[* 1]

SHORT FORM ORDER

INDEX No. 11-27103

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 2-14-12
ADJ. DATE 3-6-12
Mot. Seq. # 002 - MG

GEOFFREY MOTT,

Plaintiff,

- against -

JET SPORT ENTERPRISES, INC., STEVEN JENKINS, and BOMBARDIER RECREATIONAL PRODUCTS, INC.,

Defendants.

BARBARA LEE FORD, ESQ.
Attorney for Plaintiff
99 Tulip Avenue, Suite 104
Floral Park, New York 11001

MORENUS, CONWAY, GOREN & BRANDMAN
Attorney for Defendants Jet Sport Enterprises and Steven Jenkins
58 South Service Road, Suite 350
Melville, New York 11747

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorney for Defendant Bombardier Recreational Products
3 Gannett Drive
White Plains, New York 10604

Upon the following papers numbered 1 to 15 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 7 - 12; Replying Affidavits and supporting papers 13 - 15; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Bombardier Recreational Products Inc. for an order pursuant to CPLR 3211 (a) (1), (7), or 3211 (c), dismissing the complaint is granted to the extent of dismissing the plaintiff's complaint against Bombardier Recreational Products, Inc. pursuant to CPLR (a) (7), and is otherwise denied.

4-12-12

This is an action sounding in breach of warranty and negligence involving the alleged mechanical breakdown of two personal water craft, purchased by the plaintiff from the defendant Jet Sport Enterprises, Inc. (Jet Sport), and manufactured by the defendant Bombardier Recreational Products Inc. (BRP) under the model name Sea-Doo. In his complaint, the plaintiff sets forth four causes of action for negligent repair, negligent training and misrepresentation, breach of warranty, and negligent infliction of emotional distress, respectively.

According to the amended complaint and the affidavit submitted by the plaintiff herein[1], on or about March 25, 2011, the plaintiff purchased two Sea-Doos from Jet Sport, an "authorized servicer for BRP." All maintenance and repair work on the Sea-Doos was performed by the defendant Steven Jenkins (Jenkins), an employee of Jet Sport. On August 17, 2011, the plaintiff brought one of the Sea-Doos to Jet Sport for repairs. Two days later, when the plaintiff picked up the repaired Sea-Doo, he indicated to Jenkins that he planned to take the water craft on a trip across Long Island Sound, and he asked if it was safe to do so. Jenkins indicated that the Sea-Doo "was fine," and that the trip could take place as planned. On August 20, 2011, the plaintiff and a passenger, a friend of the plaintiff's son, set out on the trip. About one hour later, the Sea-Doo "began to sink," in about 100 feet of water, terrifying the plaintiff and his passenger. The two were rescued and, along with the Sea-Doo, they were returned to shore.

According to the plaintiff, "[s]hortly thereafter," he took a trip to the Connecticut River on the second Sea-Doo, only to find himself stranded there when the water craft became inoperable. When the plaintiff contacted Jenkins about the incident, Jenkins said, "We are learning as we go along. We do not really know what we are doing when it comes to Sea-Doos." The plaintiff then inquired as to the training Jet Sport received regarding the repair of Sea-Doos, and he was told that it consisted of an optional on-line training program. The two Sea-Doos were in the shop at Jet Sport from August 20, 2011 to September 17, 2011, when the plaintiff was notified that he could pick them up. Because he had lost confidence that the use of the Sea-Doos was safe, the plaintiff states that "he has not picked up the Sea-Doos, as based upon the foregoing I intend to exercise my right of recision."

BRP now moves for an order dismissing the complaint pursuant to CPLR 3211 (a) (1) and (7), or for an order granting summary judgment dismissing the complaint pursuant to CPLR 3211 (c). Pursuant to CPLR 3211(a) (1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Vitarelle v Vitarelle***, 65 AD3d 1034, 885 NYS2d 320 [2d Dept 2009]; ***Mazur Bros. Realty, LLC v State of New York***, 59 AD3d 401, 873 NYS2d 326 [2d Dept 2009]). In support of its motion, BRP submits the affirmation of its attorney, the pleadings, and a copy of the Sea-Doo Operating Guide (Guide).

---

[1] The allegations in the amended complaint, and the statements in the plaintiff's affidavit, are not disputed by the affidavit submitted in support of the motion. The recitation of the allegations and statements is not intended to indicate that the Court considers them to be facts except as required in deciding the instant motion.

The Court finds that the documents do not conclusively resolve all factual issues, nor do they establish a defense as a matter of law. The submitted documents do not establish that BRP has a defense as a matter of law regarding the plaintiff's claims that it is responsible for the alleged negligent repair of the water craft by Jet Sport, that it inadequately trained Jet Sport, that it breached the implied and express warranties herein, or that its negligence caused emotional harm to the plaintiff.

Pursuant to CPLR §3211(a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs ***(Leon v Martinez***, *supra*). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v. Martinez***, *supra*; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]; ***Thomas McGee v City of Rensselaer***, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi et al,*** 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

Here, a review of the complaint reveals that the plaintiff has not plead cognizable causes of action for negligent repair, negligent training and misrepresentation, breach of warranty, or negligent infliction of emotional distress against BRP. "An entity or individual that undertakes to make repairs on a product owes a duty to use reasonable care in repairing and inspecting the product for defects and in repairing the defects so that the product after repair will be reasonably safe for its intended or foreseeable uses" (PJI 2:125B; *see also* ***Smith v Man Ho Rope Mfg. Co.***, 233 AD2d 942, 649 NYS2d 880 [4th Dept 1996; ***Kalinowski v Truck Equip. Co.***, 237 AD 472, 261 NYS 657 [4th Dept 1933]). The complaint does not allege that BRP was involved in the repair of the Sea-Doos, that it undertook any duty to repair the Sea-Doos, or that it controlled or supervised the repairs made by Jet Sport and/or Jenkins. Thus, the plaintiff's first cause of action against BRP for negligent repair must be dismissed.

In addition, the plaintiff's third cause of action for breach of implied and express warranty fails to state a cause of action against BRP. Generally, New York courts require privity of contract in order to state a claim for breach of implied warranty (*see* ***Jaffee Assoc. v Bilsco Auto Serv.***, 58 NY2d 993, 461 NYS2d 1007 [1983]; ***Arthur Glick Leasing, Inc. v William J. Petzold, Inc.***, 51 AD3d 1114, 858 NYS2d 405 [3d Dept 2008]; ***Adirondack Combustion Techs., Inc. v Unicontrol, Inc.*** 17 AD3d 825, 793 NYS2d 576 [3d Dept 2005]; ***Miller v. General Motors Corp.***, 99 AD2d 454, 471 NYS2d 280 [1st Dept 1984], *affd* 64 NY2d 1081, 489 NYS2d 904 [1985]; ***Hole v General Motors Corp.***, 83 AD2d 715, 442 NYS2d 638 [3d Dept 1981]). Here, there is no allegation that there is a contract between plaintiff and BRP. In addition, the plaintiff did not plead an agency relationship between BRP and Jet Sport sufficient to create privity between the parties (*see* ***Lexow & Jenkins v. Hertz Commercial Leasing Corp.***, 122 AD2d 25, 504 NYS2d 192 [2d Dept 1986]; ***Antel Oldsmobile-Cadillac, Inc. v Sirus***

Leasing Co., Division of Sirus Enterprises, Inc., 101 AD2d 688, 475 NYS2d 944 [4th Dept 1984]; ***Utica Observer Dispatch, Inc. v Booth***, 106 AD2d 863, 483 NYS2d 540 [4th Dept 1984]).

However, New York has eliminated the privity requirement for claims alleging a breach of implied warranty where personal injury allegedly results from a defective product (*see e.g.* ***Codling v Paglia***, 32 NY2d 330, 345 NYS2d 461 [1973]). "The question thus presented is whether the implied warranties of merchantability and fitness run from a manufacturer to a remote purchaser, not in privity with the manufacturer, who has sustained no personal injury but only economic loss. Our interpretation ... leads us to conclude that it does not permit a plaintiff, not in privity, to recover upon the breach of an implied warranty of merchantability unless the claim of the remote user is for personal injuries" (***Lexow & Jenkins, P.C. v Hertz Commercial Leasing Corp.***, *supra* at 26, quoting ***Hole v General Motors Corp.***, *supra* at 716). Because the plaintiff does not have a cognizable claim for personal injury, as discussed below, he cannot maintain an implied warranty claim herein.

In addition, the plaintiff alleges a breach of express warranty based on language in BRP's brochure, entitled "2011 Operator's Guide (Guide)," which purportedly accompanied the water craft, and not on the language of the written warranty contained therein. "An express warranty can arise from the literature published about a product" (***Imperia v Marvin Windows of New York, Inc.***, 297 AD2d 621, 623, 747 NYS2d 35 [2d Dept 2002]; *see also* ***Randy Knitwear v American Cyanamid Co.***, 11 NY2d 5, 226 NYS2d 363 [1962]; ***Arthur Glick Leasing, Inc. v William J. Petzold, Inc.***, 51 AD3d 1114, 858 NYS2d 405 [3d Dept 2008]). However, a claim for breach of express warranty must set forth the terms of the warranty upon which the plaintiff relies (***Parker v Raymond Corp.***, 87 AD3d 1115, 930 NYS2d 27 [2d Dept 2011]; ***Davis v New York City Housing Auth.***, 246 AD2d 575, 668 NYS2d 391 [2d Dept 1998]; ***Valley Cadillac Corp. v Dick***, 238 AD2d 894, 661 NYS2d 105 [4th Dept 1997]; ***Copeland v Weyerhaeuser Co.***, 124 AD2d 998, 509 NYS2d 227 [4th Dept 1986]).

Here, the plaintiff's claim for breach of express warranty is based solely on the following language found at page one of the Guide:

> Congratulations on your purchase of a new Sea-Doo® personal watercraft (PWC). It is backed by the BRP warranty and a network of authorized Sea-Doo personal watercraft dealers ready to provide the part, service, or accessories that you may require. Your dealer is committed to your satisfaction. He has taken training to perform the initial setup and inspection of your watercraft as well as completed the final adjustment before you took possession. If you need more complete servicing information, please ask your dealer.

In his complaint, the plaintiff alleges that purchasers of Sea-Doos are lead to believe that work done by authorized dealers is being done by persons that have been "specifically trained by BRP for that purpose." When the terms of a written contract are clear and unambiguous, the contract should be enforced in accordance with the plain meaning of its terms (*see* ***Greenfield v Philles Records***, 98 NY2d 562, 750 NYS2d 565 [2002]; ***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]; ***Willsey v Gjuraj***, 65 AD3d 1228, 885 NYS2d 528 [2d Dept 2009]). Here, the only express warranty

made is that authorized dealers have been trained for the initial setup and inspection, as well as the final adjustments to the Sea-Doo, upon its sale. The complaint does not include an allegation that Jet Sport was not trained as represented in the Guide, nor does it include any allegations regarding the work done at the time that the plaintiff took possession of the two water craft. Thus making his claim for breach of express warranty subject to dismissal. In addition, based on the above analysis, the Court finds that the plaintiff has failed to state a cause of action for negligent training and misrepresentation against BRP. Accordingly, the plaintiff's second and third causes of action against BRP are dismissed.

The plaintiff's fourth cause of action seeks damages for negligent infliction of emotional distress. It is well settled that a cause of action for negligent infliction of emotional distress, like an action for intentional infliction of emotional distress, must be supported by allegations of conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community (***Tartaro v Allstate Indem. Co.***, 56 AD3d 758, 868 NYS2d 281 [2d Dept 2008]; ***Deak v Bach Farms, LLC***, 34 AD3d 1212, 825 NYS2d 852 [4th Dept 2006]; ***Sheila C. v Povich***, 11 AD3d 120, 781 NYS2d 342 [1st Dept 2004]; ***Dillon v City of New York***, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]; ***Stanley v Smith***, 183 AD2d 675, 584 NYS2d 60 [1st Dept 1992]). None of the exceptions to the general rule are applicable here.

Here, accepting the facts alleged in the complaint as true and interpreting them in the light most favorable to the plaintiff, the plaintiff fails to state a cause of action for negligent infliction of emotional distress. At best, the plaintiff's alleges a failure by BRP to ensure that Jet Sport took advantage of the training available to it, or to ensure that Jet Sport met some unnamed standard or degree of training. The plaintiff does not allege conduct which the court finds outrageous or sufficient to state a cause of action herein.

In addition, to the extent that the complaint can be read to assert a claim for emotional distress due to the plaintiff witnessing the fear of his passenger, it must be dismissed. "[W]here a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family–assuming, of course, that it is established that the defendant's conduct was a substantial factor bringing about such injury or death" (***Bovsum v Sanperi***, 61 NY2d 219, 473 NYS2d 357 [1984]; *see also* ***Jun Chi Guan v Tuscan Diary Farm***, 24 AD3d 725, 806 NYS2d 713 [2d Dept 2005]; ***DeAguiar v County of Suffolk***, 289 AD2d 280, 734 NYS2d 212 [2d Dept 2001]; ***Kurth v Murphy***, 255 AD2d 365, 679 NYS2d 690 [2d Dept 1998]). Here, the facts alleged by the plaintiff reveal that the passenger was not an immediate family member, nor was the passenger injured, fatally or otherwise.

In light of the Court's dismissal of the plaintiff's cause of action for negligent infliction of emotional distress, the first, second and third causes of action, dismissed herein, are further revealed to be untenable. The economic loss rule provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a purchaser where the claimed losses flow from damage to the property that is the subject of the contract and personal injury is not alleged or at issue (*see* ***Bocre Leasing Corp v General Motors Corp.***, 84 NY2d 685, 621 NYS2d 497 [1995]; ***New York Methodist Hosp. v. Carrier Corp.***, 68 AD3d 830, 892 NYS2d 110 [2d Dept 2009]; ***Weiss v Polymer***

Plastics Corp., 21 AD3d 1095, 802 NYS2d 174 [2d Dept 2005]; ***Atlas Air v General Electric Co.***, 16 AD3d 444, 791 NYS2d 620 [2d Dept 2005]; ***Amin Realty v K&R Construction Corp***., 306 AD2d 230, 762 NYS2d 92 [2d Dept 2003]). The rule is applicable to economic losses to the product itself as well as consequential damages resulting from the defect (*see* ***Bocre Leasing Corp v General Motors Corp***., *supra*; ***Weiss v Polymer Plastics Corp***., *supra*; ***Atlas Air v General Electric Co.***, *supra*).

That branch of the motion by BRP which seeks summary judgment pursuant to CPLR 3211 (c) is denied. Here, upon review of the papers, it cannot be said that the parties have deliberately charted such a course (*see* ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS2d 1 [1982]; ***Schultz v Estate of Sloan***, 20 AD3d 520, 799 NYS2d 246 [2d Dept 2005]; ***Singer v Boychuk***, 194 AD2d 1049, 599 NYS2d 680 [3d Dept], *lv denied* 82 NY2d 657, 604 NYS2d 556 [1993]). In addition, the Court deems the conversion of the motion to one for summary judgment to be academic.

Accordingly, BRP's motion to dismiss is granted to the extent of dismissing the plaintiff's complaint pursuant to CPLR 3211 (a) (7), and is otherwise denied.

Dated: July 11, 2012

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**