UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-3830 PA (AGRx)	Date	August 19, 2016
Title	Alexander Forouzesh v. Starbucks Corp.		

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Stephen Montes Kerr	None	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs: None   Attorneys Present for Defendants: None

Proceedings: IN CHAMBERS—COURT ORDER

Before the Court is a Motion to Dismiss filed by defendant Starbucks Corporation ("Defendant" or "Starbucks") (Docket No. 17). Defendant challenges the sufficiency of the Complaint filed by plaintiff Alexander Forouzesh ("Plaintiff"). The Court previously vacated the hearing and took the matter under submission. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

I. Factual and Procedural Background

Plaintiff, on behalf of both himself and a putative class he seeks to represent, alleges that Defendant systematically defrauds its customers by advertising its cold drinks as containing more liquid than they do by "underfilling" its cups with liquid and then adding ice to make the cups appear full. Specifically, according to the Complaint, the menu on Defendant's website tells consumers that "if they order a Tall Cold Drink, they will receive 12 fluid ounces of that drink; in a Grande Cold Drink, they will receive 16 fluid ounces of that drink; in a Venti Cold Drink, they will receive 24 fluid ounces of that drink; and in a Trenta Cold Drink, they will receive 30 fluid ounces of that drink." (Compl. ¶ 27.) The Complaint describes "Cold Drinks" as those prepared by Defendant's employees "by hand" and include iced coffee, iced tea, and iced blended specialty drinks. (Compl. ¶ 1 & n.1.) Plaintiff alleges that Starbucks' Cold Drinks are made according to standard practices and that among those standard practices for the Cold Drinks at issue in this action is to fill the clear cup with the selected beverage up to a fill line printed on the cup and then add ice to the top of the cup. (Compl. ¶ 30-31.) Plaintiff alleges that as a result of filling the beverage to these fill lines, a "Grande" size cold beverage will have 12 ounces of liquid instead of the 16 ounces listed on the Starbucks menu and a "Venti" size will have approximately 14 ounces of liquid instead of the 24 ounces listed on the Starbucks menu. (Compl. ¶¶ 37 & 39.) Presumably, the "Tall" and "Trenta" sizes have similar corresponding amounts of liquid with the additional volume of the cups taken up by ice. Relying on a dictionary definition of "beverage" as a "drinkable liquid," the Complaint alleges that "Ice is not a 'beverage' by definition." (Compl. ¶ 45.)

Plaintiff's Complaint alleges claims for: (1) breach of express warranty; (2) breach of implied warranty; (3) negligent misrepresentation; (4) unjust enrichment; (5) fraud; (6) violation of the California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750; (7) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200; and (8) violation fo California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500. Plaintiff seeks to represent a class defined as:

"All persons in the state of California who purchased one or more the Defendant's Cold Drinks at any time between April 27, 2006 and the present." (Compl. ¶ 56.)

II. Legal Standard

For purposes of a Motion to Dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), plaintiffs in federal court are generally required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)). The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). See, e.g., Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248–49 (9th Cir. 1997) ("The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.") (internal quotation omitted).

However, in Twombly, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." Twombly, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." Id. at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("'All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.'") (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S. Ct. at 1964–65 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

The more stringent pleading requirements of Federal Rule of Civil Procedure 9(b) apply to allegations of fraud. "In alleging fraud or mistake, a party must state with particularity the circumstances

constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "Rule 9(b) requires particularity as to the circumstances of the fraud – this requires pleading facts that by any definition are 'evidentiary': time, place, persons, statements made, explanation of why or how such statements are false or misleading." In re Glenfed, Inc. Securities Litigation, 42 F.3d 1541, 1548 n.7 (9th Cir. 1994); see also Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 540 (9th Cir. 1989) ("A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations. While statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient.") (citing Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir. 1987)).

III. Analysis

Among the arguments contained in its Motion to Dismiss, Defendant asserts that each of Plaintiff's claims fail "because the Iced Beverages meet the expectations of reasonable consumers." (Mot. 1:17-18.)

A. CLRA, UCL, and FAL Claims

Claims brought pursuant to the CLRA, UCL, and FAL are all "governed by the 'reasonable consumer' test. Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008). "Under this standard, Plaintiff must 'show that 'members of the public are likely to be deceived.''" Ebner v. Fresh, Inc., 818 F.3d 799, 806 (9th Cir. 2016) (quoting Williams, 552 F.3d at 938). Satisfying the reasonable consumer standard "requires more than a mere possibility that [the defendant's] label 'might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.'" Id. (quoting Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508, 129 Cal. Rptr. 2d 486, 495 (2003); see also Lavie, 105 Cal. App. 4th at 508, 129 Cal. Rptr. 2d at 495 (holding that the phrase "likely to deceive" "indicates that the ad [or conduct] is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled").

Plaintiff's claims that a reasonable consumer would be deceived into believing that Defendant's Cold Drinks contain 12 ounces of beverage excluding ice for a "Tall," 16 ounces of beverage excluding ice for a "Grande," 24 ounces of beverage excluding ice for a "Venti," and 30 ounces of beverage excluding ice for a "Trenta." But as young children learn, they can increase the amount of beverage they receive if they order "no ice." If children have figured out that including ice in a cold beverage decreases the amount of liquid they will receive, the Court has no difficulty concluding that a reasonable consumer would not be deceived into thinking that when they order an iced tea, that the drink they receive will include both ice and tea and that for a given size cup, some portion of the drink will be ice rather than whatever liquid beverage the consumer ordered.

This conclusion is supported by the fact that the cups Starbucks uses for its Cold Drinks, as shown in the Complaint, are clear, and therefore make it easy to see that the drink consists of a combination of liquid and ice. Moreover, neither the menu nor signage Plaintiff has reproduced and incorporated into his

Complaint explicitly state that the drinks consist of the identified ounces of liquid. Instead, as shown in paragraph 27 of the Complaint, Starbucks lists the sizes of its "drinks," not, as Plaintiff attempts to allege in paragraph 45 of the Complaint, for instance, that Starbucks has made a representation about the size of its "beverages," and that a reasonable consumer would understand that a beverage must only be a reference to the "drinkable liquid."[1/]

When a reasonable consumer walks into a Starbucks and orders a Grande iced tea, that consumer knows the size of the cup that drink will be served in and that a portion of the drink will consist of ice. Because no reasonable consumer could be confused by this, Plaintiff fails to state viable CLRA, UCL, or FAL claims.

B. Fraud and Negligent Misrepresentation Claims

"To state a cause of action for [intentional misrepresentation (that is, fraud)], a plaintiff must allege '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.'" Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1140-1141 (C.D. Cal. 2003) (quoting Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 974, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997)). "The elements of a cause of action for negligent misrepresentation are the same as those of a claim for intentional misrepresentation, with the exception that the defendant need not actually know the representation is false. Rather, to plead negligent misrepresentation, it is sufficient to allege that the defendant lacked reasonable grounds to believe the representation was true." Id. at 1141 (citing B.L.M. v. Sabo & Deitsch, 55 Cal. App. 4th 823, 834, 64 Cal. Rptr. 2d 335 (1997)). Each of these state causes of action must meet Rule 9(b)'s heightened pleading requirements. Id. at 1141 (citations omitted).

For the same reasons that a reasonable consumer would understand that the iced beverage that consumer might order from Starbucks will contain some portion of liquid and some portion of ice in the designated cup size, the Complaint fails to state sufficient well-pleaded facts that Starbucks has made any misrepresentation, or that a reasonable consumer could justifiably rely on the statements Starbucks makes concerning the sizes of its Cold Drinks to conclude that those sizes represent only the amount of beverage and exclude the amount of ice. Because Plaintiff has not and cannot allege that his reliance on those statements to mean what he alleges they mean is reasonable, his claims for fraud and negligent misrepresentation fail.

C. Express and Implied Warranty Claims

"[T]o prevail on a breach of express warranty claim, the plaintiff must prove (1) the seller's statements constitute an 'affirmation of fact or promise' or a 'description of the goods'; (2) the statement

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[1] Plaintiff also appears to ignore that a reasonable consumer understands that depending on how warm the liquid is when it is mixed with the ice, and how long it takes to drink the beverage, some portion of the ice will melt and be drinkable.

was 'part of the basis of the bargain'; and (3) the warranty was breached." Weinstat v. Dentsply Int'l, Inc., 180 Cal. App. 4th 1213, 1227, 103 Cal. Rptr. 3d 614, 626 (2010); see also Viggiano v. Hansen Natural Corp., 944 F. Supp. 2d 877, 893 (C.D. Cal. 2013) (also requiring that "the breach caused injury to plaintiff").

Here, as the Court has already concluded, Starbucks has not stated that its Cold Drinks contain a specific amount of liquid. Instead, Starbucks has stated that its iced drinks, which contain some amount of liquid and some amount of ice, are offered for sale in cups of various sizes. Plaintiff has alleged no well-pleaded facts suggesting that Starbucks has stated, or expressly warranted, that its Cold Drinks contain a specific amount of liquid. As a result, there is no statement by Defendant of any "fact or promise" that it has breached that forms the basis of the bargain. Plaintiff's strained interpretation of Defendant's menu descriptions, which is inconsistent with the understanding of a reasonable consumer, does not form the "basis of the bargain" that could support a breach of express warranty claim in these circumstances. Put simply, Plaintiff's interpretation of the promise is contradicted by the well-pleaded facts, his understanding of the bargain is contrary to that of a reasonable consumer, and Plaintiff has failed to plausibly allege that Defendant breached any express warranty it may have offered. The Complaint's express warranty claim therefore fails to state a viable claim.

According to Defendant, Plaintiff's claim for breach of the implied warranty of merchantability fails because Plaintiff has not alleged that Defendant's Cold Drinks "did not possess even the most basic degree of fitness for ordinary use." Mocek v. Alfa Leisure, Inc., 114 Cal. App. 4th 402, 406, 7 Cal. Rprt. 3d 546, 549 (2003). However, under California law, the implied warranty of merchantability also requires that the goods:

> (a) Pass without objection in the trade under the contract description; and
> (b) In the case of fungible goods, are of fair average quality within the description; and
> (c) Are fit for the ordinary purposes for which such goods are used; and
> (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
> (e) Are adequately contained, packaged, and labeled as the agreement may require; and
> (f) Conform to the promises or affirmations of fact made on the container or label if any.

Cal. Com. Code § 2314(2). Consistent with all of his other claims, Plaintiff alleges in support of his implied warranty claim that Starbucks has breached its implied promise that its beverages will contain the specified amount of liquid, rather than a combination of ice and liquid. Because Plaintiff has not plausibly alleged any well-pleaded facts in support of this theory, and that theory is contrary to the expectations of the reasonable consumer, the implied warranty claim fails as a matter of law.

D. Unjust Enrichment and Injunctive Relief

The Complaint also includes separate causes of action for injunctive relief and unjust enrichment. Under California law, both injunctive relief and unjust enrichment are remedies rather than causes of action. See Astiana v. Hain Celestial Group, Inc., 783 F.3d 753, 762 (9th Cir. 2015) ("[T]here is not a standalone cause of action for 'unjust enrichment,' which is synonymous with 'restitution.'"); Roberts v. Los Angeles County Bar Ass'n, 105 Cal. App. 4th 604, 618, 129 Cal. Rptr. 2d 546, 555 (2003) ("[A]n injunction is a remedy, not a cause of action."). Because all of Plaintiff's substantive claims fail, he has no viable basis for invoking entitlement to either unjust enrichment or injunctive relief as remedies. Put another way, Plaintiff has stated no viable claim against Starbucks and cannot therefore obtain an injunction or order of restitution as a remedy. As a result, whether alleged as separate claims or asserted as remedies tied to his substantive claims, Plaintiff is not entitled to injunctive relief or an unjust enrichment remedy.

Conclusion

For all of the foregoing reasons, the Court grants Defendant's Motion to Dismiss. The Court concludes that Plaintiff has not alleged any viable claims. The Court additionally concludes that no amendment could cure the deficiencies in Plaintiff's theories of liability. As a result, the Court dismisses this action with prejudice. The Court will issue a Judgment consistent with this Order.

IT IS SO ORDERED.