

Superior Court of New Jersey.
Middlesex County
DEFEO,
v.
Quick CHECK.
No. L-3996-11.
May 4, 2012.

Trial Order.

Connell Foley LLP, 85 Livingston Avenue, Roseland, New Jersey 07068, (973) 535-0500, Attorneys for Defendant Quick Chek Corp.

Vincent LeBlon, J.S.C.
Peter Pizzi, Esq.,

Connell Foley, LLP

85 Livingston Ave

Roseland, NJ 07068

Paul Garelick, Esq.

Lombardi and Lombardi

1862 Oak Tree Road

PO Box 2065

Edison, NJ 08818

Dear Counsel:

After hearing oral argument and upon a review of the papers submitted to the Court by the parties, this Court finds that in following the precedent of the case law provided, that summary judgment is granted in favor of Defendant Quick Chek.

This matter arises from the purchase of a forty-four (44) ounce cup of iced coffee from the Quick Check store located in Little Falls, New Jersey. Plaintiff brought suit against Quick Chek alleging that the cup could not actually hold forty-four (44) ounces of liquid as noted on the container. On February 7, 2012, Defense expert was given the opportunity to measure the fluid ounce capacity of the cup and he determined that it actually holds over forty-four (44) ounces of liquid. As such, Defendant has now moved for summary judgment.

Defendant submits that the primary issue in this case is the capacity of the cup; if Plaintiff cannot establish that the cup holds less than forty-four (44) fluid ounces, all of her claims fail as a matter of law. Here, the Defense

expert measured the capacity of the cup in the presence of the Plaintiff's counsel, and determined that the cup does in fact hold more than forty-four (44) ounces of liquid -- the exact amount held in the container without spilling over was 44.54 fluid ounces. Further, Defendant contends that the Plaintiff has failed to produce any evidence that the cup can and does not hold the forty-four (44) ounce amount as alleged.

Defendant also argues that this matter is ripe for summary judgment as no further discovery is needed with respect to this critical fact issue, despite the fact that discovery is not yet closed.

Plaintiff has opposed the instant Motion as premature: discovery does not end until August 6, 2012; depositions of Quick Chek representatives were scheduled for mid-April; paper discovery is ongoing; depositions of Third Party Defendants were scheduled for late April; Plaintiff's expert reports are not yet due; and there is a Motion to Strike Quick Chek's Answer returnable April 27th for failure to provide discovery in absence of confidentiality agreement.^[FN1] Plaintiff submits that she is entitled to complete discovery in this matter.

FN1. The Motion to Strike was withdrawn by the Plaintiff as the outstanding discovery had been provided

Defendant asserts that Plaintiff must do more than merely state that more discovery is needed; she must point to what additional discovery is needed to establish that that Cup does not have the capacity of forty-four (44) fluid ounces or greater. Defendant also highlights that the cup has been in her or her counsel's possession for nearly three (3) years and has been tested by various parties (interrogatories note that Plaintiff, her counsel, and her expert tested it). However despite that. Plaintiff has failed to provide any certifications contradicting the instant Motion. Defendant also argues that the depositions and outstanding paper discovery requested does not have any bearing on the central issue currently before the Court.

Third Party Defendant, Berry Plastics, joins in the Motion for Summary Judgment, but requests that if such relief is not granted, that a case management conference be scheduled so that the first discovery completed is the capacity of the cup.

Following oral argument, Plaintiff provided the Court with a late submission of her expert Dennis Deegan, Ph.D.'s certification. The Deegan certification states that the cup held 43.76 ounces of fluid without a lid, and could be moved around without spilling any liquid. With a lid, the cup held 43.0 ounces of fluid; when filled to the "fill line," the cup held 39.75 ounces of fluid.

Defendant was given an opportunity to respond to this late submission. Defendant submits that the Court should disregard the certification as the Motion had already been briefed and argued, and as such, the record was closed. Further, if the Court were to consider the certification, Defendant contends that it is nothing more than a "net opinion," because Deegan never explains the reasons for his opinions or how he performed the measurements. *S Polzo v. County of Essex*, 196 N.J. 569 (2008). Additionally, Quick Chek asserts that the certification actually supports summary judgment, as 43.76 ounces, rounded, equals forty-four (44) ounces, i.e. the capacity figure stated on the cup. The Food and Drug Administration permits rounding up for amounts .5 or higher. Defendant submits that Plaintiff cannot establish an ascertainable loss due to this rounding up procedure. *See Weinberg v. Sprint Corp.*, 173 N.J. 233 (2002).

Summary judgment is appropriately granted if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Amer.*, 142 N.J. 520.

540 (1995). In fact, “[b]y its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a ‘genuine issue as to any material fact challenged.’” *Id.* at 529.

However, a trial court should not grant summary judgment when the matter is not ripe for such consideration, such as when discovery has not yet been completed. *See Salomon v. Eli Lilly & Co.*, 98 N.J. 58 (1984). The court should afford “every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case.” *Oslacky v. Borough of River Edge*, 319 N.J. Super. 79, 87 (App. Div. 1999) (quoting *Velantzas v. Colgate-Palmolive Co. Inc.*, 109 N.J. 189, 193 (1988)).

It should be noted that Plaintiff's Complaint fails to make any mention as to the capacity of the cup *with* a lid and straw. Rather, the Complaint merely alleges that the cup is *incapable* of holding forty-four (44) ounces of liquid. *See* Pl.'s Compl., Count I ¶ 6, 9; Count II ¶ 2. Moreover, while in Plaintiff's Answers to Interrogatories a lid is mentioned, it is only in the context that the cup holds much less fluid when it is placed on. Both the language of the Complaint and the completed discovery highlight that the central issue in this case is whether the cup itself is capable of holding the noted amount.

I find and believe that summary judgment is appropriate as there are no genuine issues of material fact that would preclude the Court from deciding this Motion as a matter of law. Additionally, Plaintiff has failed to establish that any further discovery is necessary on the central issue of the capacity of the cup; the Court has considered both the expert report of Marvin E. Winston, as well as the certification of Dennis Deegan, despite being submitted after both the briefing schedule and oral arguments, in making its decision. Defense expert has provided a credible and clear report opining that the cup is capable of holding more than forty-four (44) ounces of fluid.

The certification provided by Plaintiff's expert does not dispute this. Notably, Plaintiff's expert fails to certify that the cup is incapable of holding forty-four (44) ounces of fluid without qualifying the statement -- i.e. while using a lid, while using the fill line, etc. The Deegan certification also provides that the capacity of the cup with a lid is 43.76 ounces, which rounded is forty-four (44) ounces. Even viewing the facts in a light most favorable to the non-moving party, the Plaintiff cannot establish an ascertainable loss as required when bringing a claim under the New Jersey Consumer Fraud Act, As with the *Weinberg* case, there is no evidence here that Plaintiff could have purchased a sub-ounce and common sense would dictate that an ounce .5 or higher would be rounded up. *Weinberg, supra*, 173 N.J. at 238, 244. Accordingly, summary judgment is granted in favor of Defendant, Quick Chek.

A copy of the signed Order is attached.

<<signature>>

VINCENT Le BLON, J.S.C.

VLB/eac

Cc: Gregory D. Miller, Esq.

Podvey Meanor (fax) 973-623-6065

Enclosure

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT QUICK CHEK CORPORATION AND AGAINST PLAINTIFF PURSUANT TO R. 4:46

THIS MATTER having been brought before the Court by Connell Foley LLP, counsel for defendant, Quick Chek Corporation (“Quick Chek”), by motion for summary judgment against plaintiff, Donna DeFeo (“Plaintiff”), pursuant to R. 4:46; and the Court having considered the within motion and all submissions in support thereof and in opposition thereto; and good and sufficient cause having been shown;

IT IS on this 4th day of May, 2012;

ORDERED that Quick Chek's motion for summary judgment against Plaintiff be and is hereby granted; and it is further

ORDERED that a copy of this Order be served upon all counsel within seven (7) days of its entry herein.

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Honorable Vincent LeBlon, J.S.C.

Defeo v. Check
2012 WL 1617419 (N.J.Super.) (Trial Order)

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