Gasque v Motor Coach
2017 NY Slip Op 30171(U)
January 27, 2017
Supreme Court, Tompkins County
Docket Number: 2016-0427
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 2nd day of December, 2016.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

MAJOR LISA GASQUE,

Plaintiff,

-vs-

THOR MOTOR COACH and MEYERS RV CENTER, LLC d/b/a CAMPING WORLD RV SALES

Defendants.

DECISION AND ORDER

Index No. 2016-0427
RJI No. 2016-0435-M

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon motion of Thor Motor Coach ("Thor") and Meyers RV Center, LLC d/b/a Camping World RV Sales ("Camping World") (Collectively "Defendants") seeking dismissal of various causes of actions asserted by Major Lisa Gasque ("Gasque"), *et al* (collectively "Plaintiffs")[1]. Defendants' motion is made pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(7). Plaintiffs move to file, and serve, an amended complaint pursuant to CPLR §3025.

On April 9, 2015, Gasque purchased a new Class A Thor Motor Coach recreational vehicle ("RV") from Camping World for $84,832.60. Gasque immediately noticed some alleged deficiencies in the workmanship and operation of the RV. The RV was returned to Camping World on multiple occasions for repair. Gasque continued to identify alleged deficiencies, both major and minor. Plaintiff also contacted Thor, the manufacturer of the RV, on a number of occasions seeking redress of the claimed deficiencies in the new RV. Thor advised that the claimed deficiencies were either covered by one of three warranties, including a chassis warrant, through Ford. Other deficiencies fell under warranties from Camping World, or were part of Camping World's responsibilities as part of "dealer prep".

On July 26, 2015, Gasque was driving the RV with five passengers in the vehicle when it caught on fire in the engine area. The passengers fled the vehicle. Several passengers (the other potential Plaintiffs) sustained injuries. The RV was towed to an authorized Ford repair shop, and Plaintiff was told that the Ford warranty on the chassis had expired.

The Plaintiffs commenced this action by the filing of a Summons and Complaint on June 30,

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[1]Plaintiff has also sought to file an amended complaint, which seeks to add additional Plaintiffs, and accordingly, this Decision and Order refers to Plaintiffs in the plural.

2016 asserting various causes of action against Defendants. Defendants filed the instant pre-answer motion to dismiss pursuant to CPLR §3211. Plaintiff cross moved to amend her complaint.

Motion to Amend Complaint

Pursuant to CPLR 3025(a), "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." A motion to dismiss a complaint pursuant to CPLR §3211(a) extends "defendants' time to answer (see CPLR 3211 [f]) until 10 days after service of notice of entry of the order determining that motion, and similarly extend[s] the time within which the plaintiffs could serve an amended complaint as of right" *Re-Poly Mfg. Corp. v. Dragonides*, 109 AD3d 532, 534-535 (2nd Dept. 2013), *see* CPLR 3025 [a]; *Johnson v. Spence*, 286 AD2d 481, 483 (2nd Dept. 2001); *STS Mgt. Dev. v. New York State Dept. of Taxation & Fin.*, 254 AD2d 409, 410 (2nd Dept. 1998).

In the present matter, Plaintiffs submitted the motion to amend the complaint, with the amended complaint, by cross motion in response to the Defendants motion to dismiss. As the Defendants' time to answer was extended by their motion to dismiss, Plaintiffs were entitled to amend their complaint as of right pursuant to CPLR §3025(a). Therefore, Plaintiffs' motion to amend and file their complaint is **GRANTED**. The Court will consider Defendants' motion to dismiss in the context of the Amended Complaint.

Motion to Dismiss Complaint

"In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction". *Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, 326 (2002), *see Leon v.*

Martinez, 84 NY2d 83, 88 (1994). The Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory". *Goldman v. Metropolitan Life Ins.*, 5 NY3d 561, 571-572 (2005); *see Arnav Indus.v. Brown, Raysman, Millstein, Felder & Steiner*, 96 N.Y.2d 300, 303 (2001); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

"Dismissal pursuant to CPLR 3211 (a) (1) may be warranted if there is documentary evidence that conclusively establishes a defense to a claim as a matter of law." *Maldonado v. DiBre*, 140 AD3d 1501, 1505 (3rd Dept. 2016; *see New York State Workers' Compensation Bd. v. Consolidated Risk Servs., Inc.*, 125 AD3d 1250, 1256 (2015); *see also, Leon, supra* at 88. To prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the movant must demonstrate that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *R.I. Is. House, LLC v. North Town Phase II Houses, Inc.*, 51 AD3d 890, 893 (2nd Dept. 2008), *quoting Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, 326 (2002); *see HSBC Bank USA, N.A. v. Decaudin*, 49 AD3d 694, 695 (2008). "Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable." *Ganje v. Yusuf,* 133 AD3d 954, 956-957 (3rd Dept. 2015); *citing Midorimatsu, Inc. v. Hui Fat Co.*, 99 AD3d 680, 682 (3rd Dept. 2012), *lv dismissed* 22 NY3d 1036 (2013) (internal quotation marks and citations omitted).

On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, the court "must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the [nonmoving party] the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory." *NYAHSA Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 141 AD3d 785, 788 (3rd Dept. 2016); *Torok v. Moore's Flatwork & Founds., LLC*, 106 AD3d 1421, 1421 (2013) [internal quotation marks and citation omitted]; *see Tenney v. Hodgson Russ*, LLP, 97 AD3d 1089, 1090 (2012).

1st Cause of Action - General Business Law §349

To state a claim under GBL § 349, a plaintiff must allege that: (1) the deceptive act or practice was consumer-oriented; (2) the deceptive act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result. *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009); *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 205-6, (2004). An act is deemed consumer oriented where "the acts or practices have a broader impact on consumers at large." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 NY2d 20, 25 (1995). "Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute" *Id.* at 25.

In the present matter, in the Amended Complaint, the Plaintiffs arguably submit allegations of misrepresentation and harm to the Plaintiffs. However, the Plaintiffs fail to allege facts to support an allegation of "broader impact on consumers at large". Rather, as pled, the Plaintiffs are alleging an individual contract dispute unique to the parties. Therefore, Plaintiffs' first cause of action is **DISMISSED**.

2nd Cause of Action - Fraudulent Misrepresentation

The elements of a fraud cause of action consist of "'a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'" *Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 178 (2011), *quoting Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 412 (1996); *see Eurycleia Partners, LP v. Seward & Kissel*, LLP, 12 NY3d 553, 559 (2009). However, "if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him [or her] of knowing, by the exercise of ordinary intelligence, the truth …

of the ... representation, he [or she] must make use of those means, or he [or she] will not be heard to complain that he [or she] was induced to enter into the transaction by misrepresentations." *Schumaker v. Mather*, 133 NY 590, 596 (1892); *see Tanzman v. La Pietra*, 8 AD3d 706, 707 (2004); *Cohen v. Colistra*, 233 AD2d 542, 543 (1996).

In the present matter, Plaintiffs allege that Camping World represented that the RV was new, when they clearly knew that it was not. Specifically, the vehicle odometer indicated that there the RV had been driven more than 900 miles. Plaintiffs allege that Gasque noticed various issues of wear and tear during the initial drive home. In addition, although the vehicle came with a one year warranty on the chassis, this had nearly expired at the time of the sale. Camping World argues that although the vehicle may have been represented as "new", it should have been obvious to Gasque that it was not new based upon the odometer reading. Additionally, any wear and tear issues could have been easily discovered through proper inspection by the Gasque.

Here, Camping World has not denied that the RV was presented to Gasque as new. Rather, it argues that Gasque should have known it was not new. However, "whether a purchaser reasonably relied on a falsehood or instead should have ascertained the truth through the exercise of reasonable diligence is ordinarily a factual issue for resolution by the finder of fact." *Revell v. Guido*, 101 AD3d 1454, 1457 (3rd Dept. 2012); *see DDJ Mgt., LLC v. Rhone Group L.L.C.*, 15 NY3d 147, 155-156 (2010). It may well be that in the context of a summary judgment motion, a further developed record would allow the Court to more clearly discern whether there are material issues of fact. However, in the context of a motion to dismiss pursuant to CPLR §3211, and giving the Plaintiffs the benefit of every possible favorable inference, the Court finds that the Plaintiffs have stated a cause of action for fraudulent misrepresentation.

Therefore, the Court finds that the Defendants' motion to dismiss the second cause of action is **DENIED**.

Third Cause of Action - Fraudulent Nondisclosure

"New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment." *Simone v. Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 520 (2nd Dept. 2007). "To maintain a cause of action to recover damages for active concealment in the context of a fraudulent nondisclosure, the buyer must show, in effect, that the seller thwarted the buyer's efforts to fulfill the buyer's responsibilities fixed by the doctrine of caveat emptor." *Simone v. Homecheck Real Estate Servs, Inc.*, 42 AD3d 518 (2nd Dept. 2007).

Plaintiffs allege that Camping World failed to disclose numerous mechanical issues and deficiencies that were known to it. Plaintiffs offer a factual basis for concluding that Defendant knew of the problems. Plaintiffs allege that an agent of Camping World acknowledged that they were aware of steering issues which required repair. However, the steering issues were not disclosed to the Plaintiffs at the time of purchase. They further allege that this material nondisclosure was a significant in the Gasque's decision to purchase the RV.

The Court finds that the Plaintiff has stated a cause of action for fraudulent nondisclosure and as such, the Defendants motion to dismiss the third cause of action is **DENIED**.

Fourth Cause of Action - Negligence *Per Se*

Plaintiffs argue that Camping World's alleged submission of a Motor Vehicle Retail Certificate in which the RV was noted as "new" is a violation of PL §210.45 by knowingly making a false statement in a written instrument on a document bearing a notice that such false statements are punishable. Plaintiffs submit that violation of this penal law provision gives rise to a tort claim of negligence *per se*. Defendants correctly point out that PL §210.45 does not explicitly create a

private cause of action. Plaintiffs assert that the violation of the statute gives rise to a claim of negligence *per se*.

"As a rule, violation of a State statute that imposes a specific duty constitutes negligence *per se*, or may even create absolute liability." *Elliott v. City of New York*, 95 NY2d 730, 734 (2001). However, a finding of negligence *per se* always involves claims of actual negligence. *See e.g. DiGiulio v. Gran, Inc.*, 17 NY3d 765 (2011); *Kopsachilis v. 130 E. 18 Owners Corp.*, 11 NY3d 512 (2008); *R.M. Kliment & Frances Halsband, Architects v. McKinsey & Co.*, 3 NY3d 538 (2004); *Bauer v. Female Academy of the Sacred Heart*, 97 NY2d 445 (2002). The Court finds no authority for the proposition that the violation of a statute outside of the context of a negligence claim can give rise to a claim of negligence *per se*. Therefore, the Court will address this cause of action as it *may* pertain to the facts giving rise to Plaintiffs' eighth cause of action sounding in negligence.

The Plaintiffs allege that they were "injured" by a representative of Camping World submitting a Department of Motor Vehicles document which described the RV as new. However, the Plaintiffs fail to plead any facts which would connect this filing of an alleged "false document" with the physical injuries sustained. Additionally, the Court can find no authority for the proposition that PL §210.45 was intended to prevent injuries of the sort sustained by some of the Plaintiffs.

Therefore, the Defendants' motion to dismiss Plaintiffs' fourth cause of action pursuant to CPLR 3211(a)(7) is **GRANTED** and Plaintiffs' fourth cause of action is **DISMISSED**.

Fifth Cause of Action - UCC §2-314

As a general principal, in a breach of warranty of merchantability claim, Plaintiff must allege that the product is not fit for the ordinary purposes for which such goods are used. *Bradley v. Earl B. Feiden, Inc.*, 8 NY3d 265, 273 (2007). However, an implied warranty of merchantability may be

waived pursuant to UCC §2-316(2). To be enforceable, such a waiver "must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous." UCC §2-316 (2). Defendants move to dismiss this cause of action pursuant to CPLR §3211(a)(1) alleging that any implied warranty of merchantability was explicitly waived in the contract of sale.

In the present matter, Plaintiffs, in their complaint, allege that the RV was not fit for ordinary purposes for which such goods are used and cites various deficiencies rendering the RV unuseable. Plaintiffs argue that the waiver of implied warranties of merchantability are unconscionable and therefore unenforceable.

A review of the contract of sale between Camping World and Plaintiffs reveals an explicit waiver of the implied warranty of merchantability. The waiver is clear and conspicuous. The waiver is typed in all capital letters and was readily accessible to Gasque. Therefore, Camping World did not provide any implied warranty of merchantability.

Plaintiff asserts that the waiver is unconscionable. "As a general proposition, unconscionability, a flexible doctrine with roots in equity ...requires some showing of 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *Matter of State of New York v. Avco Fin. Service, Inc.*, 50 NY2d 383, 389 (1980). For a waiver of implied warranty to be unconscionable, Plaintiff must allege a procedural unconscionability concerning the contract formation process and the alleged lack of meaningful choice or the substantive unconscionability which looks to the content of the contract. *State v. Wolowitz*, 96 AD2d 47, 68 (2nd Dept. 1983).

In the present matter, Plaintiffs have failed to allege either procedural or substantive unconscionability. Rather, the complaint fails to raise any issue regarding the waiver of the implied warranty of merchantability. Plaintiffs' fifth cause of action merely alleges that the RV was not fit for ordinary purposes, but fails to even address the issue of the explicit waiver of the

implied warranty of merchantability.

Therefore, the Court finds that pursuant to CPLR §3211(a)(1), the Camping World has offered documentary evidence that conclusively establishes a defense of waiver to the Plaintiffs' fifth cause of action.

The Court reaches a different conclusion with regard to Thor. Typically, parties need to be in privity for an implied warranty of merchantability to arise. *See Arthur Glick Leasing, Inc. v. William Petzold, Inc.*, 51 AD3d 1114 (3d Dept. 2008). However, where personal injuries are alleged, as they are in the seventh and eighth causes of action, a manufacturer who is not in privity with the consumer can be found liable for those injuries based upon an implied warranty of merchantability. *See Denny v. Ford Motor Co.*, 87 NY2d 248 (1995). Although there is some overlap between a claim under UCC §2-314 and a claim of products liability, it cannot be said that the claims are duplicative. *Id.* at 259. Therefore the Court finds that the physically injured Plaintiffs have pled, and may assert, a claim for breach of implied warranty of merchantability against Thor.

Therefore, Defendants' motion to dismiss Plaintiffs' fifth cause of action pursuant to CPLR §3211(a)(1) is **GRANTED** with regard to Camping World but **DENIED** with regard to Thor.

6th Cause of Action - UCC §2-608

The Plaintiffs allege a of revocation of acceptance against Camping World pursuant to UCC §2-608. Camping World argues that without an implied warranty of merchantability (or other warranty), there can be no claim for revocation under UCC §2-608.

Under UCC §2-608, a "buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it..." However, where there are no express or implied warranties, revocation pursuant to UCC §2-608 is not available.

Spano v. Domenick's Collision, 50 Misc.3d 143(A) (2016). In other words, where an individual accepts a product without warranty, they cannot later argue that it is non-conforming.

The Court having previously found that the implied warranty of merchantability was expressly disclaimed, finds that the Plaintiff cannot assert a claim for revocation pursuant to UCC §2-608.

Therefore, the Defendants motion to dismiss Plaintiffs' sixth cause of action is **GRANTED.**

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: January 17, 2017
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice