Fitness Companies Flex with Dismissal in New York UCC Elastic Band Case

By Brendan P. Hall and Judi Abbott Curry

It is critical for litigants on both sides of the "v" to pay close attention to, and strictly comply with, the critical elements necessary to establish, or defeat, a particular cause of action.

New York's Appellate Division, First Department recently issued favorable dismissals to a sporting goods retailer and manufacturer in a case alleging issues with an elastic exercise band that injured a person's right eye in a Union Square store. The plaintiff used the band by placing hard plastic handle ends between his feet and stretching the band upwards. The end of the band slipped out from under the plaintiff's foot and "projected" into his right eye. The Manhattan-based appellate court modified a trial court order and dismissed a second amended complaint (*Firuzzi v. Paragon Sporting Goods Co. LLC*, 2023 NY Slip Op 00054 [1st Dept. 2023]).

Bands Background

The retailer, Paragon Sporting Goods, displayed the subject elastic bands both packaged and unpackaged. The unpackaged bands were available for customer testing. The packaged bands contained various warnings, such as to check the products for wear and tear. However, the plaintiff failed to read a warning that consumers should avoid looking directly at the product during exercise.

Theories of Liability

The plaintiff originally pled four causes of action: fraud, aiding and abetting fraud, breach of implied warranties, and breach of express warranties in his first amended complaint. However, the plaintiff did not plead the traditional product liability theories of negligence or strict liability in design defect, manufacturing defect, or failure to warn. The trial court granted the defendants' first motion to dismiss the fraud and warranty allegations. The plaintiff then filed a second amended complaint.

Upon a second pre-answer motion to dismiss, the trial court dismissed the breach of express warranties cause of action, but it allowed the breach of implied warranties cause of action to stand. The Appellate Division modified the decision by dismissing the implied warranty claims, affirming dismissal of the express warranty claims, and directing the clerk enter judgment for the defendants.

Dismissal Grounds

Dismissal of the express warranty claims was proper because the plaintiff did not cite any affirmations of fact or promises by either Paragon Sporting Goods Co. LLC or the manufacturer, Gaiam Americas, Inc., within the amended complaint. Nor did the plaintiff allege he relied on any such statements.

With regard to the plaintiff's implied warranty claims, the plaintiff did not assert a claim for breach of implied warranty **for a particular purpose** per Uniform Commercial Code § *2-315* in the amended complaint. Such a claim requires allegations that the defendants had a reason to know

Brendan P. Hall is an associate at Harris Beach PLLC based in New York City. He practices primarily in the areas of New York Labor Law, business law, and torts. He serves as litigation counsel to businesses and individual clients throughout the US. Brendan serves on the DRI Young Lawyers Steering Committee and Harris Beach Wellness Committee.

Judi Abbott Curry is a member of Harris Beach PLLC. Judi concentrates in areas of mass tort, class action and complex product liability litigation involving pharmaceuticals, medical devices, implants, infusion pumps, compounded medicines, biologics, over-the-counter drugs, solvents, acids, benzene, per- and polyfluoroalkyl (PFAS), mixed chemical exposures, mold, Legionella, pesticides, cosmetics, food, beverages, nutritional supplements, commercial and consumer household goods. She is also a member of the firm's management committee.

mercial Code § *2-315* in the amended complaint. Such a claim requires allegations that the defendants had a reason to know any particular purpose for which the goods are used, and that the plaintiff relied on the defendants' skill or judgment to select or furnish those suitable goods. Fatally, the plaintiff did not allege any particular purpose of the exercise band or that the plaintiff relied upon defendants' skill in selecting the band.

Further, the plaintiff failed to state a claim for breach of the implied warranty of **merchantability** per UCC § *314[2][c].* Plaintiffs must allege that the goods are defective such that they were not reasonably fit for the **ordinary purpose** for which they were used, that the defect in the goods was a substantial factor in causing the injury, and that the alleged defect existed at the time the goods left the manufacturer or entity in the line of distribution. Again, the plaintiff did not support his complaint with any factual allegations explaining how the exercise band was not reasonably fit for its intended purpose.

Takeaways

The Appellate Division outcome is an impressive win for fitness companies. A few takeaways stand out.

First, it is notable the plaintiff did not assert the typical product liability theories of design defect, manufacturing defect, or failure to warn. That is because the plaintiff sued the manufacturer after the three-year statute of limitations for such claims (*See* Civil Practice Law and Rules § 214). Having missed the opportunity to bring a traditional product liability action, the plaintiff was relegated to asserting claims of fraud and warranty, which have longer statutes of limitations under New York law.

Second, the plaintiff was not entitled to submit an unsworn expert affidavit to oppose a motion to dismiss based on failure to state a cause of action. An unsworn expert report does not constitute evidence under CPLR Rule 3211. While a court may freely consider affidavits to remedy any complaint defects, it is critical for movants to submit motion materials, and particularly affidavits, in admissible form. Where an expert or witness does not swear to the truth of a statement under the penalties of perjury, New York courts will generally deem the affidavit unsworn and, thus, inadmissible, which can make or break a case. While the Appellate Division mainly took issue with the plaintiff's defective allegations, the inadmissible expert affidavit afforded no favors in keeping the case alive.

Additionally, it is critical for litigants on both sides of the "v" to pay close attention to, and strictly comply with, the critical elements necessary to establish, or defeat, a particular cause of action. Here, the defendants seized upon precise language that the UCC requires for alleged breaches of express and implied warranties. Indeed, the plaintiff's failure to plead facts tracing the language of UCC §§ 314 and 315 proved fatal. While perhaps complying with cause of action elements may sound rudimentary in nature, similar dismissal results transpire all too often.

Ultimately, both defendants worked themselves out of the case entirely. Neither the trial court nor the Appellate Division permitted the plaintiff to re-plead after the latest complaint, thereby leaving him without judicial recourse against the named defendants.

Read the full decision *here*.

If you have any questions about the matters in this Legal Alert or any other legal issues, please contact Judi Abbott Curry, Brendan Hall, or the Harris Beach attorney with whom you usually work.

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