

23-128

Richardson v. Edgewell Pers. Care, LLC

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit,
2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of
3 New York, on the 30th day of October, two thousand twenty-three.

4
5 **PRESENT:**

6 **GERARD E. LYNCH,**

7 **MICHAEL H. PARK,**

8 *Circuit Judges.*

9 **JESSICA G. L. CLARKE,**

10 *District Judge.**

11 _____
12
13 **Sherise Richardson, individually and on behalf**
14 **of all others similarly situated,**

15
16 *Plaintiff-Appellant,*

17
18 v.

23-128

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20 **Edgewell Personal Care, LLC,**

21 *Defendant-Appellee.*
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* Judge Jessica G. L. Clarke, of the United States District Court for the Southern District of New York, sitting by designation.

1 **FOR PLAINTIFF-APPELLANT:**

GLENN A. DANAS, Clarkson
Law Firm, P.C., Malibu, CA
(Neal J. Deckant and Brittany
S. Scott, Bursor & Fisher,
P.A., Walnut Creek, CA, and
Timothy J. Peter, Faruqi &
Faruqi, LLP, Philadelphia,
PA, *on the brief*)

10 **FOR DEFENDANT-APPELLEE:**

THOMAS H. DAVIS, Stinson
LLP, Kansas City, MO
(Megan McCurdy, Courtney
J. Harrison, and Logan T.
Fancher, Stinson LLP, Kansas
City, MO, and Kieran M.
Corcoran, Stinson LLP, New
York, NY, *on the brief*)

19 Appeal from a judgment of the United States District Court for the Southern District of
20 New York (Halpern, *J.*).

21 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
22 **DECREED** that the judgment of the district court is **VACATED** and **REMANDED** for further
23 proceedings consistent with this order.

24 Plaintiff Sherise Richardson brought claims under New York General Business Law
25 (“NYGBL”) §§ 349 and 350 on behalf of a putative New York subclass, and a breach of express
26 warranty claim on behalf of a putative nationwide class. She alleges that Defendant Edgewell
27 Personal Care, LLC engaged in false advertising and deceptive behavior by labeling its sunscreen
28 products as “Reef Friendly*” on the front label and “*No Oxybenzone or Octinoxate” or “*Hawaii
29 Compliant: No Oxybenzone or Octinoxate” on the back label, even though the products contain
30 other reef-harming ingredients. She also alleges that the “Reef Friendly*” label amounts to an
31 express warranty. We assume the parties’ familiarity with the underlying facts, the procedural

1 history of the case, and the issues on appeal.

2 **I. Standard of Review**

3 We review a district court’s grant of a motion to dismiss under Rule 12(b)(6) *de novo*.
4 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as
5 true, to state a claim to relief that is plausible on its face.” *Hernandez v. United States*, 939 F.3d
6 191, 198 (2d Cir. 2019) (internal quotation marks and citation omitted). “[W]e accept as true all
7 factual allegations and draw from them all reasonable inferences; but we are not required to credit
8 conclusory allegations or legal conclusions couched as factual allegations.” *Id.* (alteration in
9 original).

10 **II. NYGBL Claims**

11 NYGBL § 349 prohibits “[d]eceptive acts or practices” and NYGBL § 350 prohibits
12 “[f]alse advertising in the conduct of any business, trade, or commerce” in New York. To state a
13 claim under NYGBL §§ 349 and 350, a plaintiff must allege that ““(1) the defendant’s deceptive
14 acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff
15 has been injured as a result.”” *Chufen Chen v. Dunkin’ Brands, Inc.*, 954 F.3d 492, 500 (2d Cir.
16 2020) (quoting *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000)). Moreover, a plaintiff
17 must plausibly allege that “deceptive advertisements were likely to mislead a reasonable consumer
18 acting reasonably under the circumstances.” *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d
19 Cir. 2013). “[I]n determining whether a reasonable consumer would have been misled by a
20 particular advertisement, context is crucial.” *Id.* at 742. “We therefore consider the challenged
21 advertisement as a whole, including disclaimers and qualifying language.” *Mantikas v. Kellogg*
22 *Co.*, 910 F.3d 633, 636 (2d Cir. 2018). “[P]laintiffs must do more than plausibly allege that a

1 label might conceivably be misunderstood by some few consumers.” *Jessani v. Monini North*
2 *America, Inc.*, 744 F. App’x 18, 19 (2d Cir. 2018) (internal quotation marks and citation omitted).
3 Instead, “[p]laintiffs must plausibly allege that a significant portion of the general consuming
4 public or of targeted consumers, acting reasonably in the circumstances, could be misled.” *Id.*

5 The district court concluded that Richardson did not plausibly allege that Edgewell’s “Reef
6 Friendly*” representation on the front label of its sunscreen products was materially misleading
7 under NYGBL §§ 349 and 350. We disagree. First, the “Reef Friendly*” front label could
8 plausibly mislead a reasonable consumer into thinking the products contain no reef-harming
9 ingredients. Second, the back-label disclaimer, “*No Oxybenzone or Octinoxate” or “*Hawaii
10 Compliant: No Oxybenzone or Octinoxate,” is incomplete because it makes no mention of the four
11 other reef-harming ingredients found in the products. Taking the “Reef Friendly*” and “*No
12 Oxybenzone or Octinoxate” or “*Hawaii Compliant: No Oxybenzone or Octinoxate” labels
13 together, a reasonable consumer could conclude that the only substances known to harm reefs are
14 those listed in the back-label disclaimer. Such a disclaimer cannot be seen as “clarifying
15 language” that may “defeat a claim of deception.” *Fink*, 714 F.3d at 742. Third, as in *Mantikas*,
16 Richardson is not expected to “look beyond misleading representations” on the front label “to
17 discover the truth from the ingredient list” that the product contains reef-harming ingredients. 910
18 F.3d at 637. Even if she were, a reasonable consumer cannot be expected to know the universe
19 of chemicals harmful to coral reefs such that she could discern from an ingredient list describing
20 the product’s contents in scientific terminology whether a product is in fact “Reef Friendly.”
21 Richardson plausibly alleges that she reasonably believed the “Reef Friendly*” statement on the
22 front label meant that the product was not harmful to reefs and that she was misled by that

1 statement. We thus disagree with the district court’s conclusion that no reasonable consumer
2 could be misled by the labelling as a matter of law. Whether Richardson’s allegations can be
3 proved is a question to be determined on summary judgment or at trial.

4 **III. Breach of Express Warranty**

5 The same analysis applies to Richardson’s express warranty claim. Express warranties
6 are created as follows:

7 “(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the
8 goods and becomes part of the basis of the bargain creates an express warranty that the
9 goods shall conform to the affirmation or promise. (b) Any description of the goods which
10 is made part of the basis of the bargain creates an express warranty that the goods shall
11 conform to the description.”

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13 N.Y. U.C.C. § 2-313(1)(a)-(b).

14 “It is not necessary to the creation of an express warranty that the seller use formal words
15 such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to make a warranty.” *Id.* § 2-
16 313(2). “New York breach of express warranty claims require [i] a material statement amounting
17 to a warranty; (ii) the buyer’s reliance on this warranty as a basis for the contract with his
18 immediate seller; (iii) the breach of this warranty; and (iv) injury to the buyer caused by the
19 breach.” *Lugones v. Pete & Gerry’s Organic, LLC*, 440 F. Supp. 3d 226, 244 (S.D.N.Y. 2020)
20 (alteration in original) (emphases omitted) (quoting *Brady v. Basic Rsch., L.L.C.*, 101 F. Supp. 3d
21 217, 235 (E.D.N.Y. 2015)).

22 The district court’s conclusion that Richardson did not plausibly allege that Edgewell’s
23 “Reef Friendly*” label amounted to an express warranty was incorrect. Claims for deception and
24 breach of express warranty both depend on what a reasonable consumer would believe, so
25 allegations sufficient to plead one generally suffice to plead the other. *See Cooper v. Anheuser-*

1 *Busch, LLC*, 553 F. Supp. 3d 83, 111 (S.D.N.Y. 2021) (concluding that whether a plaintiff's
2 interpretation of a label "was erroneous or reflected a promise made by [the] [d]efendant
3 necessarily depends on what a reasonable consumer would believe" (internal quotation marks and
4 citation omitted)); *Ault v. J.M. Smucker Co.*, No. 13-CV-3409, 2014 WL 1998235, at *6 (S.D.N.Y.
5 May 15, 2014) (noting that plaintiff's breach of express warranty claim, based on the defendant's
6 labeling of its product as "All Natural," turned on "what a reasonable consumer's interpretation
7 might be"). Moreover, "[g]eneralized statements by the defendant . . . do not support an express
8 warranty claim if they are such that a reasonable consumer would not interpret the statement as a
9 factual claim upon which he or she could rely," but what is considered "vague" or "generalized"
10 in the context we are presented with here is a question of fact that should not be decided at the
11 motion to dismiss stage. *See Ault*, 2014 WL 1998235, at *6 ("[W]hat a reasonable consumer's
12 interpretation might be is a matter of fact which is not appropriate for decision on a motion to
13 dismiss."). Thus, the district court erred in dismissing Richardson's breach of express warranty
14 claim.

15 * * *

16 For the foregoing reasons, the judgment of the district court is **VACATED** and
17 **REMANDED** for further proceedings consistent with this order.

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FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". To the right of the signature is a circular official seal. The seal has a red outer ring with the words "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the ring, the words "SECOND CIRCUIT" are written in the center, flanked by two small stars.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: October 30, 2023

Docket #: 23-128cv

Short Title: Richardson v. Edgewell Personal Care, LLC

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 21-cv-8275

DC Court: SDNY (WHITE
PLAINS)

DC Judge: Halpern

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
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40 Foley Square
New York, NY 10007**

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PLAINS)

DC Judge: Halpern

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature