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SHORT FORM ORDER

INDEX NO.: 009653-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Original Motion Dates: 02-19-2013 & 05-21-2013
Motion Submit Date: 02-11-2014
Motion Sequence Nos.: 002 & 003: MOTD

[ ] Final
[x] Non Final

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JOKA INDUSTRIES INC.,

Plaintiff,

- against -

DOOSAN INFRACORE AMERICA CORPORATION and 21 ST CENTURY MACHINE TOOLS, INC.,

Defendants.

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ORDERED that the Plaintiff's motion for summary judgment and for a protective order (Mot. Seq. 002) and the Defendants' cross-motion for summary judgment or, alternatively, for an order pursuant to CPLR 3124 or 3126 (Mot. Seq. 003), are decided as set forth below.

Background

In this action, *inter alia*, to recover damages for breach of warranty and breach of contract, the plaintiff, Joka Industries, Inc. ("Plaintiff") moves (Mot. Seq. 002) for a protective order pursuant to CPLR 3103 and for partial summary judgment on the issue of liability on its causes of action for

breach of contract, breach of express warranty, breach of implied warranty of fitness for a particular purpose, and fraud in the inducement. The defendants, Doosan Infracore American Corp. ("Doosan") and 21st Century Machine Tools, Inc. ("21st Century") (collectively "Defendants") oppose Plaintiff's motion and cross-move (Mot. Seq. 003) to strike the Plaintiff's complaint pursuant to CPLR 3126 or, alternatively, for summary judgment dismissing the plaintiff's complaint.

At a settlement conference before the Court on June 12, 2013, counsel for the parties agreed to have the Court decide that branch of Defendants' cross-motion that seeks dismissal of Plaintiff's fifth cause of action for incidental and consequential damages and hold the Plaintiff's motion and the remainder of Defendants' cross-motion in abeyance pending a further settlement conference before the Court. By order dated August 12, 2013, the Court (1) granted that branch of Defendants' cross-motion seeking dismissal of the fifth cause of action for incidental and consequential damages, and (2) held the Plaintiff's motion and the remaining branches of Defendants' cross-motion in abeyance pending further settlement conferences with the Court. Settlement conferences were held on September 12 and November 13, 2013, but a settlement agreement could not be reached. Thus, the Court now decides the Plaintiff's motion and the remaining branches of the Defendants' cross-motion.

Plaintiff manufactures aerospace parts for use in numerous applications including commercial airplanes and missiles for the United States military. On July 13, 2007, 21st Century provided Plaintiff with a written proposal for the sale of a Doosan MX2500ST High Performance Multi-Axis ATC Milling and Turning Center with B-axis ("MX2500"). With its proposal, 21st Century provided a copy of its "Standard Terms and Conditions Governing the Sale of Products and Services", a "LIMITED WARRANTY" provided by Doosan, as well as the features and

specifications of the MX2500 as set forth by Doosan.

After negotiations between the parties, Plaintiff issued Purchase Order #11672 dated September 17, 2007, signed by Roger Chhabra on behalf of Plaintiff. The Purchase Order provides, in relevant part:

> Terms and Conditions:
>
> > Warranty: 2 years On Site Parts and Labor, Spindle Bearing Guaranteed for 3 years parts and labor
> >
> > * * *
> >
> > Doosan Spindle Availability Guarantee is part of this order.
> >
> > * * *
> >
> > Doosan Agrees to a return clause which states that if machine does not hold tolerances or is down 70% of the time for 3 consecutive months.
> >
> > Upon acceptance of this order, Doosan to clarify return clause in the very unlikely event it ever need [sic] to be implemented.

A letter from 21st Century's President, Angelo Pennetti ("Pennetti") to Plaintiff dated September 18, 2007, counter-signed on behalf of Plaintiff by Mr. Chhabra on September 21, 2007, states, in relevant part:

> Please consider this letter as an addition to our Proposal No. JD-313 and Deal Letter dated August 17, 2007 for one (1) Doosan MX2500ST CNC Lathe.
>
> **Return Clause:**
>
> All machines are supplied with a "Turning Center Test Record". This document will be referred to as a means to tracking the machine accuracies as factory supplied.

> Should the machine not be able to hold the accuracies or should Joka's uptime be less than 70% for 3 consecutive months, then Doosan will accept the return of the machine for the original equipment cost less accumulated depreciation based on a 60 month life.

The agreed upon purchase price for the machine was $345,000. The Limited Warranty for the machine provided by Doosan states, in relevant part:

> THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR USE OR PURPOSE. [DOOSAN'S] LIABILITY UNDER THIS WARRANTY IS EXPRESSLY LIMITED TO ITS PROMISE TO REPAIR OR REPLACE THE DEFECTIVE GOODS. [DOOSAN] SHALL HAVE NO FURTHER LIABILITY IN CONTRACT OR NEGLIGENCE OR UNDER ANY OTHER THEORY OF LAW OR EQUITY FOR ANY DAMAGES, DIRECT OR INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL, OR ANY DELAY RESULTING FROM THE DEFECT.

21st Century's Standard Terms and Conditions Governing the Sales of Products and Services provides, in relevant part:

> THE MANUFACTURER'S WARRANTY, IF ANY, IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES WHETHER WRITTEN, ORAL OR IMPLIED, INCLUDING THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

The machine was installed at Plaintiff's premises on November 15, 2007.

According to Plaintiff, the machine required servicing by 21st Century on 14 occasions from December 2007 through August 2009.

In an email regarding the machine to 21st Century on February 20, 2008, Plaintiff stated:

> This is the third breakdown in two months. We are getting a feeling that the machine is not rigid and reliable to deliver production, and Doosan does not have full resources to provide the required tech

> support. It is not a good feeling to beg for tech help on a two month old machine.

In an email to 21st Century dated March 31, 2008, Plaintiff stated:

> We reiterate that the machine is not in spec and is not holding the promised tolerances. Given that Doosan beliefs are contrary to our findings, we request a neutral agent to perform the tests this week so that we can have a final resolution when we meet on April. We will know in our next meeting if Doosan really stands behind its customers or not. We will run the machine this week with lower turret tools.

Plaintiff commenced this action in 2010. Plaintiff filed an Amended Verified Complaint in 2011. Plaintiff's primary allegation is that the machine has failed to maintain tolerances as stated within the manual, contract, proposal and specifications. The first cause of action is for breach of express warranty as set forth in Defendants' written proposal dated July 13, 2007, and the attachments thereto listing the machine's features and specifications. Specifically, Plaintiff alleges that the machine failed to perform in accordance with the "X axis repeatability," "Y axis repeatability" and "Z axis repeatability" as represented in the "SPECIFICATIONS" section of the proposal thereby constituting breach of express warranty. Plaintiff seeks $345,000 (purchase price) in damages. The second cause of action is also for breach of express warranty. Plaintiff alleges that the machine failed to perform in accordance with guarantees by Defendants regarding "uptime" of the machine. The third cause of action is for breach of implied warranty of fitness for a particular purpose. The fourth cause of action is for breach of limited warranty. The sixth cause of action is for breach of contract. The seventh cause of action is for breach of warranty of merchantability. The eighth cause of action is for fraud in the inducement alleging that the Defendants induced Plaintiff to purchase the machine through the specifications knowing that the machine would not operate as

represented in the specifications. The ninth cause of action is for negligence.

In support of its motion, Plaintiff submits, among other things, an affidavit from its Vice President and Principal Officer, Roger Chhabra. Mr. Chhabra, who holds a degree in engineering from the University of New Delhi, states, among other things, that Defendants sold Plaintiff the machine knowing that it would not meet Plaintiff's requirements and made false and inaccurate representations which Plaintiff relied upon. Chhabra states that the machine does not hold the tolerances as represented in the proposal and purchase order. Chhabra explains that repeatability is the ability of a machine to perform within certain tolerances during repeated cycles of the manufacturing process. He states that the machine Plaintiff purchased did not perform in accordance with the repeatability as stated in the specifications. In other words, it did not hold tolerance over time. Chhabra states that he made it clear to 21st Century that Plaintiff needed a machine with very exacting tolerances and it requested that an "uptime guarantee" be made part of the contract. He claims that Defendants agreed to such terms. The specifications were contained in the product brochure written by Doosan, and included certain tolerances regarding X axis, Y axis, and Z axis, upon which Plaintiff relied. However, the machine never performed to those tolerances and Plaintiff has not been able to use the machine to perform the function for which it was purchased. Chhabra claims that testing of the machine performed in the presence of representatives of all parties on March 2, 2011, confirms that the machine did not function in accordance with the X axis repeatability tolerance as set forth in the specifications. Moreover, Chhabra states that the machine was completely inoperable for the first six months and that uptime never exceed the guaranteed minimum of 70%. Nevertheless, Defendants failed to replace the machine or honor the return clause. Based upon the foregoing, Plaintiff seeks partial summary judgment on the issue of liability on its

causes of action for breach of contract (sixth), breach of express warranty regarding the "uptime" of the machine (second), breach of implied warranty of fitness for a particular purpose (third), and fraud in the inducement (eighth).

Defendants oppose Plaintiff's motion and cross-move for summary judgment dismissing the complaint. Alternatively, Defendants seek an order striking Plaintiff's complaint or compelling Plaintiff to produce documents it has refused to disclose. Defendants submit, among other things, several affidavits. According to 21st Century's President, Angelo Pennetti, as mentioned in the letter dated September 18, 2007, counter-signed by Mr. Chhabra on behalf of Plaintiff, the agreement between the parties included the machine's "Turning Center Test Record" supplied by Doosan to Plaintiff with the machine. The letter states that the Turning Center Test Record "will be referred to as a means to tracking [sic] the machine accuracies as factory supplied." Pennetti states that Plaintiff has not produced the Turning Center Test record provided with the machine, but Defendants provide an exemplar copy that includes the specifications and testing parameters but not the machine's actual test results.

Defendants also submit an affidavit from Young B. Lee, Director, Customer Service Team for Doosan, who states, among other things, that the Turning Center Test Record, based on Korean and Japanese industrial standards, includes all of the testing performed on that particular machine. The X axis repeatability tolerance for the machine, repeated 5 times for X axis, is plus or minus 0.002 millimeters. Lee also states that he viewed the videotape of testing of the machine performed by Plaintiff in March 2011, and that it was not a test for X axis repeatability.

Doosan also submits an affidavit from Peter Schwalje, P.E., its expert engineer. Based upon his review of the materials produced in discovery, his personal inspection of the machine, and his

review of the data taken on March 2, 2011, during the testing of the machine, Schwalje opines, among other things, that there exists no evidence to conclude that the machine was not capable of or failed to provide the X axis repeatability specified. He further states that the testing conducted by Doosan was inadequate and did not accurately or fairly evaluate the machine's ability to demonstrate reliability of X axis positioning. Schwalje concludes that Plaintiff's difficulty in producing consistently accurate results on parts being manufactured "had its genesis in factors which were unrelated to the repeatability performance of the machine.

Defendants contend, among other things, that summary judgment dismissing the causes of action for breach of express warranty (first and second), breach of implied warranty (fourth), and breach of contract (sixth) should be granted because Plaintiff has failed to present evidence in admissible form demonstrating that the machine did not meet the repeatability specification regarding the X axis and because the evidence demonstrates that the machine satisfied the spindle uptime guaranty. Defendants argue that the causes of action for breach of implied warranty of fitness for a particular purpose (third) and breach of warranty of merchantability (seventh) should be dismissed because such claims were effectively disclaimed by the limited warranty provided by Doosan. Defendants contend that the causes of action for fraud in the inducement (eighth) and negligence (ninth) should be dismissed because an alleged breach of contract cannot support a tort claim absent a duty independent of the contract, which Plaintiff does not allege, and because a contractual representation of future performance cannot support a claim for fraud. Plaintiff opposes Defendants' cross-motion.

Discussion

The key for the court on a motion for summary judgment is issue finding, not issue

determination, and the court should not determine issues of credibility (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Cerniglia v. Loza Rest. Corp.*, 98 AD3d 933, 935 [2d Dept. 2012]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

With regard to the first and second causes of action (breach of express warranty), the fourth cause of action (breach of limited warranty) and the sixth cause of action (breach of contract), both the motion and cross-motion are denied as neither Plaintiff nor Defendants have made a prima facie showing of entitlement to judgment as a matter of law. The submissions fail to eliminate the existence of all triable issues of fact as the affidavits of the parties and experts contain conflicting factual accounts and opinions on numerous issues including which documents comprise the contract between the parties, the relevant specifications of the machine at issue, and whether the machine performed in accordance with the applicable specifications. Accordingly, those branches of the motion and cross-motion are denied.

However, Defendants are granted summary judgment dismissing the third (breach of implied warranty of fitness for a particular purpose), and seventh (breach of implied warranty of merchantability) causes of action. Any implied warranties were effectively disclaimed by Defendants pursuant to UCC § 2-316(2) as the disclaimers mentioned the term "merchantability" and were conspicuous (*see Sky Acres Aviation Services, Inc. v Styles Aviation, Inc.*, 210 AD2d 393 [2d Dept. 1994]).

Defendants are also granted summary judgment dismissing the eighth cause of action alleging fraud in the inducement. It is well settled that a simple breach of contract is not to be considered a

tort unless a legal duty independent of the contract itself has been violated (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1982]). Here, it is undisputed that the alleged false representations by Defendants (that the machine would hold specific tolerances) were a part of the contract between the parties. "'Merely alleging scienter in a cause of action to recover damages for breach of contract, unless the representations alleged to be false are collateral or extraneous to the terms of the agreement, does not convert a breach of contract cause of action into one sounding in fraud'" (*Del Ponte v 1910-12 Ave. U. Realty Corp.*, 7 AD3d 562, 562 [2d Dept 2004], quoting *Noufrios v Murat*, 193 AD2d 791, 792 [2d Dept 1993]).

Plaintiff concedes that it does not have a meritorious cause of action for negligence. Accordingly, Defendants are granted summary judgment dismissing the ninth cause of action.

Finally, the branch of Plaintiff's motion that seeks a protective order, and the branch of Defendants' cross-motion that seeks relief pursuant to CPLR 3124 or 3126, are hereby referred to a conference before the Court scheduled for March 31, 2014, at 11:00 a.m.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: February 11, 2014
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.