



Henson v. NaturMed, Inc. et al

2021 | Cited 0 times | D. Maryland | April 9, 2021

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND * JAMES HENSON Plaintiff, * v. * Civil No. ELH-18-1102
NATURMED, INC. * Defendant. *****

REPORT AND RECOMMENDATION The above-referenced case was referred to the undersigned for review of s Motion for Default Judgment and to make recommendations concerning damages, pursuant to 28 U.S.C. § 636 and Local Rules 301 and 302. (ECF No. 48). Currently pending is s Motion for Default . (ECF No. 61). Plaintiff also submitted a Pre-Hearing Summary of of Evidence Defendant has not filed any response. A hearing to determine the appropriate damages award was held on January 28, 2021. For the reasons discussed herein, I respectfully recommend that p s Motion (ECF No. 61) be GRANTED and that relief be awarded as set forth herein.

I. BACKGROUND

A. Factual Background The following summary is based upon the Amended Complaint (ECF No. 31), the exhibits offered at the hearing, and the testimony of plaintiff. In or around April 2015, plaintiff purchased six canisters of defendant All Day Energy Greens nutritional Plaintiff testified that he used the supplement as

instructed, mixing one scoop with juice once a day. (Id.; ECF No. 31 ¶ 24). In or around August This severe pain included gastrointestinal reflux and difficulty speaking, known as dysphonia.

(ECF No. 61 at 2). Plaintiff testified that it felt like his food would get stuck in his chest and it was a terrible feeling; eventually, this feeling caused plaintiff to feel afraid to eat. While plaintiff testified that he had experienced gastrointestinal reflux and dysphonia in the past, it had been previously controlled by over the counter or prescription medication, but in this case, the severe pain persisted despite these medications.

On or about March 18, 2016, plaintiff received a voluntary recall notice from defendant regarding the six canisters plaintiff purchased in April 2015, noting ECF No. 31 ¶ 27-28; ECF No. 63-1). Plaintiff supplement after receiving this notice. (ECF No. 63 at 1). testified that he became concerned that his (Id.) Plaintiff, therefore, made an appointment with his primary care physician, Dr. Naiman, for May 13, 2016. (ECF No. 63-2 at 2-3). Following this appointment, p who prescribed two stronger medications and performed a flex



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laryngoscopy 1

on June 15, 2016. (Id. at 6-10). Plaintiff was also referred to a gastroenterologist, Dr. Blume, who examined plaintiff on June 27, 2016 and performed an

1 A flex laryngoscopy placing a flexible tube in the back of the throat. Stedmans Medical Dictionary 480330 (2014).

esophagogastroduodenoscopy 2

and a colonoscopy 3

on July 6, 2016. (Id. at 11-12, 15-16, 24-26). On the following day, a pathologist, Dr. Moira Larsen, reviewed specimens collected during the esophagogastroduodenoscopy and colonoscopy procedures and found them to be consistent with gastroesophageal reflux. (Id. at 14-15). Following these procedures, plaintiff testified that he continues to experience severe gastrointestinal symptoms and his voice continues to be hoarse. (ECF No. 63 at 2). Plaintiff had a follow-up appointment with Dr. Naiman on October 12, 2017. (ECF No. 63-2 at 28-29).

B. Procedural Background On April 17, 2018, plaintiff filed his Complaint. (ECF No. 1). On July 10, 2018, counsel for defendant entered their appearances. (ECF Nos. 4, 5). On December 5, 2018, plaintiff filed a Motion to Amend Complaint (ECF No. 24), which the court granted on May 15, 2019. (ECF No. 30). 4

(ECF No. 31). Count I Breach of Implied Warranty; Count II Breach of Express Warranty; Count III Negligence; Count IV Negligent Misrepresentation; Count V Intentional Misrepresentation, Fraud, and/or Deceit; Count VI

2 To perform an esophagogastroduodenoscopy, a physician uses a flexible tube inserted through the mouth and take biopsies if necessary. EGD esophagogastroduodenoscopy, MedLine Plus (Feb. 26, 2021), <https://medlineplus.gov/ency/article/003888.htm>. 3 A colonoscopy is performed to examine the large intestine, or colon, and rectum, and take biopsies if necessary, by inserting a flexible tube through the anus. Understanding Colonoscopy, American Society for Gastrointestinal Endoscopy, [https://www.asge.org/home/for-patients/patient-information/understanding-colonoscopy\(2\)](https://www.asge.org/home/for-patients/patient-information/understanding-colonoscopy(2)). 4 Independent Vital Life, LLC; and HKW Capital Partners III, L.P. (ECF No. 31). These additional defendants were never served, however, and were later voluntarily dismissed by plaintiff. (ECF No. 57).

Strict Liability Design Defect; Count VII Strict Liability Failure to Warn; and Count VIII Violation of Maryland Consumer Protection Act. (Id.)



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On March 11, 2019, defense counsel filed a Motion to Withdraw, indicating that defendant The court granted the Motion to Withdraw and ordered defendant to retain counsel by no later than April 11, 2019 in accordance with Local Rule 101.2(b). (ECF Nos. 27, 28). When defendant failed to retain counsel by April 11, 2019, the court ordered defendant to retain counsel by no later than June 28, 2019. (ECF No. 32). Defendant failed to retain counsel and has not answered or participated in the case since counsel withdrew their appearance on March 11, 2019. On February 5, 2020, the clerk of court entered an Order of Default against defendant. (ECF No. 40).

Plaintiff filed the pending Motion on November 30, 2020. 5

default judgment solely based on Count III Negligence. (ECF No. 61-1 at 1). A request (ECF No. 62), plaintiff filed a Summary of Evidence preceding the evidentiary hearing.

(ECF No. 63). On January 28, 2021, a hearing was held to determine the appropriate damages award. 6

II. STANDARD FOR ENTRY OF DEFAULT JUDGMENT

In reviewing a motion for default judgment, the court accepts as true the well-pleaded factual allegations in the complaint as to liability. *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780-81 (4th Cir. 2001). It remains for the court, however, to determine whether these

5 Due to procedural and substantial deficiencies, plaintiff previous Motions for Default Judgment (ECF Nos. 47, 56) were denied without prejudice. (ECF Nos. 49, 58). 6 Although notice of the hearing was sent to defendant at its last known address (ECF No. 63-7), defendant was neither present nor represented at the hearing.

unchallenged factual allegations constitute a legitimate cause of action. *Id.* If the court determines that liability is established, the court must then determine the appropriate amount of damages. *Id.* The court does not accept factual allegations regarding damages as true, but rather must make an independent determination regarding such allegations. See, e.g., *Credit Lyonnais Secs. (USA), Inc. v. Alcantara*, 183 F.3d 151, 154-155 (2d Cir. 1999).

III. DISCUSSION

A. Liability I have reviewed plaintiffs Amended Complaint (ECF No. 31) and Motion (ECF No. 61), and, accepting as true p-pleaded factual allegations, find that plaintiff states a legitimate cause of action for negligence. To assert a claim of negligence in Maryland, plaintiff must prove that: (1) the defendant was under a duty to protect plaintiff from injury, (2) the defendant breached that duty, (3) plaintiff suffered actual injury or loss, and (4) the injury or loss proximately resulted from

7 *Ctr. Title Co.*, 430 Md. 197, 212-13, 60 A.3d 1, 10 (2013). A manufacturer has a duty to exercise



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reasonable care in the design and manufacture of [their] product s]pecifically . . . so that it is Parker v. Allentown, Inc., 891 F. Supp. 2d 773, 780 (D. Md. 2012) (quoting -14, 632 F.2d 1124, 1127 (4th Cir. 1980)).

7 must apply Maryland law to issues of substantive law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Wells v. Liddy, 186 F.3d 505, 527- diversity, we have an obligation to interpret the law in accordance with the Court of Appeals of Maryland, or where the law is unclear, as it appears tha

As to the first element, defendant as the manufacturer of the supplement had a duty to exercise reasonable care in order to ensure the supplement was safe for reasonably foreseeable use. Parker, 891 F. Supp. 2d at 780. Plaintiff testified that he used the supplement as directed, which is clearly a reasonably foreseeable use. The second element is satisfied as defendant breached this duty of care because the supplement notice, to cause gastrointestinal distress. (ECF No. 63-1).

, the record

before the court does not support that finding. The evidence, however, does establish that plaintiff to see

caused his problems. As a result, plaintiff suffered actual loss or injury in the form of incurring medical expenses, undergoing invasive medical procedures, and suffering heightened anxiety and pain associated with the entire diagnostic process. Specifically, due to notice, plaintiff testified that he consulted with his primary care doctor and two specialists and underwent three invasive procedures to determ : a flex laryngoscopy, a colonoscopy, and an esophagogastroduodenoscopy. (ECF No. 63 at 1). following the voluntary recall notice, his medical costs and his pain and suffering associated with the invasive procedures supplement was the cause of his problems. In sum, plaintiff has stated a legitimate cause of action for negligence.

B. Damages Having determined that plaintiff has proven defendants liability, I now undertake an independent determination of the damages to which plaintiff is entitled. Plaintiff seeks to recover the following damages: 1) economic damages amounting to \$7,735.77; 2) noneconomic damages amounting to \$830,000; 3) punitive damages amounting to amounting to \$61,204.23. (ECF No. 63 at 2-3).

Plaintiff attributes his ongoing supplement and requests damages to reflect this injury. In a case such as this, however, evidence

is required ongoing medical condition; it is not a case in which the court or a layperson could intuitively make this connection. See , 61 Md. App. 23, 31, 484 A.2d 652, 656 (1984) (established that expert testimony is . . . required when the subject of the inference is so particularly



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Here, plaintiff has not offered any expert witness testimony regarding the connection

Although the medical records offered by plaintiff at the hearing note that he informed the doctors of his concerns that the supplement was the cause of his severe pain, supplement Dr. Blume, , stated -2 at

16). supplement caused , proves that defendant is the

(ECF No. 61-1). Yet, plaintiff testified that he experienced , although it was less severe than his current condition. Without any evidence, including medical expert testimony, to connect with continuing or increased gastrointestinal pain and dysphonia, I am not able to conclude that

I do find, however, that is causally connected to the injuries sustained by plaintiff during the time period between recall notice on or about March 18, 2016, until plaintiff underwent the three procedures, the last

of which concluded on July 6, 2016. supplement was the cause of his severe pain and distress, which led to suffering and anxiety.

Further, the recall notice caused plaintiff to seek medical attention because he became concerned that defe Prior to the recall notice, he had not sought medical attention. Therefore, I recommend an award of suffering, anxiety, and medical expenditures during this timeframe. The record, however, does

not support an award of damages for plaintiff either before he received the recall notice or after his medical procedures concluded as there is no evidence that medical condition.

1. Economic Damages Plaintiff seeks economic damages to cover medical expenses of \$7,735.77. (ECF No. 63- 1 at 2). These damages esophagogastroduodenoscopy,

and subsequent pathology on July 6, 2016. (ECF No. 63-5 at 3). Additionally, plaintiff seeks to

recover the cost of a follow-up visit to Dr. Naiman on October 12, 2017, and costs of prescriptions Id.) Plaintiff was unable to locate or obtain most of the medical bills for these provider visits and procedures. As a result, plaintiff offered the testimony of Ms. Catherine McFarland, an expert witness in medical billing, 8

regarding her estimate of Evidence. (ECF No. 63-5 at 3). At the hearing, plaintiff withdrew his request for \$297.77 in prescription costs from his actual damages, leading to an adjusted actual



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damages amount totaling \$7,438.00. As medical appointments and procedures between March 18, 2016 and July 6, 2016. In addition, I do not recommend an award to cover the follow-up appointment with Dr. Naiman that occurred on October 12, 2017, estimated at \$125.00, because it occurred after the completion of the tests which t. (ECF No. 63-5 at 3). Accordingly, I recommend an award of \$7,313.00 as plaintiff has established that these damages were caused by

2. Noneconomic Damages Plaintiff requests \$830,000 in noneconomic damages for pain and suffering. (ECF No. 63 at 2). Although plaintiff has sufficiently alleged pain and suffering and is therefore entitled to such damages, I recommend a reduced figure in light of the limited injuries which plaintiff has established were actually . Noneconomic damages for bodily injury include pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium,

8 Ms. McFarlane, a registered nurse and legal nurse consultant (see ECF No. 63-4), testified at the evidentiary hearing to her extensive experience in medical billing. Based upon her qualifications and experience, I accepted Ms. McFarlane as an expert witness in the field of medical billing.

or other nonpecuniary injury. Md. Code Ann., Cts. & Jud. Proc. § 11-108. Plaintiff testified that, he lost trust in manufacturers at large, doubted the integrity of other products, and lost nt had caused physical damage also led plaintiff to experience heightened anxiety, to seek medical care, and to undergo three invasive, disconcerting, and painful procedures to examine his larynx, esophagus, stomach, small intestine, and large intestine. (ECF No. 61 at 3). Although plaintiff testified that he experienced gastrointestinal pain and dysphonia prior to receipt of the recall notice, and after the completion of his medical tests, the record, as noted above, does not support an award for these damages. I recommend an award of noneconomic damages for pain, suffering, inconvenience, and mental anguish suffered during the period between when plaintiff received voluntary recall medical procedures on July 6, 2016. While from his gastrointestinal issues, an award of noneconomic damages must be limited to cover only this discrete time period in light of the lack of causal connection between plaintiffs condition and defendants supplement. Accordingly, I recommend an award of \$50,000 in noneconomic damages.

3. Punitive Damages Plaintiff seeks \$612,041.37 egregious since defendant sold the supplement to plaintiff during a In

a non-intentional tort action, the trier of facts may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud, i.e., actual malice. Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 652, 325 Md. 420, 460 (1992). In this case, plaintiff offered no testimony to indicate that that defendant acted

recommend an award for punitive damages.

4. Plaintiff requests an award of \$61,204.23. (ECF No. 63 at unless the relevant statute or contract in



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question provides otherwise. *Hardt v. Reliance Standard*

Life Ins. Co., 560 U.S. 242, 253 (2010); *Eastern Shore Title Co. v. Ochse*, 160 A.3d 1238, 1254, 453 Md. 303, 330 (2017). As no statute or applicable contract provides for the recovery of I do not recommend an award of attorneys fees as there is no legal basis for such an award. Accordingly, as stated above, I recommend an award of \$7,313.00 in economic damages and \$50,000.00 in noneconomic damages, resulting in a total damages recommendation of \$57,313.00.

III. CONCLUSION

For the foregoing reasons, I respectfully recommend that:

1. The Court grant plaintiffs Motion for Entry of Default Judgment (ECF No. 61); 2. The Court award plaintiff damages in the amount of \$57,313.00 in accordance with

the recommendations above.

I also direct the Clerk to mail a copy of this Report and Recommendation to defendant at their last known address. Any objections to this Report and Recommendation must be served and filed within fourteen (14) days, pursuant to Fed. R. Civ. P. 72(b) and Local Rule 301.5.b.

Date: April 9, 2021 /s/ Beth P. Gesner

Chief United States Magistrate Judge

