IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT COURT NO. 4, MAITAMA

ON THE 12TH DAY OF DECEMBER, 2024

BEFORE HIS LORDSHIP: HON. JUSTICE U. P. KEKEMEKE

SUIT NO. FCT/HC/CV/2064/19

COURT CLERKS: *JOSEPH ISHAKUBALAMI&ORS.*

BETWEEN:

BAR. OGUNNIYIOLUFUNSO DANIEL……COMPLAINANT

AND

DOLLAR PHARMACY LTD……DEFENDANT

JUDGMENT

The Claim of the Claimant as contained in his Writ of Summons and Statement of Claim dated 03/06/19 is as follows:

(1) A declaration that the Defendant owe the Claimant a duty of care in line with the regulation and practices of Pharmaceutical Council of Nigeria not to sell expired drug.

(2) A declaration that the sale of expired lactulose solution to the Claimant by the Defendant on the 24/05/19 is wrongful and illegal.

(3) That the sale of expired lactulose solution to, the Claimant on the 24/05/19 is a breach of its duty of care.

(4) An Order directing the Defendant to pay to the Claimant the sum of N20 Million as special damages for the excruciating pains caused the Claimant for days due to the use of the expired lactulose solution sold to the Claimant.

(5) N10 Million as exemplary damages.

(6) N5 Million as general damages.

The Writ of Summons, Statement of Claim and all other processes were served on the Defendant. The Defendant Statement of Defence is dated 10/12/2019 but filed on the 13/12/19. Tucked inside the Statement of Defence is a Counterclaim contrary to the Rules of Pleadings.

The Statement of Defence if accompanied with a Counterclaim should be titled STATEMENT OF DEFENCE AND COUNTER CLAIM or Defendant decides a separate Counter Claim. To do otherwise is to the effect that the pleadings are not clear enough.

Nevertheless the Defendant's Counter Claims as follows:

(1) A declaration that the Defendant/Counter Claimant exercised due diligence in respect of the only available lactulose solution as at 24/05/19 with the following details. Batch No. 17184871, used before (Expiration date: November 2020: 11- 2020 Size 500 ml and Back Code: 5017007100478.

(2) An order of Court directing the Defendant to Counterclaim to tender public apology to the Defendant Counter Claimant in three (3) National Dailies for defaming its reputation.

(3) N150 Million only as general damages for defamation.

(4) N3 Million as cost of litigation.

The Claimant's reply to Defendant's Statement of Defence and Counterclaim is dated 23/01/2020.

The Claimant opened his case and gave evidence for himself. He is OgunniyiOlufunso Daniel. He is a Legal Practitioner.He deposed to a Witness Statement on Oath on the 3/06/2019. He deposed to a Witness Statement on Oath

on the 03/06/2019.On the 23rd day of January 2021, he deposed to another Witness Statement on Oath. He adopted them as his oral evidence.

In the First Witness Statement on Oath, he stated succinctly as follows. That the Defendant is a Pharmaceutical Company. He visited the Defendant's Pharmacy on the 24/05/19 to buy a prescription drug. He was given the expired Lactulose Solution.

He paid N4,150 via a Zenith Bank Master Card. He was given a printout of the payment. The Defendant equally issued him a receipt whichcarried the Defendant, drug, the amount paid, date and time. He administered the drug on

himself immediately after payment to relieve him of the pains he was experiencing due to difficulty in excreting.

That he continued to take the lactulose solution but the pain did not abate and he could not excrete. He could not walk, sit due to the serious pains, he was suffering because the lactulose did not work.

That on 25/05/19, his roommate Israel Enagbonma examined the drug and discovered that the drug expired since April 2019. He therefore went with Israel to lay a compliant to the Defendant on 25/05/2019.

The person on duty refused to take the expired lactulose solution or refund his money except he is told the name of the person who dispensed the drug. He discussed with the staff of the Defendant to find out from their Roaster or Register who was on duty on 24/05/19 at about 12:30 am but the staff ignored him. That he returned home with the lactulose solution.

In the Additional Witness Statement deposed to on 23/01/20 he said the Defendant did not exhibit any iota of care but sold the drug which expired in April 2019 to him on 24/05/2019. That Defendant had more than one lactulose solution available on the shelf.

That the solution sold to himcarries Batch No. 171717714 use before 04, 2019 (Expiration Date) Size 500 ml Batch Code 50170071007100478 which is completely different from the lactulose Solution the Defendant is referring to.That the expired lactulose solution sold to him is as good as poison capable of taking his life. He is not a gold digger but a lawyer who has a means of livelihood. That the allegation against the Defendant are not false. That he denies all the averments in the Counterclaim.

The Claimant tendered Exhibit A – A2:

(1) The POS transaction receipts.

(2) Receipt from Defendant dated 2/05/19 &

(3) Lactulose solution.

Under cross examination, the witness answers that he is a lawyer. He was called to Bar 20th, October 2015. He took the product immediately he bought it i.e one dose. He was taking it 3 times a day. He took it on 24th& 25th of May, 2019 after the dose he took in the premises of the Defendant.

To a further question he said in all he took the solution about 7 to 8 times.To a further question he said he did not bother to check the expiry date. He does not know if Defendant has exclusive right to sell the said drug. The prescription from the medical officer is not before the Court.That when the pain did not subside, he bought another lactulose solution from another pharmacy.

He said he has no medical report to show that it was the intake of the lactulose solution that caused him the pain. The above is the case of the Claimant.

The Defence opened and called three witnesses. The 1st Defendant's witness is AgadaOnyiloIsaiah of No !2 Julius Nyerere Crescent Abuja, an Accountant and a Stock Control Officer of the Defendant. He deposed to a Witness Statement on Oath. He adopted it as his oral evidence. He said upon receipt of the Writ off Summons, the management of the Defendant called a meeting which involved his department, Stock Audit and Control to investigate what actually transpired on the said day.

They discovered that the lactulose solution available in stock and on the shelf as at 24/05/19 carries the following details Batch No. 17184871, used before (Expiration date: Nov. 2020): 11-2020 size 500 ml and Back Code 5017007100478.

The expiry report of Stock Audit and Control Department from April 2019 to November 2019 and the available lactulose solution is pleaded. That the receipt issued to the Claimant by the cashier is in respect of the available lactulose solution as at 24/05/19 with the following details: Batch No. 17184871, used before expiration date Nov.

2020: 11-2020 Size 500 ml and Back code 50170007100478.

The Defendant did not stock the purported lactulose solution. That stringent checksand balances are deployed by the Defendant to checkmate sales because the Defendant maintainshigh standard of checks and control of her products. The Defendant does not buy drugs less than one year to the expiration from her suppliers.

That the relevant department check expiration dates, quantities, price before handing it over to the pharmacist to impute into the computer. The operation of the Defendant in respect of sales and returns is fully computerised by use of

special software called Shopmaster. It is installed amongst others to control products that are about to expire which are removed from the shelf upon alert from the computer and replaced by the suppliers.

Such products will not scan or issue a receipt. The purported lactulose solution is not from the Defendant because the product would not have been scanned, produced a print out or issued a receipt.The Witness tendered Exhibit B &B1i.e:

(1) Expiry report

(2) Lactulose solution No. 4150 dated 2/11/19.

Under cross examination, he said he was in the pharmacy on that day 24/05/2019 but closed by 6 pm before the transaction in issue. He further answered that there was only one lactulose solution. That Claimant brought the one on the shelf.

On a further question, he said they had other lactulose solutions in the store. That they restock daily. That Exhibit B1 was not the one on the shelf. That Exhibit A1 was the receipt issued by the Claimant. The Exhibit does not carry the batch code. That Exhibit A2 had not expired when it was purchased. That Exhibit B will contain items that are to expire March to December 2019. The expiry date on Exhibit A2 is April, 2019. The price tag is their own.

The 2nd Defendant's Witness isAdoga Joseph Yakubu of 12 Julius Nyerere Crescent, Asokoro, Abuja, a Community Health Officer. He adopted his Witness Statement on Oath. He is the Chemical Staff of the Defendant. He said the following. He attended to the Claimant on the said date as a cashier with the Pharmacist on duty at the drug section. That the receipt he issued to the Claimant is in respect of the available lactulose solution as at 24/05/19 has the following details Batch No. 17184871 used before (Expiration date: November 2020: 11-2020 size 500 ml and back code 5017007100478.

That upon taking possession of the lactulose solution, the Claimant left with the produce and never took it immediately. The Claimant did not come to complain about the product because his name is boldly written on the receipt he issued in respect of the available lactulose solution.

They have lots ofstringent measures in place to checkmate sales.That the Stock Audit and Control Department checks expiration dates, quantities and price before handing over to the pharmacist. The operation of the Defendant is fully computerised by the use of special software called shop masters. That the receipt he issued to the Claimant is in respect of the available lactulose solution as at 24/05/2019 with the following details: Batch No. 17184871 used before

(Expiration date: November 2020) 11-2020, size 500 ml and Batch. Code 5017007100478 was done diligently with proper care to the Claimant by the pharmacist on duty.

The purported expired lactulose solution is not from the Defendant because the product would not have scanned, produced print out or issue receipts.

Under cross examination, he answered confirming paragraph 7 of his Oath. He answered that the one remaining was presented to this Court. The batches they have was to expire November 2020. That the information in paragraph 5 is not in Exhibit A1.

The 3rd Defendant's Witness is Kola Adeosun of No. 42 LadokeAkintolaBoulevard,Garki, Abuja. He is a computer scientist. He made a Witness statement on oath. He adopted it as his oral evidence.

He is the MD of Shopmaster Business Systems a company engaged by the Defendant to install, maintain and monitor quantity and prevent expired drugs. He has HND in Computer Science. That ShopmasterBussiness System was engaged by the Defendant to instal, maintain and monitor quantity and prevent expired drugs which they have been doing diligently since 2012.

That Defendant conducted the checks and discovered that the only lactulose solution available in stock and in the shelf as at 24/05/19 carries the following details- Batch No.17184871, used before (Expiration date No. 2020: 11-2020 etc.)

The receipt issued to the Claimant is in respect of the available lactulose solution. That from the checks through shopmaster software he conducted with the staff of the Defendant, the Defendant did not stock the purported lactulose solution.That the Defendant deployed a lot of stringent checks and balances to check products and sales.

That shopmaster software was installed to detect amongst others products that are about to expire which are recovered from the shelf upon an alert by the computer. That expired drugs will not scan or issue a receipt by the help of the shopmaster. That purported expired lactulose is not from the Defendant. That ShopmasterBusiness System maintains one of the best software used by pharmaceutical shops and super stores in Nigeria.

No issue has been raised as at 24/05/2019 or any other time regarding the operation of Shopmater. The witness tendered Exhibit C which is a letter ofengagement by the Defendant to MD Shopmaster dated 18/06/12.

Under cross examination, he answered he cannot remember being in the Defendant's shop on the day of the transaction. He stands by paragraph 5& 6 of his Oath. He has been a computer scientist for about 20 years. If an inaccurate information is put on, it will generate an inaccurate information.

That Exhibit B is from their Shopmaster software. It is expiry report showing what will expire in 2019. The code came from the manufacturer. The barcode scanner scans every genuine product. It will interpret it with a set of numbers. The number is unique for the product. The above is the case of the Defendant.

Parties were ordered to file Final Written Addresses. The Defendant's Final Written Address is dated 18/10/23.

Defendant's arguments: He posited two issues for determination:

(1) Whether the Claimant has sufficiently established his case on the balance of probabilities in view of his evidence before the Court.

(2) Whether having not pleaded the particulars of special damages, the Claimant is entitled to the grant of same.

In my view, issue 2 is subsumed into issue 1. He submits that the Claimant has failed in discharging the onus of proof

in him to grant of the reliefs sought. That from the evidence placed before the Court, the Claimant has failed to prove his case on the balance of probabilities.

That Claimant failed to plead the particulars of negligence which he alleges against the Defendant. That there is nothing in evidence to show that the Defendant breached any duty of care it purportedly owes the Claimant. The negligence is a question of fact.

The Claimant failed to establish that Defendant owed him a duty of care. The Claimant failed to produce any doctor's prescription. That a consumer owes himself a duty of care to check expiration dates of product before purchase. There is

no duty of care owed to the Defendant. That Claimant failed to show any damage occasioned by the said purported negligence.

The Defendant's evidence that the lactulose solution which the Claimant presented before this Court Exhibit A2 is not the same as the one on its shelf on 24/05/19 was not contradicted see Exhibit C1. Uncontradicted or unchallenged evidence is deemed admitted.

That special damages is not pleaded neither was evidence adduced in support. That the Defendant/Counter Claimant is entitled to the reliefs sought.

Claimant's argument- The Claimant's lone issue for determination is Having regard to the facts and circumstance of this case as well as the evidence, whether the Claimant is not entitled to the reliefs sought.

In respect of Reliefs 1, 2, 3, & 4, Learned Counsel submits. That there is sufficient relationship between the person accused of negligence and the victim of the negligence. That Claimant successfully demonstrated relationship of neighbourhood between him and the Defendant.

That the selling of expired drugs is a crime while any conduct by a pharmacist that is likely to cause harm to a patient is deemed to be professional misconduct or

infamous conduct. The Defendant breached that duty of care.

The price tagwas admitted to be that of the Defendant. The Claimant was not cross examinedon that key issue. He urges the Court to accept the said evidence as true. He further urges the Court to hold that it is Exhibit A2, the expired lactulose solution that was sold to the Claimant and not Exhibit B2 the lactulose solution B2which was said to be on the shelf on 24/05/19.

The Court is urged to discountenance the submission that the expiry report from the shop master software does not contain a recording of Exhibit A1. He urges the Court to

come to the conclusion that the Defendant sold Exhibit A2 an expired lactulose solution to the Claimant.

The Defendant breached the duty of care which it owed the Claimant when it sold Exhibit A2 an expired medicine. That the Claimant has made a successful case of negligence. The Claimant abandons his claim to special damages. The Claimant is entitled to general damages. That the Claimant is also entitled to exemplary damages and urges the Court to grant same.

That there are facts pleaded in the Statement of claim forming the basis of the Claimant's allegation of negligence against the Defendant. There is no basis therefore for the

Defendants submission that the Claimant did not plead particulars of the negligence alleged. That there is merit on the Claimant's case and the reliefs ought to be granted.

I have also read the Claimant's reply on point of law dated 22/05/24

RESOLUTION:

The issue for determination is whether from the pleadings and evidence before this Court, the Claimant has proved his case on the balance of probability and preponderance of evidence so as to entitle him to Judgment.

If no, whether the Defendant's counterclaim is proved. By Section 131 of the Evidence Act, in civil cases, the burden of proof is on the party who asserts a fact to prove same, for he who asserts must prove. The standard of proof required is on balance of probabilities see Section 134 of the Evidence Act.

DAUDU VS.NNPC (1998) 2NWLR (PT. 538) 355 SC.

KALA VS.POTISKUM (1998 3NWLR (PT. 540) 1 SC.

ALHAJIOTARU& SONS LTD VS.IDRIS (1999) 6NWLR (PT. 606) 330 SC.

The onus of proving an allegation is on the Claimant and the onus does not shift until he has proved the claim. The Claimant's Claim is a tort of negligence. Negligence is the

failure to take reasonable care where there is a duty and it is attributable to the person whose failure to take reasonable care has resulted in damage to another.

In other words, it is the omission or failure to do something which a reasonable man under similar circumstance would do or the doing of something which a reasonable and prudent man would not do.

See *U.T.B (NIG.) VS. OZOEMENA (2007) 3NWLR (PT. 1022) P. 488 SC.*

U.B.A. LTD VS.ACHONU (1990) 6NWLR (PT. 233) 254 SC.

ODINAKA VS.MOGHALU (1992) 4NWLR (PT. 233) 1 SC.

It is elementary that thecase of *DONOGHUE VS. STEVENSON* laid the foundation of the law of negligence. It is complete and actionable when three conditions are satisfied:

(1) The Defendant owed a duty of care to the Claimant.

(2) The duty of care was breached.

(3) The Claimant suffered damages arising from the breach.

See *UTB (NIG.) VSOZOEMENA (Supra)*

OYIDIABU VS.EKECHUKWU (1972) 5 SC. 191.

For a Claimant to succeed in an action such as this he must plead sufficient particulars of the negligence alleged.

The Claimant must also adduce credible evidence to show the duty of care owed by the Defendant, the breach of that duty by the Defendant and the damage suffered by the Claimant as a result of the Defendant's failure to take care except the Defendant admits same.

Negligence is a question of fact not law. Therefore each case must be decided in the light of its facts and circumstances.

A duty of care in negligence exists where there is a sufficient relationship of proximity or neighbourhood as between a wrongdoer and the person who has suffered damage such that in the reasonable contemplation of the

wrong doer, carelessness on his part may likely cause damage to the injured person.

See *ABUSONWAN VS. MERCHANTILE BANK LTD (1987) 3NWLR (PT. 60) 196 SC.*

In the instant case, does the Defendant owed a duty of care to the Claimant. The evidence is that the Defendant is a pharmaceutical company. The Claimant was the Defendant's customer. He approached the Defendant on 24/05/2019.

The Defendant's evidence as led by DW2 is that he is the clinical staff of the Defendant. That he attended to the

Claimant on the said day as a cashier with the pharmacist on duty at the drug section.

The relationship between the Claimant and the Defendant is that of patient/pharmacist relationship. Health professionals owe a duty of care to their patients. The Claimant therefore owes the Defendant a duty of care and I so hold.

On the 2nd condition whether the said duty was breached. It is the duty of the Claimant to plead sufficient particulars of the negligence alleged. No such particulars are sufficiently and or specially pleaded and particularised in the Claimant's Statement of Claim.

The Claimant's evidence is that the Defendant sold to him an expired lactulose solution which is marked Exhibit A2. That he bought it on 24/05/2019 whereas the said lactulose solution expired in April 2019.

The Defendant's evidence is that he did not sell the said alleged lactulose solution Exhibit A2 to the Claimant. That it is true, it sold a lactulose solution to the Claimant but denied that it was Exhibit A2 that it sold. DW2admitted issuing Exhibit A which is the receipt issued to the Claimant for buying the lactulose solution.

The Defendant's evidence is that as at 24/05/19, it did not have a lactulose solution having that Batch No on its shelf.

That the receipt it issued to Claimant is in respect of the available lactulose solution as at 24/05/19 with Batch No. 17184871 which was to expire on November 2020. The sample is Exhibit B1.

The Claimant gave evidence but did not call any other witness to corroborate his evidence. His evidence is that he went to Asokoro District Hospital on the 23/05/19. He consulted a Doctor who prescribed Lactulose Solution for him. He could not get the said medication from the hospital pharmacy. He therefore proceeded to the Defendant to purchase the said medication.

The evidence of the prescription from the Asokoro District Hospital is not in evidence or that the Claimant attended the said hospital. He also gave evidence that the following day as the pain persisted his friend and roommate Israel Enagbonma carried the drug to examine it and discovered that the drug expired since April, 2019.

That it was himself and Israel Enagbonma that went to the Defendant on 25/05/19 to complain that the drug he bought on the 24/05/2019 had expired. The said Israel Enagbonma who first discovered that the drug the subject matter of this suit had expired and who accompanied him to the Defendant was not called to give evidence.

He further said in evidence that he went with the expired lactulose solution and the POS print out to the Defendant but the person on duty insisted that he would not take the expired drug from him or refund the money if he could not tell him the name of the person who sold the drug to him.

The DW2's evidence is that he sold the Exhibit B1 to the Claimant. That his name is conspicuously written on it. That Claimant did not come back to the Defendant after it was sold to him.

I have examined Exhibit A1 tendered by the Claimant. It is clear on the said Exhibit thatthe cashier who issued the

receipt is ADOGAJ.Y. The story of the Claimant on this point is not believable.

The Defendant called three witnesses. The 1st Witness is AgadaOnyilo Isaiah an Accountant and a Stock Audit Control Officer. The 2nd witness is the cashier while the 3rd is the MD of Shop Master.

I have also perused Exhibit B the expiry report. The Claimant a legal practitioner did not write a letter of demand to the Defendant. There is no evidence that he lodged a complaint to the Defendant or any agency charged with the responsibility of regulating the Defendant.

The Claimant who said he was in serious excruciating pain followed the said Israel to the Defendant to complain about the expired drug. The Claimant did not lead credible evidence to show the breach of that duty by the Defendant.

I believe the evidence of the Defendant that the lactulose solution they sold to the Claimant is the sample of Exhibit B1& not Exhibit A2.

In the circumstance it is my view and I so hold that the Claimant failed to prove that the Defendant breached that duty of care.

On the 3rd condition whether the Claimant suffered any damage arising from the breach. Assuming but not conceding that the Claimant breached the duty, the Claimant could not by evidence prove that he suffered any damage.

In paragraph II, the Claimant said he continued to take the drug but the pain did not abate. What the above means is that the Claimant was in pain before he bought the lactulose solution. The pain continued after we bought and continued to take the said drug. There is no evidence to suggest that it is the intake of the lactulose solution that caused the pain.

There is also no evidence to show that he bought another lactulose solution and took same and the pain ceased. What made the pain to continue and what made the pain to disappear would have made the Court to come to a conclusion that it is the expired drug that made the pain to continue.

The Claimant was also not able to prove that he suffered any injury as a result of the breach of the duty of care. I note that the Claimant withdraw his claim to special damages in the Final Written Address.

In the circumstance of this case, the Claimant was not able to prove his case on the preponderance of evidence and

balance of probability so as to enable the Court grant the reliefs sought. The suit fails and it is dismissed.

The Defendant Counteclaimed for defamation. Defamation is concerned with injury to reputation resulting from words spoken or written by others.

The Defendant/Counter Claimant has the onus to prove six ingredients:

(1) The publication of the offending words.

(2) That the words complained of refer to the Claimant.

(3) That the words are defamatory of the Claimant.

(4) That the words were published to third parties.

(5) Falsity or lack of accuracy of the words complained of.

(6) That there are no justifiable legal grounds for the publication of the words.

The Defendant/Counter Claimant did not adduce any evidence of any word whatsoever that the Claimant spoke or wrote which warrants the Counter Claim.

There is no evidence of publication. The Counter Claim does not have any substance. There is no evidence adduced for cost of litigation.

The Counter claim is a white wash or wissywassy. It lacks merit and it is also dismissed.

HON. JUSTICE U. P. KEKEMEKE, ACIArb (UK), FICMC

(HON. JUDGE)

14/11/24