

<p>Wohl v Swatch Ltd.</p>
<p>2018 NY Slip Op 33078(U)</p>
<p>November 29, 2018</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 650424/2018</p>
<p>Judge: Arthur F. Engoron</p>
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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INDEX NO. 650424/2018

BARRY WOHL,

MOTION DATE 06/25/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

SWATCH LTD., and THE SWATCH GROUP (U.S.) INC.,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 25, 26, 27, 28

were read on this motion to

DISMISS

Upon the foregoing documents, defendants' motion to dismiss is granted.

Background

In this action, plaintiff, Barry Wohl ("Wohl"), individually and as a purposed class representative on behalf of all persons who purchased a Swatch watch within the State of New York whose warranty was not honored, and those persons who purchased a Swatch watch within the past twenty-four months, sues to recover damages resulting from the failure of defendants, Swatch Ltd. ("Swatch Ltd.") and The Swatch Group (U.S.) Inc. ("Swatch U.S."); collectively "Defendants") to honor the terms of a warranty that accompanies each Swatch watch, and Defendants' deceptive business practices in failing to disclose the limitations of said warranty.

It is undisputed that Swatch Ltd. warranties Swatch watches for a period of twenty-four months from the date of purchase under the terms and conditions of the warranty (the "Warranty"). The Warranty provides:

The warranty only comes into force if the warranty certificate is dated, fully and correctly completed and stamped by an official SWATCH dealer ("valid warranty certificate"). During the warranty period and by presenting the valid warranty certificate, you will have the right to have any defect repaired free of charge... This manufacturer's warranty does not cover: ... the SWATCH watch handled by non-authorized persons...

This warranty is included on the warranty page of Defendants website and within the packaging of a Swatch watch. On August 16, 2017, Wohl purchased a Swatch watch from Jet.com, whom Defendants allege is not an official Swatch dealer. On October 25, 2017, Wohl contacted Swatch Ltd. stating, "I bought a swatch skin in August 2017 from Jet. It is now broken. I did not save the paperwork. How do I get the watch replaced?" Within a few days a representative of

Swatch U.S. responded to Wohl, stating, “[y]our watch is not covered under our 2 year warranty because you did not purchase it directly from Swatch. So you will have to purchase a new watch.” The instant action then commenced.

The Complaint

The complaint, filed on January 26, 2018, asserts two causes of action: breach of contract (first cause of action), and violations of General Business Law (“GBL”) § 349 (second cause of action), and seeks, inter alia, judgment against Defendants awarding Wohl actual and punitive damages, together with costs and disbursements of the instant action and reasonable attorneys’ fees.

Defendants now move, pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7), to dismiss the complaint due to documentary evidence, lack of standing, and failure to state a cause of action; and CPLR 3211(a)(8) due to lack of personal and general jurisdiction over Swatch Ltd.

In opposition, Wohl claims that the documentary evidence submitted only raises factual disputes that cannot be decided on a motion to dismiss. Wohl also claims that: (1) he has standing to assert the claims; (2) the complaint adequately pleads both causes of action; and (3) Swatch Ltd. was properly named as a defendant.

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes a defense as a matter of law to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) (“[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law”). Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) (“[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus” in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties “notice” of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

The First Cause of Action, for Breach of Contract

The complaint fails to state a cause of action for breach of contract. To sufficiently plead breach of contract, the complaint must allege the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages. Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dept 2010). The complaint fails to allege the existence of a contract between the parties or the existence of any duty imposed upon Defendants, whether contractual or implied, to perform. In a situation like the present, there is no statutory or implied-in-law warranty. Horowitz v Stryker Corp., 613 FSupp2d 271, 285-286 (E.D.N.Y. 2009); Wallace v Parks Corp., 212 AD2d 132, 138 (4th Dept 1995) (“[b]reach of express warranty claims...arises not from a requirement imposed by State law, but from a promise voluntarily

made by the manufacturer.”) (citing Cipollone v Liggett Group, Inc., 505 US 514, 525 (1992); UCC § 2-316. The Warranty itself disclaims that any contractual relationship could have existed between the parties as Wohl purchased the Swatch watch from a non-official Swatch dealer, thus he failed to perform a condition precedent to invoke the Warranty.

The language of the Warranty conclusively establishes that Defendants had no obligation to honor the Warranty as to Wohl. The unambiguous terms of the Warranty explicitly state a condition precedent to its effectiveness, i.e., that a purchaser purchase a Swatch watch from an official Swatch dealer. The Warranty only comes into force if the warranty certificate is dated, fully and correctly completed, and stamped by an official Swatch dealer. Wohl admits that he purchased the Swatch watch from Jet.com and that the packaging did not contain the warranty certificate. Thus, the Warranty never came into force, meaning no contractual duty was created. Furthermore, the email exchange between Wohl and Swatch U.S. confirms that Wohl “didn’t save the paperwork.” Therefore, even assuming Wohl’s Swatch watch packaging contained the warranty certificate, Wohl would not have been able to invoke the Warranty, as the terms require that a purchaser present the valid warranty certificate upon enforcement. Given the fact that Wohl threw out the paperwork, under the clear and unambiguous terms of the Warranty, Wohl could not have benefitted from the Warranty. Wohl claims that Defendants have failed to disclose which retailers are authorized distributors of Swatch watches, such that the Warranty would apply; this has no bearing on the breach of contract claim, as Wohl does not and cannot meet the requirements set forth within the terms of the Warranty, i.e. Wohl lacks the warranty certificate.

The Second Cause of Action, for violations of GBL § 349

GBL § 349 permits individuals to bring an action to enjoin deceptive business practices based upon a material misrepresentation. In an action for deceptive trade practices, the statute requires a showing that a defendant’s acts were directed at consumers, that they are deceptive or misleading in a material way, and that plaintiff has been injured as result. Zurakov v Register.Com, Inc., 304 AD2d 176, 180 (1st Dept 2003). The complaint alleges that Defendants have engaged in deceptive acts through their sale of watches subject to undisclosed limitations on the express warranty. Said undisclosed limitations being: (1) Defendants’ failure to disclose that only purchases made directly from Swatch would allow a customer to utilize the Warranty; (2) the Warranty and website fail to disclose who is an authorized distributor; and (3) Defendants’ fail to disclose that if a watch is purchased from another retailer, in effect the only remedy is to purchase a new watch. Defendants argue that Wohl cannot prove that Defendants acted in a deceptive or misleading way or that Wohl was injured as a result. Defendants further argue that Wohl was not deceived when he purchased the Swatch watch because he did not know of the Warranty prior to purchasing, thus the alleged deceptive acts could not have misled him. Wohl, in his opposition papers, states that he has purchased Swatch watches in the past and knew that Defendants offer a warranty.

The terms of the Warranty conclusively establish that Defendants did not engage in deceptive business practices; Wohl’s allegation that Defendants were deceptive in failing to disclose certain limitations on the express warranty is belied by the fact that the Warranty, located in both the packaging of a Swatch watch and on Defendants’ website, explicitly discloses the limitations, i.e., that the Warranty comes into force only if the warranty certificate is completed by an official

Swatch dealer. The terms are clear, only purchases from official Swatch dealers would invoke the Warranty; if an individual were to purchase a Swatch watch from a retailer that is not an official Swatch dealer the purchaser's only remedy could be to purchase a new Swatch watch. Wohl's argument that a consumer would be justified in assuming any retailer selling Swatch branded watches in its original packaging is an authorized distributor is irrelevant when the terms of the Warranty clearly establish that an authorized Swatch dealer is one who has the authority to fill out the warranty certificate. Wohl's purchase from Jet.com did not even include the warranty certificate. Furthermore, this Court finds Wohl's argument that Defendants failed to disclose who is an authorized distributor of Swatch watches to be unavailing; as Defendants have pointed out, official Swatch dealers can be identified by displays in stores, on the receipt, and through Defendants website. Wohl contends that Swatch U.S. customer service was uncertain or unwilling to provide the names of their authorized dealers, and that the term "authorized dealer" is not a defined term within the Warranty. However, the Warranty is clear, an authorized dealer is one who has the authority to complete the warranty certificate.

The terms of the Warranty conclusively establish that Wohl could not have been deceived, as the Warranty explicitly limits its terms to those Swatch watches purchased from an official Swatch dealer. Thus, the Warranty establishes that there was no deceptive act by Defendants because it is clear that by its terms, the Warranty was not invoked by Wohl, as he failed to keep the paperwork accompanying the Swatch watch and, more importantly, his purchase from Jet.com lacked the warranty certificate. Wohl alleges that he is familiar with the Warranty, as he has purchased Swatch watches in the past; however, if that were true Wohl would have known that in order to invoke the Warranty he would need to keep the paperwork and have a warranty certificate. Any argument that a reasonable consumer would not understand that the warranty certificate is different from the printed warranty included in the packaging of the watch is unavailing as the Warranty refers to a separate warranty certificate which must be signed, stamped, and dated; the warranty certificate itself provides a space for the official Swatch dealer to do so, the printed Warranty does not.

Defendants' Request for Sanctions

Although the Court finds the complaint to be subject to dismissal, the Court does not find that the assertion of such claim in the complaint to be in bad faith or otherwise sanctionable under 22 NYCRR 130-1.1. Accordingly, Defendants' request for an award of costs, disbursements, and fees incurred as a result of the instant motion is denied.

Wohl's Request to Replead

In its discretion, this Court denies Wohl's request for leave to replead. However, Wohl may start a new case if not barred by the Statute of Limitations.

Conclusion

Motion to dismiss the complaint is granted, and the clerk is hereby directed to enter judgment dismissing the complaint.



ARTHUR F. ENGORON, J.S.C.

11/29/2018

DATE

CHECK ONE:

 CASE DISPOSED GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

 OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

 REFERENCE