2011 IL App (5th) 100465-U

NO. 5-10-0465

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THERESA JOHNSTON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 08-L-967
	)	
CONAGRA FOODS, INC.,	)	Honorable
	)	Clarence W. Harrison II,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Donovan and Spomer concurred in the judgment.

O R D E R

¶ 1 *Held*: The plaintiff failed to raise a genuine issue of material fact in suit to recover damages resulting from alleged Salmonella poisoning, and therefore, the circuit court properly granted the defendant's motion for summary judgment.

¶ 2 The plaintiff, Theresa Johnston, filed an action in the circuit court of Madison County, alleging that she suffered personal injuries after consuming peanut butter manufactured by the defendant, ConAgra Foods, Inc. The circuit court granted the defendant's motion for summary judgment, and the plaintiff appeals. We affirm.

¶ 3 BACKGROUND

¶ 4 On October 16, 2006, at 1 a.m., the plaintiff ate two sandwiches with peanut butter manufactured by the defendant. Two hours later, she became nauseated and vomited. She also suffered from diarrhea and continued to suffer from ongoing diarrhea until the end of 2007.

¶ 5 On February 14, 2007, the defendant issued a recall of peanut butter that it had

produced. Included in the recall were jars of peanut butter that the plaintiff had purchased and consumed. Peanut butter remained in one of three jars in the plaintiff's possession, and that peanut butter was submitted for testing.

¶ 6 On October 15, 2008, the plaintiff filed her one-count complaint against the defendant, alleging that she became ill with Salmonella poisoning after consuming the defendant's peanut butter. The plaintiff alleged that the food was contaminated, defective, spoiled, and unfit for human consumption. The plaintiff alleged that the defendant breached its warranty to the plaintiff that the food was good, healthful, sound and wholesome, free from defects, and fit for human consumption. The plaintiff claimed damages in a sum not to exceed $50,000.

¶ 7 On February 25, 2009, with the parties' consent, the circuit court transferred the cause to arbitration. The parties participated in the nonbinding arbitration in Madison County, Illinois, and on August 25, 2009, the arbitrators found in favor of the defendant. On September 9, 2009, the plaintiff rejected the arbitrators' award.

¶ 8 Thereafter, in an April 23, 2010, deposition, Donald Murray, M.D., the plaintiff's treating physician, testified that during his examination of the plaintiff in April 2007, the plaintiff complained of ongoing diarrhea that had lasted six weeks and stated that she had eaten peanut butter that had been recalled. Dr. Murray explained that he ordered a stool culture, but the plaintiff's stool culture tested negative for Salmonella. When asked whether the plaintiff suffered from Salmonella poisoning, Dr. Murray responded: "It is hard to say. You can't say she does have it and you can't she doesn't because we have no scientific evidence to prove one way or the other."

¶ 9 Dr. Murray explained that it was difficult to determine the cause and effect of the plaintiff's illness. Dr. Murray testified that if the plaintiff's stool would have been tested before she took antibacterial medication, the testing for the Salmonella may have yielded a

different result. Dr. Murray acknowledged that the plaintiff's lengthy illness was inconsistent with a diagnosis of Salmonella poisoning.

¶ 10 In response to the defendant's requests for admissions, the plaintiff admitted that no medical professional had opined orally or in writing that her symptoms were caused by exposure to Salmonella. She admitted that she could not produce expert testimony that her symptoms were caused by Salmonella. The plaintiff also admitted that her stool was cultured for the presence of Salmonella and that the culture was negative.

¶ 11 In his 2010 affidavit, Samuel Miller, M.D., a professor of medicine, microbiology, and genome science at the University of Washington, stated that he had been retained by the defendant to serve as an expert on infectious diseases and that he had reviewed the plaintiff's medical records and deposition. Dr. Miller stated that Salmonellosis usually causes diarrhea and almost as frequently causes abdominal discomfort, nausea, and sometimes fever and that symptoms typically begin about 12 to 72 hours after exposure to the organism. Dr. Miller testified that symptoms persist for several days to perhaps as long as a week. Dr. Miller stated, "Symptoms beginning much earlier than 12 hours post-exposure, or much later than 72 hours post-exposure, are symptoms probably caused not by Salmonella but by something else." Dr. Miller testified that symptoms lasting for more than a week are also unlikely to have been caused by Salmonella infection.

¶ 12 Dr. Miller noted that on August 22, 2007, the plaintiff had had diarrhea for almost a full year and submitted to colonoscopy. Dr. Miller noted that pursuant to the physician's direct inspection using the colonoscope and the biopsy, the plaintiff's colon tested normal. Dr. Miller stated, "In the presence of [S]almonellosis, inflammation should have been grossly visible to the examining endoscopist, at least at the ileocolic junction (where the small intestine joins the large), in the form of reddened, swollen bowel[,] [and] [i]t wasn't." Dr. Miller stated that the plaintiff "ha[d] no laboratory evidence of [S]almonellosis" and that

"her history is inconsistent with [S]almonellosis." Dr. Miller opined that the source of the plaintiff's symptoms was not bacteria in peanut butter.

¶ 13 In a February 17, 2010, affidavit, Gregory Ma, M.S.P.H, senior scientist and director of general microbiology at Molecular Epidemiology, Inc., stated that of the 1231 samples of peanut butter submitted by plaintiffs who had filed claims against the defendant and tested by Molecular Epidemiology, Inc., 29 tested positive for Salmonella. Ma stated that in this case, the plaintiff submitted a peanut butter sample that tested negative for Salmonella bacteria, and Molecular Epidemiology, Inc., "found no evidence that the sample submitted was contaminated with Salmonella."

¶ 14 On March 10, 2010, the defendant filed its motion for summary judgment. In its motion, the defendant argued that the plaintiff had failed to produce any evidence to show that the peanut butter she ate was contaminated with Salmonella when she consumed it, that her illness resulted from exposure to Salmonella, or that the defendant was responsible for contaminating the peanut butter. On August 25, 2010, after hearing arguments, the circuit court granted the defendant's motion for summary judgment. On September 21, 2010, the plaintiff filed her timely appeal.

¶ 15 ANALYSIS

¶ 16 The parties do not dispute that the defendant produced peanut butter contaminated by Salmonella or that the plaintiff consumed peanut butter included in the resulting recall. The defendant argues that although the plaintiff's peanut butter was included in its recall, the plaintiff has failed to show that the peanut butter she consumed contained Salmonella or that her symptoms were a result of Salmonella poisoning. We agree.

¶ 17 Summary judgment is properly granted if the pleadings, depositions, admissions, and affidavits on file show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008);

Murray v. Chicago Youth Center, 224 Ill. 2d 213, 245 (2007). Because a summary judgment is a drastic method of terminating litigation, the reviewing court must construe the pleadings, affidavits, depositions, and admissions on file strictly against the moving party and liberally in favor of the nonmoving party. *Murray*, 224 Ill. 2d at 245; *Washington v. City of Evanston*, 336 Ill. App. 3d 117, 121 (2002). "Whether the trial court properly granted summary judgment is a question of law that we review *de novo*." *Happel v. Wal-Mart Stores, Inc.*, 316 Ill. App. 3d 621, 625 (2000), *aff'd*, 199 Ill. 2d 179 (2002).

¶ 18 "Where an article of food or drink, intended for human consumption, is sold in a sealed container, an implied warranty is imposed on the manufacturer that the article was fit for that purpose, enabling a consumer to recover for the warranty's breach." *Warren v. Coca-Cola Bottling Co. of Chicago*, 166 Ill. App. 3d 566, 572 (1988). "The theory of strict products liability is also available to a plaintiff where a 'defect' exists in the goods produced." *Id.* "In addition to the theories of breach of implied warranty and strict liability, an injured party may establish liability against a manufacturer of a sealed food product on the basis of negligence, since the law imposes upon a manufacturer a duty to adequately prepare, inspect, and package the product produced." *Id.*

¶ 19 "However, the mere fact that injury occurs in consumption of the product does not alone raise a presumption, or otherwise create an inference, under any of the above theories, entitling the consumer to recover against the manufacturer." *Id.* at 572-73. "The mere possibility of a causal connection is insufficient to raise the requisite inference of fact." *Id.* at 573. Likewise, the "plaintiff's own speculation is insufficient to establish the necessary inference of causation in order to provide a basis for recovery, and must be discounted as surmise and conjecture." *Id.*

¶ 20 In the present case, the plaintiff has failed to set forth sufficient evidentiary facts from which the court could infer that the peanut butter she consumed contained Salmonella

bacteria or that her illness was attributable to contaminated peanut butter. The plaintiff presented no evidence that the peanut butter she consumed was contaminated with Salmonella bacteria. Instead, the plaintiff provided a sample of peanut butter that tested negative for Salmonella bacteria. Additionally, the plaintiff provided no evidence that her illness resulted from Salmonella contamination, which is a required element of her claim. See *Warren*, 166 Ill. App. 3d at 572. The plaintiff's physician was unable to state to a reasonable degree of medical certainty that Salmonella contamination of the defendant's peanut butter caused the plaintiff's illness. Instead, the evidence revealed that the timing and the duration of the plaintiff's symptoms, *i.e.*, her symptoms began much earlier than 12 hours postexposure and lasted for more than a week, were not typical of Salmonella poisoning. Further, the plaintiff's stool culture tested negative for Salmonella, and the plaintiff's colonoscopy, which was normal both to inspection by the endoscopist and to the pathologist's microscopic examination of tissue removed at biopsy, indicated that the plaintiff did not suffer from Salmonellosis. Although the plaintiff indicated that she believed that her symptoms resulted from contaminated peanut butter, the plaintiff's own speculation is insufficient to establish the necessary inference of causation to provide a basis for recovery and must be discounted as surmise and conjecture. See *id.* at 573; see also *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999) ("Mere speculation, conjecture, or guess is insufficient to withstand summary judgment."). We therefore find that the plaintiff has failed to carry her burden to produce sufficient evidence to raise an issue of fact to preclude summary judgment in the defendant's favor. See *Warren*, 166 Ill. App. 3d at 575.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 23 Affirmed.