

SCAN

SHORT FORM ORDER

SUPREME COURT-STATE OF NEW YORK
PRESENT:

HON. BRUCE D. ALPERT

Justice
TRIAL/IAS, PART 7

ANNA AMANDA BERNACCHIA, by her Guardian,
ROBERT BERNACCHIA, and ROBERT BERNACCHIA,
as Father and Natural Guardian of JARED BERNACCHIA,
JAMES BERNACCHIA, JOSHUA BERNACCHIA
and JACK BERNACCHIA, Infants,

Plaintiffs,

Motion Sequence No. 2

Index No. 3890/03

Motion Date: July 31, 2003

-against-

CYTODYNE TECHNOLOGIES, INC.,
ROBERT CHINERY, PHOENIX
LABORATORIES, INC., NATURE'S
PANTRY, INC. and MASTERSON HEALTH
FOOD INCORPORATED,

Defendants.

The following papers read on this motion to dismiss:

| | |
|-----------------------|----|
| Notice of Motion | X |
| Opposing Submission | X |
| Supporting Submission | X |
| Memoranda of Law | XX |

Upon the foregoing papers it is ordered that this motion by defendant, Robert Chinery, for an order dismissing the amended complaint pursuant to CPLR 3211(a)(8), on the ground that this Court lacks jurisdiction over him, and, pursuant to CPLR 3211(a)(7), on the ground that it fails to state a cause of action against him, personally, is determined as hereinafter provided.

At the outset the Court notes that since the motion's submission for determination on July 31, 2003, moving counsel has transmitted two supplemental submissions dated, respectively, August 1 and August 15, 2003, and plaintiff's counsel elected to submit a single supplemental submission dated August 12, 2003. While the Court frowns on such practices, and affords express notice that it will not tolerate same in the future, it has permitted counsel to chart its own procedural course in this instance.

In the future, it would behoove counsel to communicate with each other to seek a consensual adjournment or wanting the requisite professional courtesies, to apply on notice therefore.

Plaintiffs commenced this action seeking to recover damages for personal injuries allegedly sustained by plaintiff, Anna Amanda Bernacchia, due to the ingestion of Xenadrine RFA-1, a dietary supplement commonly used as an aid in weight loss. The active ingredients in Xenadrine RFA-1 include ephedra and

caffeine. Cytodyne Technologies, Inc., a New Jersey corporation, markets, sells, and advertises Xenadrine RFA-1 through magazine, television and radio advertisements. Cytodyne Technologies, Inc. is now known as Nutraquest, Inc. For purposes of this motion, all references to Cytodyne shall include both Cytodyne Technologies, Inc. and Nutraquest, Inc. Defendant Chinery is Cytodyne's former President and Chief Executive Officer.

Plaintiffs initiated this product liability action against Cytodyne and other corporate defendants for negligence, breach of express warranty, breach of implied warranty, strict liability, loss of services and punitive damages. Plaintiffs' original complaint also asserted a cause of action for negligence against Robert Chinery individually, a New Jersey resident and Cytodyne's former officer/shareholder. Plaintiffs only allegation of tortuous conduct asserted against Mr. Chinery is that he was the individual ultimately responsible for the formulation, manufacture, distribution and sale of Cytodyne's various dietary supplements.

Mr. Chinery had moved to dismiss plaintiffs' original complaint against him predicated on the asserted lack of personal jurisdiction and a failure to state a viable cause of action. In response, plaintiffs filed the present amended complaint retaining all of the allegations against the corporate defendants. As to Mr. Chinery, plaintiffs seek to hold him individually liable for an alleged defect in the

subject product by claiming that Mr.Chinery is Cytodyne's alter ego.

Defendant Chinery now seeks to dismiss the amended complaint on the grounds that plaintiffs cannot establish personal jurisdiction over him.

Specifically, Mr. Chinery asserts that the amended complaint fails to allege that he committed a tortuous act without New York, that he transacted any business in New York in his individual capacity or engaged in any persistent course of conduct within this State, as required by New York's long-arm statute.

It is further asserted that plaintiffs have not alleged specific facts demonstrating that the movant derives independent and substantial revenue from his individual business activities in New York or from interstate commerce.

New York's "long arm" statute, CPLR 302 (subd. [a]) states:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: ...

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or ***

3. commits a tortuous act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(I) regularly does or solicits business, or engages in any other persistent course of

conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Upon the record submitted, this Court finds that plaintiffs have made a sufficient start and set forth adequate allegations establishing a sufficient predicate for the exercise personal jurisdiction over the individual defendant pursuant to CPLR 302[subd. [a], par. 1 and par. 3; cls. (I), (ii).] A *prima facie* showing of jurisdiction is not required. (see, *Peterson v Sportan Industries, Inc.* 33 NY2d 463, 467) Similarly, plaintiffs need not, at this juncture, demonstrate on a *prima facie* basis that the movant committed a tortuous act without the State. (see, *Evans v Planned Parenthood of Broome County, Inc.*, 43 AD2d 996, 997[3rd Dept.])

As noted above, plaintiffs' amended complaint alleges that Chinery was negligent in formulating Xenadrine RFA-1, a dietary supplement that contains ephedra together with its other components, primarily caffeine, and that it causes serious adverse health effects including cardiac arrhythmias, cardiac arrest and death. Specifically, plaintiffs allege that defendant Chinery knowingly placed into

the stream of commerce a certain bottle of Xenadrine RFA-1 which was purchased by Anna Amanda Bernacchia causing her to suffer cardiac arrest, resulting in an irreversible coma. The amended complaint also contains allegations regarding the individual defendant's domination and control of Cytodyne. For example, the amended complaint asserts that:

Defendant CYTODYNE was and is the mere instrumentality, agent and/or alter ego of defendant CHINERY.

Defendant ROBERT CHINERY, exercised and exercises complete dominion and control of defendant CYTODYNE.

Defendant ROBERT CHINERY has used the corporate form of defendant CYTODYNE to conduct his personal business.

Defendant ROBERT CHINERY used defendant CYTODYNE as a corporate shell to commit negligent and fraudulent acts in connection with the manufacturing, designing, formulating, promoting, advertising, selling and distributing (sic) various products, including Xenadrine RFA-1.

Defendant ROBERT CHINERY has employed the corporate form of defendant CYTODYNE to commit fraud upon the public, including plaintiffs, by personally profiting from the sale of a known dangerous product, Xenadrine RFA-1, containing ephedrine and its other components.

Defendant ROBERT CHINERY failed to disclose that

dietary supplements containing ephedra alkaloids caused cardiovascular and central nervous system stimulation resulting in increased blood pressure, increased cardiac work, and increased irritability of the heart muscle leading to an increased risk of death, myocardial infarction, cardiac arrhythmias, myocarditis hypertension, stroke and seizures.

This Court further notes that in an action commenced in the State of California, Cytodyne's defense attorneys have also alleged that: 1) "the personal assets of Chinery have been repeatedly commingled with those of [Cytodyne Technologies, Inc.];" 2) "[t]he corporate form, entity and structure of [Cytodyne Technologies, Inc.]. ...were at all times relevant disregarded by Chinery" and that 3) "[a]n adherence to the fiction of the separate existence as a corporation of [Cytodyne Technologies, Inc.] ... would sanction a fraud and promote an injustice in that Chinery is attempting to hide behind [Cytodyne Technologies, Inc.] ... and manipulate assets and liabilities to avoid responsibility", and that the assets...have been shuffled amongst other corporations and/or transferred to Chinery in violation of the corporate form."

Once the requirements of CPLR 302 (subd. [a], par. 3, cls. [i], [ii]) have been satisfied, the complaint must also allege that the defendant was the source of acts outside the State and adequately frame a cause of action in tort arising therefrom. (see, *Evans v Planned Parenthood of Broome County, Inc.*, *supra*)

Here, defendant Chinery does not deny that he was acting on behalf of Cytodyne, the manufacturer of Xenadrine, the product allegedly ingested by Ms. Bernacchia, and allegations have been asserted that Chinery was the alter ego of Cytodyne. Under the facts at bar, plaintiffs' complaint properly states causes of action in negligence, (first cause of action) loss of services (fifth & sixth causes of action). Proof may await the plenary trial. (*Id.*).

In resolving jurisdictional challenges raised by a nonresident defendant under CPLR 3211(a)(8), the sole concern is whether the party is subject to in personam jurisdiction of our courts "and not with the question of his ultimate liability to a particular plaintiff." (see, *Longines-Wittnauer Watch Co., Inc. v Barnes & Reinecke, Incorporated*, 15 NY2d 443, 460)

In view of the foregoing, the branch of the motion which seeks to dismiss the complaint on jurisdictional grounds is denied.

This court will now address the branch of the motion based upon CPLR 3211(a)(7).

In considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the Court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable

legal theory (see, *Tenuto v Lederle Labs.*, 90 NY2d 606, 609-610; *Leon v Martinez*, 84 NY2d 83, 87-88). (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414; see also, *Polonestsky v Better Homes Depot, Inc.* 97 NY2d 46, 54)

Viewing the facts alleged in the complaint liberally, plaintiff's complaint states causes of action for negligence, and loss of services. Hence, the first, fifth and sixth causes of action are sufficient to survive this motion.

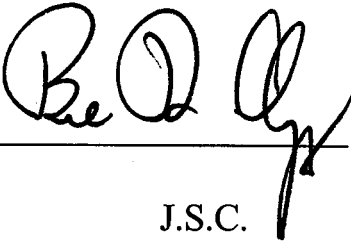
As noted above, plaintiffs have alleged sufficient facts which, if accepted by the ultimate fact finders, would support piercing the corporate veil so as to hold the individual personally liable.

Significantly, the corporate form will be disregarded when it has been used to achieve fraud or where the corporation has been so dominated by an individual or another corporation (usually a parent corporation), and its separate identity so disregarded, that it primarily transacted the dominator's business, rather than its own, and can, therefore, be considered the other's alter ego. (see, *Morningside Fuel Corp. v Lanius*, 244 AD2d 198 [1st Dept.]; see also, *Gartner v Snyder*, 607 F2d 582, 586 [2nd Cir 1979]

The branch of the motion which seeks to dismiss plaintiff's cause of action for punitive damages (seventh cause of action) is granted. (see, *Rocanova v*

Equitable Life Assurance Society of the United States, 83 NY2d 603; Probst v
Cocoulidis, 295 AD2d 331, 332)

DATED: September 30, 2003


J.S.C.

ENTERED

OCT 03 2003

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**