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No. 12951/06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 10-26-06
Submission Date: 11-3-06
Motion Sequence No.: 001/MOT D

KENNETH M. MOLLINS, on behalf of himself and other entities and individuals similarly situated,

Plaintiffs,

- against -

NISSAN MOTOR CO., LTD., NISSAN NORTH AMERICA, INC., and SMITHTOWN INFINITI INC. d/b/a COMPETITION INFINITI,

Defendant,

COUNSEL FOR PLAINTIFF
Law Office of Kenneth M. Mollis, P.C.
425 Broad Hollow Road, Suite 215
Melville, New York 11747

COUNSEL FOR DEFENDANT
Herzfeld & Rubin, P.C.
40 Wall Street
New York, New York 10005

ORDER

The following papers were read on Defendants' motion to dismiss the complaint:

Notice of Motion dated October 4, 2006;
Affidavit of Jeffrey L. Chase, Esq. sworn to on Ocrober 4, 2006;
Affidavit of Kenneth Carter sworn to on October 3, 2006;
Defendant's Memorandum of Law;
Affirmation of Kenneth M. Mullins, Esq. dated October 17, 2006;
Affidavit of Richard M. Budd sworn to on October 30, 2006;
Defendant's Reply Memorandum of Law.

Defendants move pursuant to CPLR 321(a)(1), (5) and (7) to dismiss this action.

BACKGROUND

Plaintiff Kenneth M. Mollins ("Mollins") brings this class action seeking to recover damages for himself and others similarly situated relating to alleged deficiencies in a "Blue Tooth" phone system in the 2006 Infiniti M35X.

On or about March 15, 2006, Mollins entered into a three year lease with Smithtown Infiniti Inc. d/b/a Competition Infiniti ("Smithtown") pursuant to which he leased a 2006 Infiniti M35X. The vehicle was equipped with a Blue Tooth hands-free phone system.

Mollins alleges that he advised the Smithtown salesperson with whom he dealt that he conducted business on the phone from his car. Therefore, he needed a cell phone system that would provide clear, uninterrupted service.

He alleges the salesperson with whom he dealt advised him that the Blue Tooth system in the vehicle he was leasing was the best system available for any vehicle. The Smithtown sales representative advised Mollins that he had never had any complaints about the system.

Despite these assurances, prior to the execution of the lease, Mollins asked if he could pair his cell phone with a test vehicle to assure the clarity of reception and ease of hands-free operation. Smithtown denied this request and reiterated their assurances that the Blue Tooth system in the 2006 Infiniti M35X would meet Mollins' requirements.

Mollins took possession of the vehicle in March 2006. He asserts the Blue Tooth system never functioned properly because the system had an echo. This prevented him from hearing the person at the other end of his telephone conversation.

Despite Smithtown's efforts to remedy this problem, the Blue Tooth system could not be satisfactorily corrected.

In July 2006, Smithtown installed a new Blue Tooth system in the vehicle which also had a navigation system. Mollins alleges the navigation system never worked. He further asserts the new Blue Tooth system worked as poorly, if not worse, than the system that had been replaced.

Plaintiff commenced this action in August 10, 2006.

On or about August 29, 2006, the lease was terminated when Mollins surrendered possession of the vehicle to Smithtown. Upon surrender of the vehicle, Smithtown refunded to Mollins the deposit paid on the lease and all monthly payments made to date. Mollins accepted the check, endorsed it without restriction and deposited it.

Despite the surrender of the vehicle, termination of the lease and a full refund of all money paid on account of the lease, Mollins has refused to discontinue this action. As a result, Defendants have moved to dismiss the complaint.

The complaint alleges five causes of action. The first cause of action alleges a breach of the lease agreement. The second cause of action alleges a breach of warranty. The third cause of action alleges fraud. The fourth cause of action alleges

the Defendants "...violated the New York State General Obligations Laws (*sic*), have engaged in deceptive trade practices and violating the New York State Consumer Protection Laws." The fifth cause of action alleges a claim that merges fraud with strict products liability.[1]

Mollins also named Nissan Motor Co., Ltd. ("Nissan") and Nissan North America, Inc. ("NNAI") as Defendants.

DISCUSSION

A. Accord and Satisfaction - Payment

Defendants assert that based upon the documentary evidence, the cancellation of the lease and the receipt of a check refunding to Mollins all sums paid under the lease as well as his endorsement and negotiation of the check without a reservation of rights constitutes payment in settlement of this action. CPLR 3211(a) (1) and (5).

This transaction is subject to the provisions of the Uniform Commercial Code ("UCC") Article 2-A - Leases. Article 2-A applies to any transaction that creates a lease. UCC §2-A-102. The lease between Smithtown and Mollins is a "consumer lease" as

[1]While the pleading is vague as to the theory of recovery in the fifth cause of action, the Court will assume it to be one for strict products liability.

defined by UCC §2-A-103(e).[2] If it is not a consumer lease, then it is a lease as defined by UCC §2-A-103(j).[3]

UCC §1-207, which is applicable to all transactions governed by the UCC, permits a party to accept partial payment of a claim without affecting an accord and satisfaction so long as the party reserves its rights by endorsing the check in such a way as to indicate that it is not accepting the partial payment as payment in full. Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., Inc., 66 N.Y.2d 321 (1985). See, Metropolitan Knitwear v. Trans World Fashions, Inc., 233 A.D.2d 241 (1st Dept. 1996).

In this case, Mollins received the check, endorsed and negotiated it without indicating he was reserving any rights.

Nevertheless, receipt and deposit of the check is considered an accord and satisfaction only if the debtor expresses "...a clear manifestation of intent...that the payment is in full satisfaction of the disputed claim (citations omitted)." Boyle v. American Airlines, Inc., 89 A.D.2d 667 (3rd Dept. 1982). See also, JRDM Corp. v. U.W. Marx, Inc., 252 A.D.2d 854 (3rd Dept. 1998); and Complete Messenger & Trucking Corp. v. Merrill Lynch Money Markets, Inc., 169 A.D.2d 609 (1st Dept. 1991). "[T]he debtor must make clear that the check which he sent is offered only on condition that it

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[2]UCC §2-A-103(e) defines a "Consumer lease" as "...a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for personal, family or household purposes."

[3] UCC §2-A-103(j) defines "Lease" as "...a transfer of the right of possession and use of goods for a term in return for consideration."

is taken in full payment of the disputed claim (citations omitted)." Manley v. Pandrick Press, Inc., 72 A.D.2d 452, 455-6, (1st Dept. 1980).

The check tendered to Mollins did not indicate that it is being tendered as full payment of all claims Mollins might have arising out of the lease transaction. The "Odometer Disclosure Statement" is a certification by Mollins of the odometer reading as of the date of surrender of possession of the vehicle is the actual milage on the vehicle. However, nothing in the Odometer Disclosure Statement indicates that executing that document constitutes a waiver or release of any claims Mollins might have arising out the transaction.

An action will be dismissed pursuant to CPLR 3211(a)(1) when the documentary evidence submitted in support of the motion conclusively establishes a defense to the action as a matter of law. Leon v. Martinez, 84 N.Y.2d 83 (1994). See also, 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002); 730 J & J LLC v. Fillmore Agency, Inc., 303 A.D.2d 486 (2nd Dept. 2003); and Berger v. Temple Beth-el of Great Neck, 303 A.D.2d 346 (2nd Dept. 2003). The documentary evidence does not establish the defense of settlement or accord and satisfaction as a matter of law. The check does indicate it is being tendered as "payment in full". The check was not accompanied by a letter or any other correspondence indicating it was being tendered as payment in full.

CPLR 3211(a)(5) permits the court to dismiss the complaint where the claim has been settled or paid. The check without further proof surrounding the issuance of the

check and the termination of the lease cannot be considered payment or settlement of the Mollins claim. JRDM Corp. v. U.W. Marx, Inc., *supra*. Since the documentary evidence does not establish the defense of settlement or payment as a matter of law, the motion to dismiss pursuant to CPLR 3211(a)(5) must be denied.

B. Breach of Contract - First Cause of Action

1. *Privity*

The lease agreement between Mollins and Smithtown is a contract as defined by UCC §1-201(11).[4] UCC §1-201 provides general definitions applicable to all provisions of the UCC.

One may not maintain an action for breach of contract against a party with whom it is not in privity. La Barte v. Seneca Resources Corp., 285 A.D.2d 974 (4th Dept. 2001); and M. Paladino, Inc. v. J. Lucchese & Sons Contracting Corp., 247 A.D.2d 515 (2nd Dept. 1998).

The lease is between Mollins and Smithtown. Nissan and NNAI are not parties to the lease. Since Mollins is not in privity with either Nissan and NNAI, the first cause of action against them must be dismissed.

2. *Smithtown*

Smithtown asserts that Mollins cannot maintain this action because he cannot recover any contractual damages.

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[4]UCC §1-201(11) defines contract as "...the total legal obligations which results from the parties' agreement as affected by this Act and any other applicable rules of law."

"A basic principle of damages in a contract action is that the injured party should be left in as good a position as it would have been had the contract been fully performed, and that the injured party should not recover more from the breach than it would have gained had the contract been fully performed (citations omitted)." Bogdan and Faist, P.C. v. CAI Wireless Systems, Inc., 295 A.D.2d 849, 853-4 (3rd Dept. 2002). See, Freund v. Washington Square Press, Inc., 34 N.Y.2d 379 (1974); and Lager v. City of New York, 304 A.D.2d 718 (2nd Dept. 2003).

The amount of damages, which Mollins is permitted to recover in this action, is governed by UCC §2-A Part 5. That provision provides for remedies in the event the lessor breaches the lease. UCC §2-A-501.

Termination of the lease discharges all executory obligations, but does not discharge any rights on prior default or breach. UCC §2-A-505(2).

UCC §2-A-517(1) permits a lessee to revoke acceptance of the leased goods if the nonconformity of those goods substantially impairs its value to the lessee. The revocation of acceptance must be made within a reasonable time after the lessee discovers, or should have discovered, the goods were non-conforming. UCC §2-A-517(4).

In this case, Mollins accepted delivery of the vehicle. Mollins was advised that the vehicle's hands-free telephone system would operate in a certain manner. The item did not operate as represented. As a result, Mollins properly revoked his acceptance of the vehicle.

The statutory remedy provided to Mollins under this circumstance is the right to cancel the lease and recover so much of the rent and security paid as may be just under the circumstances. UCC §2-A-508(1)(a)(b). This is precisely what happened. Thus, Mollins has been fully compensated for the damages he sustained as a result of any breach by Smithtown. Since Mollins has been fully compensated for his contractual damages, the breach of contract cause of action must be dismissed for want of the essential element of injury.

C. Breach of Warranty - Second Cause of Action

Since Mollins leased the vehicle, the warranties provided are those provided by UCC Article 2-A. UCC §2-A-102.

UCC §2-A-210(1)(a) provides that any affirmation of fact or promise made by the lessor to the lessee about the goods that become part of the basis of the bargain creates an express warranty that the goods will conform to such affirmation or promise.

UCC §2-A-212 creates an implied warranty of merchantability if the lessor is a merchant with respect to the goods. Goods are merchantable if they are fit for the ordinary purpose for which goods of those type are used. UCC §2-A-212(2)(c). Likewise, UCC §2-A-213 provides for an implied warranty of fitness for a particular purpose when the lessor knows, or has reason to know, that the lessee is leasing the goods for a particular purpose and the lessee relied upon the lessor's skill and judgment in selecting suitable goods.

Section 9 of the lease provides that the vehicle is covered by "The Standard New Vehicle Limited Warranty provided by the manufacturer or distributor of this Vehicle." The section states:

> "EXCEPT AS EXPRESSLY PROVIDED UNDER THIS LEASE, WE OFFER NO EXPRESS OR IMPLIED WARRANTIES WITH RESPECT TO THIS VEHICLE. WE MAKE NO IMPLIED WARRANTY OF MERCHANTABILITY. THE LESSOR UNDERTAKES NO RESPONSIBILITY FOR THE QUALITY OF THE GOODS EXCEPT AS OTHERWISE PROVIDED IN THIS CONTRACT. THE LESSOR ASSUMES NO RESPONSIBILITY THAT THE GOODS WILL BE FIT FOR ANY PARTICULAR PURPOSE FOR WHICH YOU MAY BE LEASING THESE GOODS, EXCEPT AS OTHERWISE PROVIDE IN THE CONTRACT."

Additionally, Mollins was provided with an Infiniti Warranty Information Booklet ("Warranty Booklet"). The first page of the warranty booklet contains the following provision:

> "LIMITATION OF WARRANTIES AND OTHER WARRANTY TERMS AND STATE LAW RIGHTS
>
> EXTRA EXPENSES - LIMITATION OF DAMAGES THIS WARRANTY DOES NOT COVER INCIDENTAL OR CONSEQUENTIAL DAMAGES SUCH AS LOSS OF THE USE OF THE VEHICLE, INCONVENIENCE OR COMMERCIAL LOSS."

The same section of the Warranty Booklet states, "Nissan does not authorize any person to create for it any other warranty, obligation or liability in connection with this vehicle."

Mollins' claim of breach of express warranty is premised upon the statements made to him by Smithtown's sales representatives regarding the operation of the Blue Tooth hands-free phone system.

A lessor may exclude or disclaim express warranties. See, Brennan v. Shapiro, 12 A.D.3d 547 (2nd Dept. 2004); and UCC §2-A-214(1). The documentary evidence conclusively establishes that the Defendants excluded any express warranties regarding the Blue Tooth system.

The lease specifically states that the lessor has made no express warranties regarding the vehicle. Therefore, Mollins was on notice that he could not consider the representations made by Smithtown's sales representatives as express warranties.

The Warranty Booklet provided to Mollins in connection with the lease states that no one has authority to create any warranties other than those contained therein. Therefore, the representations made by the Smithtown representatives regarding the Blue Tooth system cannot be considered to be binding upon Infiniti or NNAI.

A party is under an obligation to read a document before accepting its terms and cannot avoid the effect of the document by asserting they he or she did not read or understand the contents of the document. Pimpinello v. Swift & Co., 253 N.Y. 159 (1930); and Saxony Ice Co., Division of Springdale Ice Co., Inc v. Little Mary's American Bistro, 243 A.D.2d 700 (2nd Dept. 1997); and Martino v. Kaschak, 208 A.D.2d 698 (2nd Dept. 1994). Mollins is an attorney. He does not assert that he was not given copies of the lease or Warranty Booklet. He, more than most, had the knowledge and ability to understand the meaning and effect of these disclaimers.

A lessor may also exclude a warranty of merchantability provided the disclaimer is in writing, is conspicuous and mentions merchantability. UCC §2-A-214(2). See, Brennan v Shapiro, *supra;* and Sky Acres Aviation Services, Inc. v. Styles Aviation, Inc., 210 A.D.2d 393 (2nd Dept. 1994). The exclusion or disclaimer of the warranty of merchantability contained in the lease herein is conspicuous in that it specifically mentions merchantability and is in larger and contrasting type UCC §1-201 (10). The lease clearly and unequivocally excludes any warranties of merchantability.

The lease also excludes any warranties of fitness for a particular purpose. Such exclusionary provisions are also permissible. Sky Acres Aviation Services, Inc. v. Style Aviation, Inc., *supra.*; and ConTel Credit Corp. v. Mr. Jay Appliances & TV, Inc., 128 A.D.2d 668 (2nd Dept. 1987).

The lease clearly states that the only warranty on the vehicle was the standard new vehicle limited warranty. The Warranty Booklet provided to Mollins clearly describes the items that were warranted. The provisions of the standard new vehicle lease contained in the Warranty Booklet do not make reference to the Blue Tooth system. Neither Plaintiff nor Defendant indicate that the Blue Tooth system had any warranties separate and apart from those provided by the standard new car limited warranty.

Since the documentary evidence conclusively establishes all express warranties, implied warranties of merchantability and implied warranties of fitness for a particular

purpose were fully and properly disclaimed, the second cause of action must be dismissed.

D. Fraud - Third Cause of Action

The third cause of action alleges that Mollins, and the other members of the putative class, were fraudulently induced into leasing Infiniti vehicles based upon the knowingly false representations made about the Blue Tooth system.

The elements of common law fraud are "...representations of a material existing fact, falsity, scienter, deception and injury." Channel Master Corp. v. Aluminum Ltd. Sales, 4 N.Y.2d 403, 407 (1958). Fraud must be plead with specificity. CPLR 3016(b). A contract that is fraudulently induced is voidable. Dalessio v. Kressler, 6 A.D.3d 57 (2nd Dept. 2004).

Damages in an action for fraud are limited to actual pecuniary loss – the out of pocket rule. Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413 (1996); Barrett v. Huff, 6 A.D.3d 1164 (4th Dept. 2004); and O'Neill v. O'Neill, 264 A.D.2d 766 (2nd Dept. 1999).

In this case, Mollins has already obtained a cancellation or rescission of the contract. In such a case, his damages for fraud are limited to a recovery of the payments made as of the date of the cancellation of the contract. Merry Realty Co., Inc. v. Shamilin and Hollis Real Estate Co., Inc., 230 N.Y. 316 (1921).

Since Mollins has obtained full compensation, he has sustained no cognizable damages or injury. Thus, he may not maintain an action for fraud. This cause of action must be dismissed.

E. Breach of Consumer Protection Statutes – Fourth Cause of Action

The fourth cause of action alleges violations of "...New York State General Obligations Laws (*sic*) ... and New York State Consumer Protection Laws" (Complaint ¶ 50).

The complaint does not state which specific statutes support Plaintiff's cause of action. The papers submitted in opposition to the dismissal motion do not indicate the statutes violated.

CPLR 3013 requires a pleading to sufficiently particularize the material elements of each cause of action. A pleading that fails to set forth a material element of a cause of action is violative of CPLR 3103. Siegel, *New York Civil Practice 4th* §208.

Where liability is premised upon a statutory violation, the plaintiff must allege the specific statutory provisions claimed to have been violated. See, Johnson v. National Railroad Passenger Corp., 83 A.D.2d 916 (1st Dept. 1981); and City of Albany v. Lee, 76 A.D.2d 978 (3rd Dept. 1980), *aff'd.*, 53 N.Y.2d 633 (1981). For this reason alone, the allegations in the fourth cause of action are insufficient and warrant dismissal.

The Court has reviewed the General Obligations Law and has been unable to discern any provision that would be relevant to this action.

The term "New York State Consumer Protection Laws" is so vague as to defy definition.

To the extent the complaint alleges a violation of the "Lemon Law" (General Business Law ["GBL"] §198-a), Plaintiff has obtained full compensation under the statute. GBL §198(c)(1) gives the manufacturer and the dealer the option of either repairing the vehicle or accepting the return of the vehicle and refunding to the lessee the "Lease Price" as defined by GBL §198-a(a)(6). Smithtown has fully complied with this provision by accepting the vehicle, cancelling the lease and refunding to Mollins all the payments made on account of the lease to Mollins.

Article 22-A of the General Business Law is designated as "Consumer Protection From Deceptive Acts and Practices." GBL §349 thereunder prohibits deceptive business practices. The statute makes actionable conduct which does not rise to the level of common law fraud. Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999). It provides a remedy to those who have been subject to deceptive or misleading acts or business practices that are consumer oriented. Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20 (1995). A deceptive act or practice for the purposes of GBL § 349 is one which is likely to mislead a reasonably prudent consumer. Karlin v. IVF America, Inc., 93 N.Y.2d 282 (1999).

The elements of a claim under GBL § 349 are "(1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury resulting from such act. (citations omitted)". Andre Strishak & Assoc., P.C. v. Hewlett Packard

Co., 300 A.D.2d 608, 609 (2nd Dept. 2002). See also, Solomon v. Bell Atlantic Corp., 9 A.D.3d 49 (1st Dept. 2004).

Private contract disputes unique to the parties are not within the ambit of the statute. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., *supra;* and Genesco Entertainment v. Koch, 593 F.Supp 743 (S.D.N.Y. 1984). To maintain an action under GBL § 349, a plaintiff must show that the deceptive acts or practices are not limited to the parties but have a potential impact on consumers at large. Teller v. Bill Hayes, Ltd., 213 A.D.2d 141 (2nd Dept. 1995), *lv. app. dism. in part, den. in part,* 87 N.Y.2d 937 (1996).

This is a private dispute between Mollins and the Defendants. The gravamen of the complaint and the damages Mollins seeks to recover involve his inability to effectively use his cell phone from his car to conduct his law practice. Mollins seeks to recover the damages he allegedly sustained as a result of the interference with his ability to speak to his office, clients or other attorneys from his car. This claim is thus specific to Mollins and his business needs. It does not involve consumers in general. Thus, he has failed to state a valid claim under GBL §349.

F. Fraud/Strict Product Liability – Fifth Cause of Action

This cause of action alleges that the Defendants intended to deceive the public by selling a defective product. To the extent that this cause of action is premised on fraud, the cause of action must be dismissed as discussed under headnote D, *supra.*

To the extent this cause of action alleges a claim for strict products liability, it fails to state a claim upon which relief can be granted. The relationship between Mollins and Smithtown is contractual. One cannot recast a contract liability as on in tort unless the plaintiff can establish that defendant violated some a legal duty that is separate and apart from the defendant's contractual obligations. Sommer v. Federal Signal Corp., 79 N.Y.2d 540 (1992); Clark-Fitzpatrick v. Long Island Rail Road Co., 70 N.Y.2d 382 (1987); and Muldoon v. Blue Water Pool Services, Inc., 7 A.D.3d 496 (2nd Dept. 2004). In this case, Plaintiff has failed to establish the existence of such a duty.

One may not recover for economic loss - the cost of repair of the product and consequential damages - in an action predicated upon strict product liability. Borce Leasing Corp. v. General Motors Corp. (Allison Gas Turbine Div.), 84 N.Y.2d 685 (1995); and 1A PJI3d 2:120, at 637- 8 (2006).

Here, Mollins is seeking to recover for his economic loss in this action since he has already received full compensation for his actual out-of-pocket expenses.

Additionally, Plaintiff has failed to plead an essential element of a cause of action for strict products liability. Such a cause of action in strict products liability requires the plaintiff to plead not only that the product was defective, but also the defect rendered the product unsafe. Cover v. Cohen, 61 N.Y.2d 261 (1984); and Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102 (1983). See also, Denny v. Ford Motor Co., 87 N.Y.2d 248 (1995). In this case, Mollins pleads that the product – the Blue Tooth system – was defective. However, he does not plead that the defect rendered the product

unsafe. This defect in the complaint is not remedied by Mollins' submissions in opposition to the motion. Therefore, Mollins has failed to plead a cause of action for strict products liability.

G. Class Action Status

Where the named plaintiff in a class action does not have a viable claim, the complaint must be dismissed. See, Estruch v. Volkswagenwerk, AG, 97 A.D.2d 978 (4th Dept. 1983).

Accordingly, it is,

ORDERED, that Defendants' motion to dismiss the complaint is **granted** and the complaint is hereby dismissed.

Dated: Mineola, NY
January 31, 2007

Hon. LEONARD B. AUSTIN, J.S.C.

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