Barr v Bentley Motors Ltd.
2016 NY Slip Op 32250(U)
November 3, 2016
Supreme Court, Nassau County
Docket Number: 601718/2016
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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THOMAS BARR IV,

Plaintiff,

-against-

BENTLEY MOTORS LIMITED, LUKE VUKSANAJ, BESPOKE MOTOR GROUP LLC, BESPOKE MOTOR GROUP LLC d/b/a BESPOKE MOTOR GROUP, BESPOKE MOTOR GROUP LLC d/b/a BENTLEY LONG ISLAND, BENTLEY LONG ISLAND, LLC, BENTLEY LONG ISLAND LLC d/b/a BENTLEY LONG ISLAND, MANHATTAN MOTORCARS, INC., MANHATTAN MOTORCARS, INC. d/b/a BENTLEY MANHATTAN, BENTLEY MOTORCARS, INC., JOSEPH L. BUCKLEY, ASIF A. SIDDIQI, THE NASSAU COUNTY POLICE DEPARTMENT, KATHLEEN RICE AS THE DISTRICT ATTORNEY OF NASSAU COUNTY, and THE COUNTY OF NASSAU,

Defendants.

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Index No. 601718/2016

Motion Submitted: 09/06/16
Motion Sequence: 001, 002, 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause............	XXX
Answering Papers..	XXX
Reply...	XXX
Briefs: Plaintiff's/Petitioner's........................	XXX
Defendant's/Respondent's..................	XXX

By Motion Sequence 2/2S, plaintiff Barr moves this Court for an Order disqualifying Sills, Cummins & Gross, P.C. (SCG) as counsel for Bentley Motors

Limited, Bentley Motors, Inc., Joseph Buckley, Esq., Manhattan Motorcars, Inc. d/b/a Bentley Manhattan, and Bespoke Motor Group, LLC d/b/a Bentley of Long Island (collectively, the Bentley defendants), imposing sanctions against those defendants, and striking those defendants' exhibits submitted in connection with their separate motion to dismiss the complaint identified as Motion Sequence 1.[1]

Plaintiff claims that the SCG should be disqualified on the basis that one of its members, William Buckley, Esq., "is a material witness whose testimony at upcoming depositions and trial is crucial to Plaintiff's claims for relief," and that Buckley "provided factual advice to Plaintiff regarding the vehicle at issue in this litigation," thereby "acting as an agent or employee of [the Bentley defendants]."

In sum and substance, plaintiff alleges that the Bentley vehicle that he purchased in or about September 2013 is defective, in that it cannot be driven in temperatures below 45°F because it is equipped with summer tires, and because the vehicle does not meet Bentley's road force specifications at the tire inflation pressures recommended by Bentley.

Insofar as disqualification, the Court recognizes that a party is entitled to be represented by counsel of his or her own choosing, and that this is a valued right which should not be abridged without a clear showing that disqualification is warranted. (***Eisenstadt v. Eisenstadt,*** 282 AD2d 570 [2d Dept 2001]). "Where, as here, a party moves to disqualify an opposing party's attorney on the ground that the attorney will be called as a witness at trial, the movant bears the burden of establishing that the attorney's testimony will be necessary" (***Id.***). In addition, the movant must demonstrate not only

[1] Mr. Barr refers to these requests for relief as "my three TB Motions as set forth on the E-File Docket as Doc Nos 58 through 63 (Affidavit in Support of Motion Sequence 3, p. 3). In actuality, those requests for relief are subsumed under the motion sequence denominated as Motion Sequence 2/2S. Motion Sequence 3 filed by Mr. Barr seeks to bar the Bentley defendants from filing reply papers in connection with Motion Sequence 1, and to grant immediate judgment against those same defendants for an alleged failure to timely respond to Motion Sequence 2/2S (the "TB Motions").

Counsel of record for plaintiff, Herbert A. Smith, Jr., Esq., has neither adopted nor rejected plaintiff's papers submitted thus far; however, because plaintiff has submitted papers in connection with all presently pending motions, the Court will, for the purposes of the pending motions *only* (Sequences 1 through 3 decided herein, and Sequence 4 decided separately), accept plaintiff's papers. In the future, the Court will not accept any papers from plaintiff acting in a *pro se* capacity, until such time as a fully-executed consent to change attorney is properly filed with the Nassau County Clerk (e-filed), or until Mr. Smith brings on an appropriate application to be relieved, which results in the termination of his representation of plaintiff.

that the opposing party's counsel's testimony is necessary to his or her case, but that such testimony would be prejudicial to the opposing party (***Magnus v. Sklover***, 95 AD3d 837 [2d Dept 2012]). The movant must also offer proof as to the content or subject matter of the testimony that might be elicited from the opposing counsel (***Goldstein v. Held***, 52 AD3d 471 [2d Dept 2008]).

The Court recognizes that Rule 3.7 of the Rules of Professional Conduct provides that, unless certain exceptions apply, "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact. . ." With the Rule in mind, the disqualification of an attorney is addressed to the sound discretion of the court (***Stober v. Gaba & Stober, P.C.***, 259 AD2d 554 (2d Dept 1999); ***Solomon v. New York Property Insurance Underwriting Association***, 118 AD2d 695 [2d Dept 1986]), and any doubts are to be resolved in favor of disqualification (***Stober***, ***supra***).

In this case, plaintiff argues that SCG should be disqualified based upon a February 5, 2014 e-mail in which Mr. Buckley "asserts several fact-based assertions which have nothing to do with his legal representation of Defendants" (Document 61, p. 5). The factual statements made in the e-mail, a copy of which is annexed to plaintiff's moving papers, concern the series of events that occurred when the dealer attempted to return the vehicle to plaintiff on January 31, 2014, the rejection of plaintiff's demand for vehicle parts that were replaced, Bentley's recommendations concerning the use of winter tires, Bentley's policy with respect to valet service, and Buckley's request that plaintiff respond to counsel's e-mails concerning plaintiff's spoliation of evidence.

The Court notes that the February 5, 2014 e-mail from Mr. Buckley begins by advising plaintiff that "threats of physical violence, such as the following excerpt from one of your emails to Luke Vuksanaj [Bentley's employee]" are taken seriously. Mr. Buckley further writes that, "[s]hould you continue to make such threats please be advised that we must pursue all steps necessary to ensure the safety of the employees of our Firm, our clients, and our clients' business partners."[2]

The threatening e-mail referred to by Mr. Buckley was sent by plaintiff to Mr. Vuksanaj on February 3, 2014, and is annexed to plaintiff's papers. Aside from being replete with expletives, plaintiff wrote, "this is the last time I am going to offer free legal advice. If you do something this stupid again, I will persecute you to the ends of time, take your head off with my bare hands, show it to you—and then stuff it down the hole."

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[2] The threat against Mr. Vuksanaj resulted in plaintiff's arrest on March 2, 2014. The statute with which he was charged was subsequently declared unconstitutional in the context of an unrelated prosecution, and the criminal case against plaintiff was eventually dismissed.

Based upon that e-mail, it appears that plaintiff was unable to communicate with the Bentley defendants' employees in a reasonable manner, necessitating counsel's intervention to protect his firm's clients. Furthermore, plaintiff acknowledges that "Buckley was the designated point of contact for all inquiries and communication with both entities. All scheduling was also relayed through Defendant Buckley with regards to repairs." Thus, the fact that Mr. Buckley was relaying information on behalf of his clients, the Bentley defendants, does not make him a necessary witness. To the contrary, it appears that plaintiff's own behavior necessitated a go-between with the Bentley defendants.

Moreover, the e-mail from tire manufacturer Pirelli with which plaintiff attempts to "impeach" Buckley's statements regarding tire performance was sent on November 25, 2013, prior to the Buckley e-mail. The Pirelli e-mail was written in response to plaintiff's own independent inquiry to Pirelli wherein plaintiff states that he was "advised by the *dealer*" (Document 63) (emphasis added) as to certain tire pressure issues. The fact that Pirelli's response clearly involves technical issues underscores the obvious necessity of expert testimony to resolve this matter. Inasmuch as Buckley is an attorney and not a scientist/tire expert, the statements that he relayed on behalf of his clients, necessitated by plaintiff's inability to communicate with the car dealer in a civilized manner, are not evidence of anything, and he is not a necessary witness.

Plaintiff's other claim for disqualification is that Buckley was "instrumental in obtaining and (sic) arrest of Plaintiff, and the subsequent Order of Protection that was issued prevented Plaintiff from contacting the dealership directly to arrange further repairs to the automobile." Plaintiff submits no evidence at all to support this claim, aside from the bare allegations made in the complaint.

Plaintiff's further statements that, "[a]s litigation in this matter ramps up, Plaintiff fully intends to call Defendant Buckley at a deposition and introduce emails and correspondence with Defendant Buckley at the deposition – and later, at trial. As such, Defendant Buckley is obviously a necessary and material witness" are conclusory. Plaintiff fails to offer any proof as to the actual content of the testimony that might be elicited from Buckley. Moreover, plaintiff is free to depose Vuksanaj, who reported the threatening February 3, 2014 e-mail to police.

Buckley's testimony is not necessary to any of plaintiff's claims, including that each repair attempt was unsuccessful, that the vehicle was not safe, or that the defendants refused to schedule a fourth repair attempt. There are many factual witnesses that may be called, including repair technicians, as well as repair records, and plaintiff's own e-mails

and testimony that are far more probative evidence than that of an attorney who acted as a conduit to protect his clients from plaintiff's less than genteel communications.

Plaintiff has also failed to demonstrate in any way that Buckley's testimony would be prejudicial to the moving defendants. Accordingly, that branch of plaintiff's motion seeking disqualification of SCG is denied (***Magnus***, ***supra***).

The Court now turns to Motion Sequence 1, the motion to dismiss the complaint, before it determines whether, as plaintiff contends in Motion Sequence 2, sanctions are appropriate for the making of that dismissal motion.

As to that branch of plaintiff's Motion Sequence 2 asserting that the affidavits and exhibits submitted by defendants in connection with Motion Sequence 1 should be stricken, that relief is denied for the reasons advanced by plaintiff. The Court will, instead, address the exhibits in connection with the arguments advanced by the moving defendants.

Named defendants Bentley Motors Limited, Bentley Motors, Inc., Joseph L. Buckley, Bespoke Motor Group, LLC d/b/a Bentley of Long Island, Bespoke Motor Group LLC d/b/a Bespoke Motor Group, Bespoke Motor Group LLC, Bentley Long Island LLC, Bentley Long Island LLC d/b/a Bentley Long Island, Manhattan Motorcars, Inc. d/b/a Bentley Manhattan, and Manhattan Motorcars, Inc. move this Court for dismissal of the complaint pursuant to CPLR §§ 3211 (a)(1), (a)(7), (a)(8).

Specifically, dismissal is sought against Bentley Motors Limited (BML) for lack of personal jurisdiction (***CPLR §3211 [a][8]***), or, in the alternative for failure to state a claim upon which relief can be granted (***CPLR §§ 3211 [a][1], [a][7]***).

Dismissal of the complaint, with prejudice, as against BML, Bentley Motors, Inc., (BMI) and Joseph L. Buckley, Esq. (collectively, the Bentley defendants) is sought pursuant to CPLR §§ 3211 (a)(1), (a)(7).

Dismissal of the first through fourth causes of action, with prejudice, as against Bespoke Motor Group, LLC d/b/a Bentley of Long Island, Bespoke Motor Group LLC d/b/a Bespoke Motor Group, Bespoke Motor Group LLC, Bentley Long Island LLC d/b/a Bentley Long Island, Manhattan Motorcars, Inc. d/b/a Bentley Manhattan, and Manhattan Motorcars, Inc. (collectively, the Dealer defendants) is sought pursuant to CPLR §§ 3211 (a)(1), (a)(7).

This action was commenced on February 11, 2015, in Suffolk County. The matter was later transferred to Nassau County by Order of the Supreme Court, Nassau County (Mahon, J.). Plaintiff purchased the subject vehicle on or about September 19, 2013, from Bentley Manhattan.

BML relies upon the submission of Justine Pridding, corporate counsel for BML, to establish that the Court has no jurisdiction over BML. Ms. Pridding is corporate counsel for BML. She attests that BML is a foreign corporation that manufactures Bentley automobiles, and that the company is registered and organized under the laws of England and Wales. Further, BML's principal place of business and corporate headquarters are located in Cheshire, England.

Ms. Pridding also states that BML is not authorized to do business in New York, or anywhere else in the United States, and does not do business here. BML does not maintain any offices in the United States, including New York, nor does it have any officers, registered agent for process, files, or sales agents located in New York/the United States. As to its finances, Ms. Pridding's affidavit establishes that BML does not maintain any bank accounts, telephone listings, mailing addresses, or post office boxes in New York. Importantly, BML does not collect or pay any taxes to New York.

Ms. Pridding further maintains that BML does not have a contractual relationship with any of the dealer defendants named in this action, nor does it have a contractual relationship with the plaintiff.

Although Ms. Pridding acknowledges that BML maintains a website and that it distributes advertising of its vehicles, Ms. Pridding states that BML does not directly solicit, sell, or distribute particular advertising toward New York. The website is accessible via the Internet, for viewing by anyone, located anywhere, that has Internet access.

As to BMI, Ms. Pridding states that BML and BMI are separate and distinct legal entities, that they maintain separate corporate bylaws, books, that they file separate tax returns in their respective countries, and they do not have any common or shared bank accounts. According to Ms. Pridding, BMI is an importer and distributor of BML's automobiles.

The affidavit of David A. Goldsmith, head of customer relations for BMI, further establishes that BMI is the United States importer and distributor of Bentley automobiles. According to Mr. Goldsmith, BMI is a Delaware corporation. Further according to Mr. Goldsmith, BMI has an exclusive buying and distributorship agreement with BML,

whereby the subject vehicle was purchased from BML, in England, shipped to the United States, and distributed to Bentley Manhattan for purchase. After the subject vehicle was imported into the Unites States, BMI sold the subject vehicle to Bentley Manhattan. After that sale, according to Mr. Goldsmith, BMI does not dictate or control the terms of the retail sale.

New York's general jurisdiction statute, CPLR § 301, provides that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." A foreign corporation, such as BML, is subject to the general jurisdiction of New York courts "if it has engaged in such a continuous and systematic course of doing business here that a finding of its presence in this jurisdiction is warranted" (***Landoil Resources Corp. v. Alexander & Alexander Services, Inc***., 77 NY2d 28, 33 [1990]; *see also* ***Fernandez v. DaimlerChrysler, A.G***., 2016 NY Slip Op 06679 [2d Dept 2016]). The exercise of general jurisdiction over a foreign corporation must comport with due process such that the exercise of jurisdiction is justified by the corporation's constant and pervasive affiliations with the state in which suit is brought (***Daimler AG v. Bauman***, 134 S Ct 746, 761 [2014]; ***Fernandez, supra***). The placement of a product into the stream of commerce by a corporation, by itself, does not warrant a determination that the forum in which the suit is brought necessarily has general jurisdiction over that corporation (***Daimler AG, supra*** at 757).

Here, plaintiff alleges that BML is a foreign corporation having a principal place of business in England. Plaintiff makes bare assertions that BML controls BMI, that BML "authorized, participated in, approved of, consented to, or ratified the conduct and actions of the defendant [BMI]." While these conclusory allegations are more germane to an analysis of New York's long-arm statute conferring personal jurisdiction (***CPLR § 302 [a]***), these allegations do not suffice to allege general jurisdiction over BML. Plaintiff does not allege, either specifically or generally, that BML has constant and pervasive affiliations within New York.

Moreover, plaintiff alleges that he, himself, collected information about the subject vehicle prior to purchasing it, that he collected the advertising materials from a Bentley dealer in Atlanta (presumably Georgia), and that he entered into the purchase agreement with Bentley Manhattan, not that BML targeted him or any other New York resident, or that BML provided those materials to him in New York.

As to New York's long-arm statute, the question as to "'[w]hether a non-domiciliary has engaged in sufficient purposeful activity to confer jurisdiction in New York requires an examination of the totality of the circumstances'" (***Jacobs v. 201***

Stephenson Corporation, 138 AD3d 693, 694 [2d Dept 2016], *quoting* ***Farkas v. Farkas***, 36 AD3d 852, 853 [2d Dept 2007]).

The non-domiciliary's activities must be volitional, and where jurisdiction is contested, the ultimate burden of proof rests upon the plaintiff (***Mejia-Haffner v. Killington, Ltd.***, 119 AD3d 912 [2d Dept 2014]). Here, aside from asserting in conclusory fashion that BML "authorized, participated in, approved of, consented to, or ratified the conduct and actions of the defendant [BMI]," and that BML "manufactured, delivered, and offered" Bentley automobiles for sale in New York, plaintiff does not allege any sales and promotional activities by BML that would lead this Court to conclude that BML has invoked the benefits and protections of New York's laws. Accordingly, the Court finds that plaintiff has failed to allege that BML transacted business within New York within the meaning of CPLR § 302 (a)(1).

Moreover, plaintiff's allegations that BML delivered and offered the automobile for sale in New York are contrary to the facts established by the Pridding and Goldsmith affidavits, and are in contravention to the complaint whereby plaintiff alleges that he bought the car from Bentley Manhattan. For the same reasons, plaintiff fails to adequately plead long-arm jurisdiction pursuant to CPLR § 302 (a)(3). As discussed below, plaintiff has failed to plead that BML, among other defendants, committed any tort in New York; therefore, plaintiff has failed to state this basis for jurisdiction. In any event, because plaintiff has actually pled that he negotiated with, and purchased the vehicle from Bentley Manhattan, the Court finds that plaintiff has failed to plead that BML could have reasonably expected any tortious action, if there were any, to have consequences in New York.

Accordingly, and for the foregoing reasons, dismissal of the complaint against BML pursuant to CPLR § 3211 (a)(8) is granted. Even if this Court had jurisdiction over BML, dismissal of the causes of action pled against that defendant would be warranted pursuant to CPLR §§ 3211 (a)(1), (a)(7), as discussed below.

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a) (7), the facts pleaded must be presumed to be true and accorded every favorable inference, and the sole criterion is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (***Guggenheimer v. Ginzburg***, 43 NY2d 268, 275[1977]; *see* ***Leon v. Martinez***, 84 NY2d 83, 87-88 [1994]; ***Sokol v. Leader***, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; ***Gershon v. Goldberg***, 30 AD3d 372, 373 [2d Dept 2006]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v. Goldman, Sachs & Co.***, 5 NY3d 11, 19 [2005]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . .dismissal should not eventuate" (***Guggenheimer*, *supra*** at 275; *see also* ***Vertical Progression, Inc. v. Canyon Johnson Urban Funds***, 126 AD3d 784 [2d Dept 2015]; ***YDRA, LLC v. Mitchell***, 123 AD3d 1113 [2d Dept 2014]; ***Korsinsky v. Rose***, 120 AD3d 1307 [2d Dept 2014]).

"In sum, in instances in which a motion to dismiss made under CPLR 3211 (subd [a], par 7) is not converted to a summary judgment motion, affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action. It seems after the amendment of 1973 affidavits submitted by the defendant will seldom if ever warrant the relief he seeks *unless too the affidavits establish conclusively that plaintiff has no cause of action*" (***Rovello v. Orofino Realty Co.***, 40 NY2d 633, 636 [1976] [emphasis added]).

The instant motion is being treated as it is noticed, as a motion for dismissal pursuant to CPLR § 3211. The Court is not treating this motion as one for summary judgment pursuant to CPLR § 3211(c).

In support of their motion, the moving defendants submit the verified complaint in this matter. There are no exhibits annexed to the complaint, nor does the complaint incorporate any specific items or documents by reference thereto, with the exception of the written agreement to purchase the subject vehicle that is not in dispute,[3] the owner's handbook and advertising book that plaintiff refers to in the complaint, and the February 3, 2014 e-mail threatening defendant Vuksanaj, which is also referred to by plaintiff. Accordingly, neither the other e-mails annexed to the moving defendants' papers, nor the affidavit of David A. Goldsmith will be considered, as they do not constitute documentary evidence within the contemplation of CPLR § 3211 (a)(1) (***JGBR, LLC v. Chicago Title Insurance Company***, 128 AD3d 900 [2d Dept 2015]; ***25-01 Newkirk Avenue, LLC v. Everest National Insurance Company***, 127 AD3d 850 [2d Dept 2015]). Furthermore, Mr. Goldsmith's affidavit does not serve to conclusively establish that plaintiff does not have a cause of action (***CPLR § 3211 [a][7]***).

The first two causes of action allege a breach of the implied warranty of merchantability against Bentley Motors Limited (BML), Bentley Motors, Inc. (BMI), Manhattan Motorcars, Inc., and Manhattan Motorcars, Inc. d/b/a Bentley Manhattan (collectively, Bentley Manhattan). Plaintiff claims, respectively that the subject vehicle

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[3] This agreement is a contract that may properly be relied upon by the Court as documentary evidence (***Fontanetta v. John Doe 1***, 73 AD3d 78, 86 [2d Dept 2010]).

is unsuitable for driving for approximately six months of the year (in winter conditions or in temperatures below 45°F), because of deficiencies in the tires specified and sold, and because the subject vehicle cannot be brought into compliance with the manufacturer's road force specifications for the tires, when they are inflated to the pressures as designated on the tire inflation pressure label mandated by federal regulations.

It is undisputed that plaintiff purchased the subject vehicle on or about September 19, 2013, from Manhattan Motorcars, Inc., an authorized Bentley dealer. The invoice annexed to the moving defendants' papers is dated September 19, 2013, and bears plaintiff's name and address. Accordingly, Bentley Manhattan is the seller, and plaintiff is the purchaser.

Based upon reading the plain language of the complaint, it is further undisputed that plaintiff fails to allege that he suffered physical injury as a result of the claimed breaches of warranty. Plaintiff's assertion that he "lost control of the automobile, skidded, swerved and lost traction with the surface of the road, *nearly* experiencing a serious accident and severe or serious physical injury or death" (Complaint, ¶ 152 [emphasis added]) does not constitute an allegation of actual physical injury. Moreover, the Court will not engage in a wildly expansive reading of the complaint to attribute the physical injures that plaintiff claims to have suffered as a result of his being arrested in 2014 (Complaint, ¶ 479) to the unspecified date when he claims to have lost control of the vehicle and skidded.

"It is now settled that no implied warranty will extend from a manufacturer to a remote purchaser not in privity with the manufacturer where only economic loss and not personal injury is alleged" (***Lexow & Jenkins, P.C. v. Hertz Commercial Leasing Corporation***, 122 AD2d 25, 26 [2d Dept 1986]; ***UCC §2-318***; ***Arthur Jaffee Associates v. Bilsco Auto Service, Inc.***, 58 NY2d 993 [1983]; ***Key International Manufacturing, Inc. v. Morse/Diesel, Inc.***, 142 AD2d 448 [2d Dept 1988]; ***Carbo Industries, Inc. v. Becker Chevrolet, Inc***., 112 AD2d 336 [2d Dept 1985]; ***Hole v. General Motors Corporation***, 83 AD2d 715 [3d Dept 1981]).

Based upon the foregoing, the first two causes of action sounding in breach of implied warranty are hereby dismissed as to defendants BML and BMI, because neither of those defendants are in privity of contract with plaintiff.

Those same two causes of action are also dismissed as to Bentley Manhattan (Manhattan Motorcars, Inc. d/b/a Bentley Manhattan and Manhattan Motorcars, Inc.). The written sales invoice for the subject vehicle contains clear language whereby Bentley Manhattan disclaims all warranties. Specifically, the invoice states, "[a]ll warranties on this vehicle are the manufacturer's. The Seller hereby expressly disclaims all warranties either expressed or implied, including any implied warranty of merchantability or fitness for a particular purpose and neither assumes nor authorizes any other person to assume

for it any liability in connection with the sale of the vehicle. This disclaimer by the Seller in no way affects the terms of the Manufacturer's Warranty."[4]

"Although an automobile dealer may, by statute, disclaim both express and implied warranties (Uniform commercial Code § 2-316), the implied warranty of merchantability (Uniform Commercial Code § 2-314), may only be disclaimed by use of language mentioning the word 'merchantability' and, in the case of a writing, such language must be conspicuous (Uniform Commercial Code § 2-316 [2] [remaining internal citation omitted]). The question of whether a particular disclaimer is conspicuous, and hence valid, is a question of law to be determined by the court [internal citations omitted]" (***Carbo Industries, supra*** at 339).

In this case, the Court finds that the disclaimer appearing in the middle of the face of the invoice for the subject vehicle, in its own boxed section, is conspicuous, and is, therefore, valid.

Based upon that same disclaimer, the third cause of action sounding in breach of express warranty is dismissed as to Bentley Manhattan (Manhattan Motorcars, Inc. d/b/a Bentley Manhattan and Manhattan Motorcars, Inc.) only.

BMI does not contend that the third cause of action should be dismissed as against it. In fact, BMI acknowledges in its Memorandum of Law that BMI issued a three-year limited warranty for the subject vehicle, citing to paragraphs 254 through 258 in the verified complaint (Memorandum of Law, p. 23).[5] According to those paragraphs of the verified complaint, which are not controverted, BMI warranted that the vehicle "would be 'free from defects in materials or workmanship under normal use and service for the applicable Warranty period mentioned below,'" and "that it was the obligation of the defendant Bentley Motors, Inc. to 'repair or, at its option, [provide for and install] the replacement with a new or remanufactured unit, without charge for labor or parts, of any part, assembly or component determined to be defective in material or workmanship during the applicable Warranty period.'" Accordingly, the third count of the verified complaint remains as alleged against BMI.

Plaintiff's requests for punitive damages based upon his breach of warranty claims are dismissed. The dismissal of plaintiff's first two substantive causes of action for breach of implied warranty mandates the dismissal of his concomitant requests for punitive damages based thereon (*see* ***Tighe v. North Shore Animal League America***, 142 AD3d 607 [2d Dept 2016]).

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[4] The Manufacturer's Warranty is not included in any of the submissions to the Court.

[5] The document referred to as the "limited warranty" has not been submitted to the Court.

In any event, punitive damages related to the breach of warranty claims are not generally available. UCC §§ 2-714 and 2-715 do not authorize punitive damages. Moreover, "[p]unitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights [internal citation omitted]. However, where the breach of contract also involves a fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations,' punitive damages are recoverable if the conduct was 'aimed at the public generally' (*see*, *Walker v. Sheldon*, 10 NY2d 401, 404-405 [1961]). Punitive damages are available where the conduct constituting, accompanying, or associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious under the *Walker* standard to warrant the additional imposition of exemplary damages. Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally" (***Rocanova v. Equibable Life Assurance Society of the United States***, 83 NY2d 603, 613 [1994]).

The complaint in this case fails to plead that the alleged tortious conduct was part of a pattern of similar conduct directed at the public generally; instead, plaintiff merely alleges that the conduct of BML and BMI "was in conscious disregard for the rights of the plaintiff" (Complaint, ¶¶ 234, 249, 267). Plaintiff's additional conclusory allegations made in the first three causes of action, that the defendants' actions were "wanton and reckless," "malicious," "egregious," and "involved a high degree of moral culpability" are belied by his claims that he cannot use the car for six months of the year due to the fact that winter tires were not supplied. Plaintiff's alleged inability to use his vehicle does not rise to a point anywhere near the level of conduct for which punitive damages are contemplated.

As to the fourth cause of action, "[t]ort recovery in strict products liability and negligence against a manufacturer should not be available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract" (***Bocre Leasing Corporation v. General Motors Corporation***, 84 NY2d 685, 694 [1995]). "'The economic loss rule provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream 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'" (***126 Newton St., LLC v. Allbrand Commercial Windows & Doors, Inc.***, 121 AD3d 651, 652 [2d Dept. 2014] *citing* ***Atlas Air, Inc. v. General Electric Company***, 16 AD3d 444, 445 [2d Dept 2005]). "Therefore, when a plaintiff seeks to recover damages for purely economic loss related to the failure or malfunction of a product, such as the cost of replacing or retrofitting the product, or for damage to the product itself, the plaintiff may not seek recovery in tort against the manufacturer or the distributor of the product, but is limited to a recovery

sounding in breach of contract or breach of warranty" (***126 Newton St., LLC*, *supra*** at 652).

In this case, plaintiff does not allege that he actually suffered any personal injury as a result of the claimed defects; therefore, the fourth cause of action sounding in strict products liability is dismissed as to all defendants against whom the allegations are directed.

The eighth cause of action sounding in fraud is alleged against BML only. The Court agrees with the moving defendant that this cause of action should be dismissed. Plaintiff alleges that he relied upon representations made in an advertising book distributed by BML and entitled "The New Continental GT Speed and GT Speed Convertible," which book he pleads that he obtained "from an automobile dealer licensed by the defendant Bentley Motors, Inc. (known to the plaintiff as 'Bentley Atlanta') prior to purchasing the. . . 2013 Bentley Continental GT Speed."

Although plaintiff quotes extensively from this advertising book in the complaint, plaintiff's fraud claim is distilled in paragraphs 364 and 365 of the complaint wherein he alleges that the subject vehicle could not be safely operated in winter conditions, and that when the temperature falls below 45°F, the subject vehicle must be equipped with different tires.[6] Plaintiff does not allege in what specific respects the quoted statements from the book are actually false. To recover for fraud as herein, the complaint must contain specific allegations of a representation of material fact, falsity, scienter, reliance and injury. (*see* ***Morales v. AMS Mortgage Services, Inc***., 69 AD3d 691 [2d Dept 2010]). Moreover, the circumstances of the fraud must be stated in detail, including specific dates and items (*see* ***CPLR § 3016[b]***). Plaintiff has failed to sufficiently plead his fraud claim with specificity.

Moreover, an ordinary breach of contract action does not constitute a tort unless a legal duty independent of the contract has been violated (***Heffez v. L&G General Construction, Inc.***, 56 AD3d 526, 527 [2d Dept 2008]). The Court finds that no independent legal duty has been pled in this complaint, but that the fraud claim is essentially duplicative of plaintiff's warranty claims. Accordingly, the eighth cause of action alleging fraud is dismissed (*see* ***Tiffany at Westbury Condominium v. Marelli Development Corp.***, 40 AD3d 1073 [2d Dept 2007]).

Moving defendant BMI asserts that plaintiff's ninth cause of action sounding in conversion should be dismissed as against it. The incident pled in the ninth cause of action is alleged to have occurred on or about and between January 30, 2014 and

[6] It is apparently undisputed that the winter tires are not complimentary, but would have to be purchased by plaintiff.

February 14, 2014. In paragraphs 165 through 181 of the verified complaint, it is clear that the subject vehicle was physically located at Bentley Long Island (Bespoke Motor Group, LLC d/b/a Bentley of Long Island, Bespoke Motor Group LLC d/b/a Bespoke Motor Group, Bespoke Motor Group LLC, Bentley Long Island, LLC d/b/a Bentley Long Island) for repairs, and that plaintiff was communicating with one of Bentley Long Island's employees, defendant Luke Vuksanaj, concerning those repairs. As alleged in those paragraphs of the complaint, Bentley Long Island transported the subject vehicle via flatbed truck to its facility in Jericho, New York on January 30, 2014, at Bentley Long Island's expense, pursuant to the terms of the warranty.

It is further alleged that plaintiff received a telephone call from a driver of a flatbed automobile transport truck on February 1, 2014 stating that the driver was on his way to plaintiff's residence to deliver the subject vehicle back to the plaintiff. Plaintiff alleges that he received no prior notice of this delivery, and that he told the driver that he could not accept delivery on that date. On the next day, February 2, 2014, plaintiff requested that Vuksanaj provide written proof that the defects had been corrected/repaired, but that Vuksanaj failed to respond to plaintiff's request. Plaintiff further alleges that on February 3, 2014, Vuksanaj informed plaintiff that he could obtain the release of the subject vehicle only if plaintiff payed storage charges "that were posted at the repair facility of the defendants [Bentley Long Island]" (Complaint, ¶ 175). Finally, according to the complaint, Bentley Long Island "decided to release and transport the [subject vehicle] to the plaintiff's residence" at their sole cost and expense. Delivery was made on February 14, 2014.

In order to state a cause of action sounding in conversion, the plaintiff is required to "establish legal ownership of a specific identifiable piece of property and [defendants] exercise of dominion over or interference with the property in defiance of plaintiff[s'] rights" (***Gilman v. Abagnale***, 235 AD2d 989, 991 (3d Dept. 1997); *quoting* ***Ahles v. Aztec Enterprises, Inc.***, 120 AD2d 903 [3d Dept 1986]; *see also* ***Petty v. Barnes***, 70 AD3d 661, 662 [2d Dept 2010]). Nowhere in his allegations does plaintiff plead that BMI exercised dominion over the subject vehicle in defiance of plaintiff's rights. In fact, BMI is not named in paragraphs 375 through 393 of the complaint constituting the ninth cause of action. Dismissal of the ninth cause of action as to BMI is warranted.

As to the tenth and eleventh causes of action sounding in false arrest and false imprisonment, the Court agrees that those causes of action should be dismissed as to defendants Buckley and BMI.

"In order to prove a claim of false arrest or imprisonment, a plaintiff must show: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the

confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged" (***Williams v. City of New York***, 916 FSupp 235, 241 [EDNY 2012]).

"In order to hold a civilian defendant liable for false arrest, the plaintiff must establish that that defendant did not merely report a crime to the police or participate in the prosecution, but actively importuned the police to make an arrest without 'reasonable cause [to believe] in the plaintiff's culpability' [internal citations omitted]" (***Rivera v. County of Nassau***, 83 AD3d 1031, 1033 [2d Dept 2011]). Where it is shown that a civilian complainant merely provided information to the police and did not intend to confine the plaintiff, or lack reasonable cause for his or her belief in the plaintiff's culpability, the plaintiff's action for false imprisonment should be dismissed (***Defilippo v. County of Nassau***, 183 AD2d 695 [2d Dept 1992]).

In this case, plaintiff admits that, because he was "frustrated by what [he] perceived was the unlawful refusal to return the [subject vehicle and] the failure to satisfactorily address the defects and deficiencies reported to the defendants," he communicated to Vuksanaj and Buckley, via e-mail, on February 3, 2014, that, "[i]f you do something this stupid again, I will persecute you to the ends of time, take your heads off with my bare hands, show it to you – and then stuff it down the hole" (Complaint, ¶ 190).

Plaintiff alleges only that Vuksanaj and Buckley conferred about the e-mail, that Buckley advised/instructed Vuksanaj to report this communication to the police, that Vuksanaj reported plaintiff's e-mail communication to the police, that Vuksanaj requested that the plaintiff be arrested, that the plaintiff spoke to the police (Detective Siddiqui) on February 12, 2014 and "insisted that words used [in the e-mail] were a joke," but that the police, nevertheless, determined to arrest plaintiff.

No allegations are made *vis a vis* BMI and/or Buckley that either of those defendants actively importuned the police to make the arrest without reasonable cause to believe in the plaintiff's culpability.

Plaintiff's further allegations in paragraph 399 that defendant Buckley "knew or should have known that the conduct of the plaintiff complained of did not constitute a crime . . ." is incorrect as a matter of law.

The dismissal of plaintiff's criminal matter (Penal Law § 240.30 [1]) on June 6, 2014 was the product of the Court of Appeals' decision in ***People v. Golb*** declaring that section of the Penal Law unconstitutionally vague (23 NY3d 455 [2014]), which decision

was rendered on May 13, 2014, more than two months after plaintiff's arrest.[7] Moreover, it is not alleged that either Buckley or BMI made the determination as to which specific criminal charge was to be brought against plaintiff. Accordingly, the tenth and eleventh causes of action are dismissed as to defendants BMI and Buckley.

Likewise, plaintiff has failed to plead causes of action for assault and battery (the twelfth and thirteenth causes of action) as against BMI and Buckley.

"To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact. To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact without the plaintiff's consent" (***Bastein v. Sotto***, 299 AD2d 432, 433 [2d Dept 2002]).

Here, there are no allegations that BMI, or Buckley, made any physical contact whatsoever with plaintiff. Moreover, there are no allegations that BMI and/or Buckley engaged in a common plan or design, or conspired and agreed with the other named defendants to commit an assault and/or battery upon plaintiff (*see* ***Rodriguez v. City of New York***, 112 AD3d 905 [2d Dept 2013]; ***Wilson v. DiCaprio***, 278 AD2d 25 [1st Dept 2000]). The twelfth and thirteenth causes of action for assault and battery, respectively, are hereby dismissed as to defendants Buckley and BMI.

Malicious prosecution plaintiffs must establish the following four elements: 1) that a criminal proceeding has been commenced or continued against the plaintiff by defendant; 2) that the criminal proceeding terminated in favor of the accused; 3) that probable cause for the criminal proceeding was absent, and 4) that the defendant commenced or continued the criminal proceeding with actual malice (*see* ***Smith-Hunter v. Harvey***, 95 NY2d 191 [2000]; ***Hollender v. Trump Village Cooperative, Inc.***, 58 NY2d 420 [1983]; ***Broughton v. State of New York,*** 37 NY2d 451 [1975]). A failure to establish any one of those elements results in the defeat of the plaintiff's cause of action (***Baker v. City of New York,*** 44 AD3d 977, 979 [2d Dept 2007]).

Furthermore, "a civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution" (***DuChateau v. Metro-North Commuter Railroad Company***, 253 AD2d 128, 131 [1st Dept 1999]; *see also* ***Mesiti v. Wegman***, 307 AD2d 339 [2d Dept 2003]; ***Schiffren v. Dramer***, 225 AD2d 757 [2d Dept 1996]).

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[7] Penal Law § 240.30 (1) has since been amended following the ***Golb*** decision.

Even accepting the alleged facts as being true, the complaint fails to assert that Buckley or BMI played an active role in the prosecution, or gave advice or encouragement, or importuned the authorities to act (***DuChateau*, *supra*** at 131); nor is it alleged that any of the aforementioned defendants, with undue zeal, affirmatively induced the officer to act to the point where the officer was not acting of his own volition (***Mesiti*, *supra*** at 340). Plaintiff's conclusory allegations that Buckley, "with malice," advised Vuksanaj to complain to the police is conclusory and insufficient to state a cause of action for malicious prosecution against Buckley or BMI. Plaintiff has also failed to allege that Buckley was acting at the direction of BMI when he purportedly "advised" Vuksanaj to report plaintiff's threatening e-mail to the police.

Plaintiff also fails in paragraphs 464 through 475 to allege that probable cause for the proceeding was absent, and that the proceeding terminated in his favor. The section of the complaint entitled "Allegations of Common Facts Supporting Causes of Action," also fails to make those allegations. As previously noted, the section of the Penal Law with which plaintiff was charged was not declared unconstitutional until more than two months after his arrest. Moreover, there was no controlling authority, as a matter of law, declaring said Penal Law section to be unconstitutional prior to plaintiff's arrest. Accordingly, plaintiff has failed to plead a cause of action for malicious prosecution as against Buckley and BMI; therefore, the fourteenth cause of action is dismissed as to Buckley and BMI.

As to the fifteenth cause of action alleging a violation of plaintiff's civil rights, that cause of action should also be dismissed as to the moving defendants Buckley and BMI.

"For the purposes of section 1983,[8] the actions of a nominally private entity are attributable to the state when: (1) the entity acts pursuant to the 'coercive power' of the state or is 'controlled' by the state ('the compulsion test'); (2) when the state provides 'significant encouragement' to the entity, the entity is a 'willful participant in joint activity with the [s]tate,' or the entity's functions are 'entwined' with state policies ('the joint action test' or 'close nexus test'); or (3) when the entity 'has been delegated a public function by the [s]tate,' ('the public function test')" (***Sybalski v. Independent Group Home Living Program, Inc.***, 546 F3d 255, 257 [2d Cir 2008] *quoting* ***Brentwood Academy v. Tennessee Secondary School Athletic Association***, 531 US 288, 296 [2001]; *see also* ***Benzemann v. Citibank N.A.***, 2015 US App LEXIS 19839 [2d Cir 2015]).

It is undisputed that Buckley is a private citizen and that BMI is a private corporation. The complaint in this matter utterly fails to allege that Buckley and/or BMI were compelled by the named municipal/governmental defendants to bring the prosecution against plaintiff, that Buckley and/or BMI acted jointly with the government,

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[8] 42 USC § 1983.

or that Buckley and/or BMI have been delegated a public function by the government. It appears that this fifteenth cause of action is based upon plaintiff's allegations of false arrest, false imprisonment, and malicious prosecution, which have already been addressed by this Court. Plaintiff has failed to plead any of the elements constituting a violation of his civil rights as against Buckley and BMI; therefore, the fifteenth cause of action is dismissed as to those defendants.

To the extent that plaintiff's fifteenth cause of action may be based upon his New York law claims for false arrest, false imprisonment, or malicious prosecution, those claims must fail. The elements of those claims are the same when subsumed in a civil rights claim pursuant to 42 USC 1983; therefore, the analysis is identical to that which has already been performed by this Court (***Boyd v. City of New York***, 336 F3d 72, 75 [2d Cir 2003]). As previously discussed herein, plaintiff's claims for false arrest, false imprisonment, and malicious prosecution all fail pursuant to CPLR § 3211 (a)(7); thus, any claim made under §1983 that is based thereon necessarily fails as well.

To summarize, the first, second, and fourth causes of action have been dismissed in their entirety as to the defendants named therein.

The third cause of action has been dismissed as to Manhattan Motorcars, Inc. and Manhattan Motorcars, Inc. d/b/a Bentley Manhattan only.

The eighth cause of action for fraud alleged against BML has been dismissed.

The ninth cause of action for conversion has been dismissed as to BMI only.

The tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth causes of action have been dismissed as to defendants Buckley and BMI only.

That branch of plaintiff's Motion Sequence 2 seeking sanctions against the moving defendants for making Motion Sequence 1 is denied.

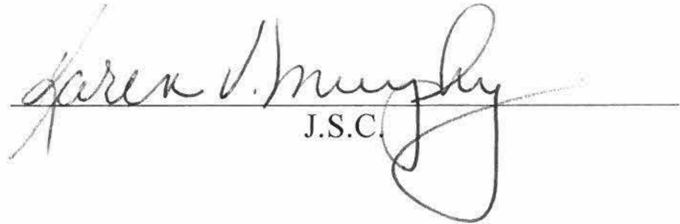
Plaintiff's Motion Sequence 3 seeking to prohibit the moving defendants on Motion Sequence 1 from filing reply papers in connection with Motion Sequence 1, and granting a default judgment against the moving defendants is denied as moot. By telephone conference held on August 8, 2016, the Court permitted the moving defendants time to file and serve their reply papers with respect to Motion Sequence 1. Mr. Barr was a party to the telephone conference, and the Court notes that Mr. Barr had been afforded an earlier courtesy by the moving defendants to adjourn the return date of Motion Sequence 1.

Moreover, the Court has afforded all moving parties an opportunity to submit appropriate papers upon these motions in an effort to resolve certain issues on their

merits, including having afforded plaintiff the courtesy of considering his papers on this occasion, although he is not counsel of record in this matter.

The foregoing constitutes the Order of this Court.

Dated: November 3, 2016
Mineola, NY



J.S.C.

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