IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK MCKAY	:	CIVIL ACTION
	:	
v.	:	
	:	
REPUBLIC TOBACCO CO., et al.	:	NO. 00-2366

MEMORANDUM AND ORDER

BECHTLE, J. FEBRUARY , 2001

Presently before the court are defendant Republic Tobacco, L.P.'s ("Defendant")[1] Motion to Dismiss, the papers in support of and in opposition to said motion, and Plaintiff Mark McKay's ("Plaintiff") Motion for Appointment of Counsel. For the reasons set forth below, Defendant's motion to dismiss will be granted and Plaintiff's motion for appointment of counsel will be denied as moot.

I. BACKGROUND

Plaintiff, an inmate in the State Correctional Institution in Graterford, Pennsylvania, brings this pro se action against Defendant, which is headquartered in Glenview, Illinois.[2] Plaintiff alleges that Defendant violated the Cigarette Labeling and Advertising Act (the "Labeling Act"), 15 U.S.C. §§ 1331-1341, and failed to warn against the risks of smoking in connection

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[1] The court notes that although the docket lists defendant as Republic Tobacco Co., defendant's moving papers refer to it as Republic Tobacco, L.P.

[2] The court has jurisdiction under 28 U.S.C. § 1332 (diversity jurisdiction).

with Defendant's product, "Top" tobacco.

Defendant filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiff opposes the motion and has filed a motion for appointment of counsel.

II. LEGAL STANDARD

For the purposes of a motion to dismiss, the court must accept as true all well-pleaded allegations of fact in a plaintiff's complaint, construe the complaint in the light most favorable to the plaintiff, and determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988). The court may also consider "matters of public record, orders, exhibits attached to the Complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994) (citations omitted). The court, however, need not accept as true legal conclusions or unwarranted factual inferences. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). A complaint is properly dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

Under the Labeling Act, it is "unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear" the Surgeon General's warning. 15 U.S.C. § 1333(a)(1). For purposes of the Labeling Act, a "cigarette" is defined as:

> (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and
> (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

Id. § 1332(1).

Courts have consistently found that tobacco companies have no duty under the Labeling Act to provide the Surgeon General's warning on loose tobacco products. Gonzalez v. Republic Tobacco Co., No.98-C-7228, 2000 WL 343236, at *2 (N.D. Ill. March 31, 2000) (recognizing "Congress's choice to apply the warning requirement only to pre-rolled, packaged cigarettes, not loose-leaf tobacco") (citing Anthony v. Top Tobacco Co., No.98-1502-CIV-T-17B, 1999 WL 459727, at *2 (M.D. Fla. June 14, 1999); Toole v. Brown & Williamson Tobacco Corp., 980 F. Supp. 419, 421 (N.D. Ala. 1997) (stating that Labeling Act "makes clear that the . . . labeling requirement does not apply to loose tobacco products"); Wilson v. Brown & Williamson Tobacco Corp., 968 F. Supp. 296, 300 (S.D. W. Va. 1997) (finding that loose tobacco is not cigarette under Labeling Act)).

The parties dispute whether the Labeling Act applies to Top. Defendant states that Top is a loose tobacco product. (Def.'s Reply in Supp. of Mot. to Dismiss at 1.) It is packaged with rolling papers and the tobacco is rolled into cigarettes by the consumer. Id. Although Plaintiff acknowledges that Top comes with papers with which the tobacco is rolled into individual cigarettes, he contends that because the package itself is shaped in the form of a roll, it is a "huge cigarette" that must be labeled under the Act. (Pl.'s Decl. in Opp'n to Def.'s Mot. to Dismiss at 2-5.) The court notes, however, that other courts addressing Defendant's product have found that the Labeling Act applies only to pre-rolled, packaged cigarettes. See Gonzalez, 2000 WL 343236, at *2 (finding that Labeling Act does not apply to Top); Gibbs v. Republic Tobacco, L.P., 119 F. Supp. 2d 1288, 1292 (M.D. Fla. 2000) (same).

Moreover, the Labeling Act can only be enforced through criminal proceedings or through suits for injunctive relief brought by the Attorney General. Gonzalez, 2000 WL 343236, at *2 (citing 15 U.S.C. §§ 1338, 1339). The Labeling Act does not provide for a private cause of action. Id. (citing Mangini v. R.J. Reynolds Tobacco Co., 793 F. Supp. 925, 927 (N.D. Cal. 1992)). Nor is there any indication that Congress intended to provide a private cause of action pursuant to the Labeling Act. Id. Thus, the court finds that Plaintiff has failed to state a claim under the Labeling Act.

Construing the Complaint liberally, Plaintiff also may be asserting a state-law failure-to-warn claim premised on negligence or product liability.

In Pennsylvania, there is no liability for failure to warn when the danger involved is apparent or open and obvious. Dauphin Deposit Bank and Trust Co. v. Toyota Motor Corp., 596 A.2d 845, 849 (Pa. Super. Ct. 1991) (stating that manufacturer has "no duty to warn potential users of that which is known to most people"). The court finds that the "potential risks of smoking are widely known, well-publicized, and within the common knowledge of the community." Gonzalez, 2000 WL 343236, at *3. Courts routinely take judicial notice of the risks associated with tobacco use. Id. (citing Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 172 (5th Cir. 1996) (granting summary judgment on duty-to-warn claim where "the dangers of cigarette smoking have long been known to the community"); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988) (stating that "[t]obacco has been used for over 400 years and [its] characteristics have also been fully explored. Knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community"); Todd v. Brown & Williamson Tobacco Corp., 924 F. Supp. 59, 62-63 (W.D. La. 1996) (stating knowledge of dangers of cigarette smoking extends to loose tobacco); Paugh v. R.J. Reynolds Tobacco Co., 834 F. Supp. 228, 230 (N.D. Ohio 1993) (stating that "dangers posed by tobacco smoking have long been within the ordinary

knowledge common to the community")); see also Hite v. R.J. Reynolds Tobacco Co., 578 A.2d 417, 420-21 (Pa. Super. Ct. 1990) (rejecting design defect claim against tobacco company as danger of tobacco is within ordinary knowledge common to community).

Thus, Plaintiff has failed to allege a state-law failure to warn claim based on negligence or product liability. This suit will be dismissed for failure to state a claim upon which relief may be granted.[3]

IV. Conclusion

For the foregoing reasons, the court will grant Defendant's motion to dismiss and deny Plaintiff's motion for appointment of counsel as moot.

An appropriate Order follows.

[3] This dismissal counts as one of Plaintiff's three allotted dismissals under 28 U.S.C. § 1915(g). Under § 1915(g), if a prisoner has had a total of three federal cases or appeals dismissed as frivolous, malicious, or failing to state a claim, he may not file suit in federal court without prepaying the filing fee unless he is in imminent danger of serious physical injury.

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ORDER

AND NOW, TO WIT, this day of February, 2001, upon consideration of defendant Republic Tobacco, L.P.'s ("Defendant") Motion to Dismiss, the papers in support of and in opposition to said motion, and Plaintiff Mark McKay's ("Plaintiff") Motion for Appointment of Counsel, IT IS ORDERED that:

1) Defendant's motion to dismiss is GRANTED; and

2) Plaintiff's motion for appointment of counsel is DENIED AS MOOT.

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LOUIS C. BECHTLE, J.