SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 650911/2013
MID ISLAND LP
vs
HESS CORPORATION
Sequence Number : 002
DISMISS DEFENSE

INDEX NO. _____
MOTION DATE 8/19/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 17-22
Answering Affidavits — Exhibits _____ | No(s). 25-26
Replying Affidavits _____ | No(s). 27, 30

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/2/13

SHIRLEY WERNER KORNREICH J.S.C
_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MID ISLAND LP d/b/a MADISON MANAGEMENT OF QUEENS and CARNEGIE PARK ASSOCIATES, L.P., on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

HESS CORPORATION,

Defendant.

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Index No.: 650911/2013

DECISION AND ORDER

KORNREICH, SHIRLEY WERNER, J.:

This putative class action arises out of allegedly adulterated fuel oil deliveries made by defendant Hess Corpration (Hess). Pursuant to CPLR 3211(a)(7), Hess moves to dismiss the complaint. Plaintiffs oppose. For the reasons that follow, the court dismisses the complaint with leave to replead.

I. Background

The following account is based on the complaint, which is taken as true for the purposes of this motion. Plaintiffs are New York limited partnerships which own apartment buildings in New York City; defendant Hess Corporation (Hess) is a Delaware corporation that, among other things, sells and distributes fuel oil, used to heat homes and other buildings, throughout New York City, Westchester and Long Island. Fuel oil comes in a variety of grades, including No. 4, which is used in modern commercial and residential buildings, and No. 6, which is used in older commercial and residential buildings. The specifications for these grades, and others, are set

forth in the Standard Specification for Fuel Oils established by the American Society for Testing and Materials in a document known as ASTM D396.

To deliver the fuel to its customers, Hess employs third-party trucking companies. Plaintiffs allege that rather than filling their entire tank with Hess's fuel, the trucks (not owned or controlled by Hess) would "frequently" first stop at a separate facility (also not owned or controlled by Hess), which would fill their tanks with oil that had already been used for some other purpose (complaint ¶ 20). The trucks would then proceed to Hess and fill the rest of their tanks with Hess's heating oil (*id.*).[1] This mixture of third-party used oil and Hess's oil would then be delivered to Hess's customer. Plaintiffs Mid Island LP and Carnegie Park Associates L.P. point to two particular deliveries they respectively received, one on March 3, 2010 and one on July 9, 2010, where they maintain that the fuel oil delivered was partially comprised of used oil. Plaintiffs maintain that in each instance they were given, on behalf of Hess, a delivery ticket identifying the oil shipment as heating oil. Plaintiffs claim that this pattern of Hess delivering heating oil cut with used oil was widespread and persisted over the course of a number of years. It is not alleged that Hess was ever aware that this practice was taking place.

On March 13, 2013, more than two and a half years after the deliveries mentioned above, plaintiffs' counsel sent a letter to Hess notifying it that they believed that Hess had breached its warranty that the products delivered were fuel oil. The next day, plaintiffs commenced this putative class action on behalf of themselves and all other persons who purchased No. 4 or No. 6

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[1] At oral argument, plaintiffs' counsel instead stated that *first* the truck loaded up with Hess oil, and *then* siphoned off a portion of that oil, replacing it with used oil (transcript, Aug. 15, 2013, 16:12–20). Counsel later appeared to revert to the complaint's narrative (*id.* at 39:24–40:2).

fuel oil from Hess but actually received a product that had been mixed with used oil. The complaint seeks money damages and a permanent injunction against the practices described, positing causes of action for breach of warranty under the Magnuson-Moss Warranty Act and the Uniform Commercial Code, violation of General Business Law § 349, breach of contract, negligence and unjust enrichment. With the filing of the complaint, plaintiffs simultaneously sought a preliminary injunction prohibiting Hess from selling or delivering fuel oil that did not comply with certain regulations promulgated by the State or City of New York. The motion was settled on stipulation, with Hess agreeing to refrain from delivering No. 4 or No. 6 oil that failed "to conform to the specifications set forth in the applicable laws and regulations" and to put in place a protocol to check the contents of randomly selected tanker trucks that came to pick up fuel oil for delivery to Hess's customers (order, March 21, 2013). Hess now moves to dismiss the complaint in its entirety.

II. Standard

On a motion to dismiss the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty* Corp., 60 NY3d 491 [2009]; *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [citing *McGill v Parker*, 179 AD2d 98, 105 (1992)]; *Mazzai v Kyriacou*, 98 AD3d 1088, 1090 [2d Dept 2012]; *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 [1998]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames*, *id.* [citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff

(*Amaro,* 60 NY3d at 491). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames*, 1 AD3d at 250 [citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994)]).

III. Discussion

A. Breach of Warranty

At the heart of the complaint is the claim that Hess failed to deliver the No. 4 fuel oil that plaintiffs ordered. It is important, however, to be clear on what plaintiffs do *not* allege. It is not claimed that the fuel ultimately delivered to plaintiffs deviated from any of the actual requirements for No. 4 fuel oil laid out in ASTM D396. While plaintiffs assert that the oil that Hess delivered contained a "lower heat content" than the fuel that they ordered (complaint, ¶ 28), they do not specify what level of "heat content" they believed they would be getting, nor are there any allegations about the product's actual performance. While plaintiffs assert that Hess's oil damaged their boilers, they are not seeking compensation for those damages (plaintiffs' brief 20). Rather, the crux of plaintiffs' claim is that the simple fact that Hess's oil delivery allegedly contained substantial amounts of used oil means that what Hess delivered was not "heating oil," and that they are therefore entitled to the difference between what they (and all others similarly situated) paid and the value of whatever it is that they actually received (*see* transcript, Aug. 15, 2013, 20:6–15).

Under New York's Uniform Commercial Code, "[a]ny description of [] goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to

the description" (UCC 2–313 [b]). Plaintiffs have cited to no statute, case or regulation which defines what compounds or products may or may not be legally sold as "heating oil" or "fuel oil."[2] As far as can be discerned from the complaint and the submissions on this motion, the standard against which plaintiffs seek to hold defendant's product is their own invention, with no authority, legal or otherwise, supporting their contention that a mixture of used oil and new oil cannot properly be called "fuel oil". However, the mere fact that Hess does not agree with plaintiffs' interpretation of the term is immaterial at this stage in the proceedings. It would be plaintiffs' burden to prove that the term "fuel oil" means what they claim it means, and if the term remains unclear or ambiguous, its meaning would be resolved by the trier of fact (*see, e.g., Frigaliment Importing Co. v B.N.S. Intl. Sales Corp.*, 190 FSupp 116 [SDNY 1960] [Friendly, J.] ["The issue is, what is chicken?"]).

The problem with plaintiffs' claim is not the basis, or lack thereof, of their contention that what was delivered did not match Hess's description, but the question of why the discrepancy matters, i.e., how plaintiffs were harmed. It appears that plaintiffs were completely unaware that the oil they had received in 2010 was defective until they were so informed by their current counsel years later (complaint ¶¶ 16, 62; plaintiffs' brief 9).[3] So while plaintiffs have claimed that Hess's fuel was defective because its "heat content" was lower than what they had ordered, they appear to have been oblivious to this supposed shortfall until counsel apprised them that the

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[2] While the complaint refers to certain environmental regulations concerning fuel oil, those regulations are inapplicable here (*see BMW Group LLC v Castle Oil Corp.*, Sup Ct, NY County, Apr. 29, 2013, Kornreich, J., index No. 650910/2013).

[3] Counsel had apparently discovered the addition of used oil through their own investigation prior to their retention by plaintiffs (transcript, 30–32).

chemical contents of the fuel were not what they thought they were. The claim for damages, therefore, does not appear to be based on any injury sustained through the use of the oil, but rather on the supposed difference in value between "pure" fuel oil and the product that was delivered. But plaintiffs are not oil merchants, and fuel oil is neither a durable good nor a collector's item: it is bought to be burned. It makes little sense to premise an action on the claim that Hess overcharged for its fuel, where plaintiffs apparently burned the fuel without a problem and have not identified how they were disappointed with the product's performance or a failure to comply with a warranty as to heat content (or anything else) upon which they actually relied. It is neither the court's task nor the defendant's to speculate as to plaintiffs' injury. If plaintiffs have been harmed, they should explain how, rather than take refuge in scholastic inquiries into the true nature of fuel oil. Accordingly, the complaint is dismissed in its entirety, with leave to replead.

B. UCC Notice

Even assuming that the complaint was sufficiently clear on the question of plaintiffs' injury, other problems exist in regard to the pleadings. Under the UCC, a delivery of goods is presumed to be conforming unless the buyer notifies the seller otherwise. A buyer may reject goods as non-conforming by giving notice of rejection within a "reasonable time after their delivery or tender" (UCC 2-602). A failure to timely reject the goods constitutes an acceptance of the delivery (UCC 2-606). While acceptance obligates the buyer to pay the contract price, it does not necessarily foreclose his right to recover if the goods are nonconforming; however the buyer must give notice of the nonconformity "within a reasonable time of after he discovers or should have discovered [it] . . . or be barred from any remedy" (UCC 2-607).

At the most basic level, these requirements are consistent with the general scheme of Article Two of regulating the buyer/seller relationship through presumptions which become irrebuttable if timely affirmative action is not taken (*see* UCC 2-605 [certain objections to rejected goods waived if not timely stated]; UCC 2-615 [seller must "seasonably" give notice of excusable delay to avoid breach]; UCC 2-616 [upon receipt of such notice, buyer must give notice within thirty days if he wishes to terminate or modify contract]). After acceptance, the seller is entitled to believe that the transaction has satisfactorily ended, and it is the buyer's duty to inform him otherwise or waive his objections. The notice of breach, therefore, is simply required to disabuse the seller of the notion that the rights of the parties have been fully determined.

Timely commencing litigation through a formal complaint would obviously accomplish this task (*see Panda Capital Corp. v Kopo Intl., Inc.*, 242 AD2d 690, 692 [2d Dept 1997]). Various ancillary virtues have been attributed to the 2-607 notice, such as affording the seller the opportunity to investigate the claim while the facts are fresh, take whatever steps it deems necessary to defend itself or offer a cure or remedy (*see, e.g., Standard Alliance Indus., Inc. v Black Clawson Co.*, 587 F2d 813, 826 [6th Cir 1978]; William D. Hawkland, 2 Uniform Commercial Code Reporting Service, 2-607:4). However, the mere fact that the buyer has chosen to drag the seller into court in the first instance does not prevent the seller from doing any of these things; indeed, the normal rules of civil procedure are designed to accomplish exactly these tasks within the litigation process. The court notes, moreover, that in contrast to rejection (UCC 2-508), the seller has no *right* to cure accepted nonconforming goods. The UCC does not

require pre-action mediation, and the court will not read Section 2-607 as creating such an obligation.

The second cause of action alleges breach of warranty under the Uniform Commercial Code. The fact that plaintiffs here delivered a notice of breach to Hess merely a day prior to commencing this action is immaterial under the UCC. However, the timeliness of the notice given is at issue. The complaint makes allegations about two particular deliveries in 2010, while notice was given nearly three years later, on March 13, 2013. Section 2-607 allows notice to be given within a reasonable time of discovery, and the complaint is silent as to when the plaintiffs discovered the supposed breach, instead offering a legally conclusory statement that notice was given within a reasonable time thereof (complaint ¶ 53). As the preservation of the claim through timely notice is a condition precedent to bringing an action for breach of warranty, it is plaintiffs' burden to plead and prove timely notice, which they have failed to do (*Wayne County Vinegar & Cider Corp. v Schorr's Famous Pickled Prods., Inc.*, 118 Misc2d 52, 61–62 [Civ Ct, Kings County 1983]; *see also Regina Co. v Gately Furniture Co.*, 171 AD 817, 821 [3d Dept 1916]). For this reason, the UCC claim must be dismissed, with leave to replead.

C. Magnuson-Moss Act and General Business Law § 349

Plaintiffs have also cited the federal Magnuson-Moss Warranty Act (the Act) and Section 349 of New York's General Business Law as separate grounds for relief. The Act provides a private right of action in any state or federal court to "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation . . . under a written warranty, implied warranty or service contract" (Magnuson-Moss Warranty Act, 15 USC § 2310 [d] [1]). The Act defines a "consumer" as "a buyer . . . of any consumer product" (*id.* at § 2301

[3]), and a "consumer product" is defined as "any tangible personal property which is distributed in commerce and which is normally used for personal, family or household purposes" (*id.* at § 2301 [1]). This definition excludes products designed for commercial use (*Kwiatkowski v Volvo Trucks N. Am., Inc.*, 500 FSupp2d 875, 877 [ND Ill. 2007] [dismissing claims concerning tractor-trailers]; *People v Cent. Sprinkler Corp.*, 174 FSupp2d 824, 828–30 [CD Ill. 2001] ["Because their normal use is commercial, these sprinklers are not consumer products."]; *Essex Ins. Co. v Blount, Inc.*, 72 FSupp2d 722, 723 [ED Tex. 1999] [dismissing claims relating to sale of a "heavy piece of timber equipment . . . designed almost exclusively for commercial use"]; *Walsh v Ford Motor Credit Co.*, 113 Misc2d 546, 547 [Sup Ct, Albany County 1982] [denying, on reargument, motion to amend complaint to add claims under the Act pertaining to sale of tractor-trailer]).

Section 349 of the General Business Law prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce" (General Business Law § 349 [a]), and grants a private right of action to "any person who has been injured by reason of a violation of this section" (*id.* at § 349 [h]). The statute is "directed at wrongs against the consuming public," and so, "as a threshold matter, plaintiffs claiming the benefit of section 349 . . . must charge conduct of the defendant that is consumer-oriented" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 24, 25 [1995]). Much like in the Act, "[i]n New York law, the term 'consumer' is consistently associated with an individual or natural person who purchases goods, services or property primarily for personal, family or household purposes" (*Cruz v NYNEX Info. Resources*, 263 AD2d 285 [1st Dept 2000] [citations omitted]). Thus, while a plaintiff need not be a consumer to sue for deceptive consumer-oriented conduct under

Section 349 (*see, e.g., N. State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5 [2d Dept 2012]), no action under Section 349 can be maintained where the complained of conduct was directed towards the purchasers of goods or services which are not meant for the general public (*Med. Socy. of the State of NY v Oxford Health Plans, Inc.*, 15 AD3d 206 [1st Dept 2005] [dismissing action brought by medical society alleging deceptive practices directed at physicians]; *Sheth v NY Life Ins. Co.*, 273 AD2d 72, 73 [1st Dept 2000] [dismissing claim for allegedly deceptive practices directed at insurance agents]; *Cruz*, 263 AD2d at 291 [dismissing claim alleging false advertising concerning ad space in Yellow Pages, on grounds that such space is "a commodity available to businesses only"]; *see also Weiss v Polymer Plastics Corp.*, 21 AD3d 1095 [2d Dept 2005] [affirming summary judgment dismissing deceptive practices claim by homeowner against manufacturer of building material, where "[t]he transaction . . . was between two companies in the building construction and supply industry"] *citing St. Patrick's Home for the Aged & Infirm v Laticrete Intl., Inc.*, 264 AD2d 652, 655 [1st Dept 1999]).

No. 4 and No. 6 oil are not consumer products. They are used to fuel the boilers of large buildings, and are procured by businesses, like the named plaintiffs, who manage and maintain those buildings. That some of those buildings may be residential does not transform these fuels into consumer products nor does it make Hess's representations about the fuel a consumer-oriented trade practice (*see Weiss*, 21 AD3d at 1097; *Miller v Herman*, 600 F3d 726 [7th Cir 2010] [dismissing plaintiff homeowner's claims under Act against manufacturer of windows incorporated into plaintiff's home]). Simply put, No. 4 and No. 6 oil are never bought for "personal, family or household purposes," but rather to fuel commercial or industrial burners run

by building staff. Accordingly, plaintiffs' first and third causes of action are dismissed with prejudice.

D. Other Claims

As the deliveries were made pursuant to a written contract, a cause of action for unjust enrichment is inappropriate (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [*citing Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 (2005)] *accord Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987] ["existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]). Plaintiffs' negligence claim also fails, as the complaint does not allege that Hess breached any legal duty independent of its contract (*Sommer v Fed. Signal Corp.*, 79 NY2d 540, 551 [1992]). Plaintiffs' reliance on General Business Law Section 391-a, which, among other things, prohibits the sale of liquid fuels "in any manner . . . so as to deceive or tend to deceive the purchaser as to the nature, quality, and identity of the product so sold," is unavailing, as "the public's interest in compliance with a statutory or regulatory scheme is not sufficient to create tort liability" (*Verizon v Optical Communications Group, Inc.*, 91 AD3d 176, 182 [1st Dept 2011]). Only where a breach of contract could have "catastrophic consequences" for the general public will it be held that a statutory regime has the effect of making contractual compliance a source for a duty of care (*id.* [*citing NY Univ. v Cont. Ins. Co.*, 87 NY2d 308, 317 (1995)]). This is hardly the case here, where the alleged misconduct is at most claimed to have possibly shortened the life span of certain boiler equipment, a claim that, as noted, plaintiffs have disavowed any interest in pursuing. "[W]here plaintiff is essentially seeking enforcement of the bargain, the action should

proceed under a contract theory" (*Sommer*, 79 NY2d at 552 [citations omitted]). Consideration of defendant's objections to class certification will be deferred until a new complaint has been filed and a motion for class certification has been made. Accordingly, it is

ORDERED that the motion of defendant Hess Corporation to dismiss the complaint of plaintiffs Mid Island LP d/b/a Madison Management of Queens and Carnegie Park Associates, L.P. with prejudice, is granted to the extent of dismissing the first, third, fifth, and sixth causes of action with prejudice, and dismissing the second and fourth causes of action without prejudice; and it is further

ORDERED that plaintiff is granted leave to serve an amended complaint repleading the second and fourth causes of action within 10 days after service on plaintiffs' attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event plaintiff fails to serve and file an amended complaint in conformity herewith within such time, the Clerk, upon service of a copy of this order with notice of entry and an affirmation by defendants' counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice.

Dated: December 2, 2013

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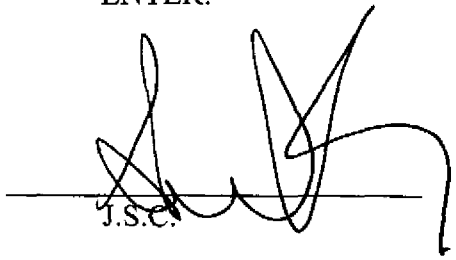

J.S.C.