail to allege the existence of a special or privity-like relationship between the parties or that defendants possessed unique or specialized expertise which imposed a duty on defendants to impart correct information to plaintiffs. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011).

Finally, defendants seek to dismiss plaintiffs' eighth cause of action based on violations of New York General Business Law Sections 349 and 350. In order to state a claim for deceptive acts and practices in violation of GBL Secs. 349 and 350, plaintiffs must show that defendants engaged in (1) consumer oriented conduct that is (2) materially misleading and that (3) plaintiffs have been injured as a result. *Plavin v. Group Health Inc.*, 2020 WL 1355864, at *4 (2020). Thus, a plaintiff claiming the benefit of these sections must demonstrate that defendants' conduct had a broader impact on consumers at large. *Id.* Here, plaintiffs' allegations regarding defendants' statements about the safety and efficacy of the Just for Men products and defendants' campaign to remove negative reviews from the internet fall squarely within this cause of action and are clearly consumer-oriented, contrary to defendants' contentions. Accordingly, this cause of action will not be dismissed.

Finally, defendants' motion to sever the claims of the individual plaintiffs for trial is premature as the parties have not yet engaged in any discovery. Accordingly, it is

ORDERED that the motion is granted to the extent that the first and seventh causes of action are dismissed, and is otherwise denied.

5/26/20
DATE


PAUL A. GOETZ, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | GRANTED IN PART |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | REFERENCE | | |