SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

KAREN M. POLITO and MARIANO POLITO,

Plaintiff(s),

INDEX No. 18842/05

-against-

MOTION DATE: 11/7/07

WESTBURY JEEP CHRYSLER DODGE, INC.
and DAIMLER CHRYSLER CORPORATION,

Defendant(s).

MOTION SEQ. No. 1-MG
2-MOD

The following papers read on this motion:
Notice of Motion/Affirmation/Affidavit/Exhibits
Memorandum of Law
Notice of Motion/Affirmation/Exhibits
Affidavit in Opposition/Exhibits
Affidavit in Opposition/Exhibits
Memorandum of Law
Reply
Reply

This motion by defendant DAIMLER CHRYSLER CORPORATION ("DAIMLER CHRYSLER") for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the Complaint against it is Granted.

This cross-motion by defendant WESTBURY JEEP CHRYSLER DODGE ("WESTBURY JEEP") for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the Complaint against it is Granted to the extent provided herein.

The following facts are not disputed. The defendant DAIMLER CHRYSLER manufactured a 2003 Jeep Liberty which it sold to defendant WESTBURY JEEP on or about May 15, 2003. Defendant WESTBURY JEEP modified the Jeep's exhaust system by creating a cosmetic dual exhaust system which

began not at the manifold as a true dual exhaust system would, but at the muffler. The plaintiffs purchased the Jeep from WESTBURY JEEP on or about December 29, 2003, fully aware that it had a dual exhaust system. The window sticker noted that the dual exhaust system was a Dealer Added Option.

On or about July 29, 2005, plaintiff MARIANO POLITO noticed a puddle of gas under the car and found a hole in the gas tank. The Jeep was towed to the local DAIMLER CHRYSLER dealer in Catskill, N.Y. where it was inspected. The exhaust pipes were found to be improperly fitted as they were too close to the gas tank. This apparently resulted in heat from the pipe causing a hole in the tank, brake line and inside of the rear bumper. Because it was the result of the post manufacture modification by WESTBURY JEEP, the repair was not covered under DAIMLER CHRYSLER's warranty.

The Jeep was towed to WESTBURY JEEP whose inspection revealed the same result, however, WESTBURY JEEP went one step further in concluding that the pipes' proximity to the tank was caused by impact damage, i.e., an accident. It so advised the plaintiffs. A claim was submitted to the plaintiffs' insurer, Allstate Insurance Company; however, it is disputed who submitted it, the plaintiffs or WESTBURY JEEP.

Allstate agreed to cover the repair under the plaintiffs' insurance policy, with the plaintiffs paying their deductible of $500.00. The plaintiffs, however, declined insurance coverage for the repair, adamantly maintaining that the defect was not the result of impact damage as the Jeep has been in only one "minor fender bender." The plaintiffs, rather, maintain that the exhaust system defect is the result of DAIMLER CHRYSLER's manufacture and/or WESTBURY JEEP's modification of the Jeep. Their attempt to get the jeep repaired pursuant to the warranty failed and this action ensued.

The plaintiffs have continued to make installment and insurance payments on the Jeep which remains in storage. The plaintiffs have not authorized WESTBURY JEEP to repair the Jeep.

In their Complaint, the plaintiffs allege that when they purchased the Jeep on December 29, 2003, they believed that "the vehicle was a new vehicle manufactured by Chrysler;" that "a dual exhaust was part of the equipment of the vehicle;" and, "that [it] would have the benefit of the standard manufacturer's warranty." Plaintiffs further allege that on July 31, 2005, the gas tank began to leak and that when it was inspected at Bengal Jeep, the representative said that "the dual exhaust burnt a hole in the gas tank, brake line and inside

of the rear bumper" and that Chrysler would have to authorize the necessary repairs. Plaintiffs allege that when a Chrysler representative inspected the Jeep, he concluded that the damage was caused by the dual exhaust system which was installed by WESTBURY JEEP and so Chrysler's warranty would not cover the repair. Plaintiffs allege that the Jeep was towed to WESTBURY JEEP, which, after inspecting it, told the plaintiffs to put in a claim with their insurance company and to say that the Jeep was in an accident. Plaintiffs state that they refused to do so because such a claim would be false.

The plaintiffs allege that WESTBURY JEEP independently and acting as an agent for DAIMLER CHRYSLER either knowingly or recklessly falsely represented that the Jeep would be fully covered by the manufacturer's warranty to induce their purchase of the vehicle; that they relied on that representation; and, that they did not know that the dual exhaust system was not standard equipment which is not covered by the warranty. Plaintiffs allege that had they known the truth, i.e., that the dual exhaust system was not covered by the warranty, they would not have purchased the Jeep.

Based on their claim sounding in fraud, plaintiffs seek rescission of the sales agreement and a refund of their purchase price as well as punitive damages. The plaintiffs also allege breach of contract.

Both DAIMLER CHRYSLER and WESTBURY JEEP seek summary judgment dismissing the Complaint against them.

Summary judgment is only appropriate where there are no material triable issues of fact. *Sillman v Twentieth Century Fox-Film Corp.*, 3 NY2d 395 (1957). Because it is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978); *Moskowitz v Garlock*, 23 AD2d 943, 944 (3rd Dept. 1965). Nevertheless, only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment. *Rotuba Extruders, Inc. v Ceppos, supra*; *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 (1973); *Rosenberg v Del-Mar Div. Champion Intern. Corp.*, 56 AD2d 576 (2nd Dept. 1977).

Carlos Sosa, WESTBURY JEEP's employee who installed the dual exhaust system, has attested that he installed the dual exhaust system pursuant to the instructions provided by its manufacturer Mopar Performance Exhaust System and that he did not install a piece of rubber between the exhaust pipe and the

gas tank. In fact, he states that the rubber piece was not a part in the system he installed. He further attests that when he inspected the Jeep, he observed that "the left rear exhaust pipe was deformed [which] demonstrate[d] and indicate[d] that sometime after the vehicle left WESTBURY JEEP CHRYSLER DODGE INC. someone stuck a pipe or other object into the exhaust pipe to pry the exhaust pipe down. The deformity on the inner-most ring of the exhaust pipe was not present when the customer took delivery at WESTBURY JEEP CHRYSLER DODGE, INC. after [he] had installed the parts. From the inspection of the vehicle, [he] can determine using [his] knowledge, expertise, experience, professional training and understanding, after having worked upon hundreds of Jeep Liberty vehicles, that the subject vehicle was in some sort of an accident or other traumatic reconfiguration of the exhaust system parts."

Ralph Dee Baum, DAIMLER/CHRYSLER's automotive expert, concluded in his investigation report that the damage was caused by the after-market dual exhaust system. More specifically, his "lift inspection revealed that there is an aftermarket dual exhaust system installed on this vehicle. The left rear exhaust pipe is leaning against the rear of the plastic tank. There is a piece of rubber wedged between the tank and the pipe. Heat from the pipe melted a hole into the tank, causing fuel to leak out." Notably, Baum does not profess to know what caused the left rear pipe to come to lean against the gas tank; who put the wedged piece of rubber between the two; or, how long it was there. Indeed, while he originally testified that the exhaust system was dangerously installed, he corrected himself and said that was the way it was when he looked at it. At his examination-before-trial, he testified that any conclusion that WESTBURY JEEP caused these problems was based purely on the fact that WESTBURY JEEP installed the dual exhaust system.

DAIMLER CHRYSLER's technical advisor Joseph Paskewicz inspected the Jeep in December, 2005. At his deposition, he testified that the direct cause of the damage to plaintiffs' Jeep was the exhaust pipe touching the fuel tank and that the root cause was that the exhaust pipe had been bent. He, too, could not say who did that. He opined "whoever made the final adjustment, the last person that touched the vehicle was the one [who] would have been directly responsible for the . . . damage to the vehicle." As for the piece of rubber, he opined that "it would have been installed after the fact, sometime after the vehicle was delivered to the customer" He explained that if the pipe had been in that close proximity to that piece of rubber and the gas tank . . . the ultimate problem . . . would have happened a lot sooner."

Allstate's inspection concluded "it appears the l/s tailpipe was bent up into the rear bumper and then pried back down. The pipe melted the rear bumper & is also bent mid way up the pipe & is against the plastic gas tank which is melted. This is a borla exhaust system which was dealer installed."

The plaintiffs both maintain that they used the Jeep uneventfully for approximately 18 months. They also adamantly maintain and plaintiff KAREN POLITO has attested that they never had any work performed on the dual exhaust system and that only normal maintenance had been done on the Jeep. In fact, POLITO attests that the hole in the gas tank developed only after their first long trip in the Jeep to Canada.

DAIMLER CHRYSLER has established that it was not a party to the plaintiffs' sales agreement and that it did not manufacture or install the dual exhaust system in the plaintiffs' Jeep. DAIMLER CHRYSLER has established that while the post manufacture modification by WESTBURY JEEP did not void the warranty in its entirety, its warranty does not cover "items added or changed after the vehicle left [its] manufacturing plant." It is clear that the damage to plaintiffs' jeep was clearly related to–although not necessarily caused by WESTBURY JEEP's post-manufacture modifications. DAIMLER CHRYSLER has accordingly established that the defect is not covered by its warranty. *In re General Motors Corp. (Sheikh),* 41 AD3d 993 (3rd Dept. 2007).

DAIMLER CHRYSLER has also established that WESTBURY JEEP was not its agent. DAIMLER CHRYSLER does not own any portion of WESTBURY JEEP, nor does it hire, fire, or supervise its employees, manage its business or share in its profits. They are separate distinct business entities. Indeed, their Dealer Sales and Service Agreement provides:

> "This agreement does not create the relationship of principal and agent between [DCC LLC] and [Westbury Jeep], and under no circumstances is either party to be considered the agent of the other."

See, Holzer v Dodge Brothers, 233 NY 216 (1921); *Shuldman v Daimler Chrysler Corp.*, 1 AD3d 343 (2nd Dept. 2003).

DAIMLER CHRYSLER's motion is Granted and the Complaint against it is Dismissed.

WESTBURY JEEP seeks dismissal of the Complaint as barred by the economic loss doctrine. *Bocre Leasing Corp. v General Motors Corp., Allison Gas Turbine Div.*, 84 NY2d 685, 688-689 (1995).

The Court disagrees.

The plaintiffs' claims are not barred by the economic loss doctrine. When a plaintiff seeks to recover damages for purely economic loss resulting form 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. *Manhattanville College v Romeo Consulting Engineer, P.C.*, 28 AD3d 613 (2nd Dept. 2006); *Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 293-295 (1991); *532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 288 n 1 (2001); *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 (1995); *Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.], supra; 7 World Trade Co. v Westinghouse Elec. Corp.*, 256 AD2d 263, 264 (1998).

WESTBURY JEEP has cited a litany of cases that stand for the uncontrovertible position that the economic loss rule bars negligence and strict products liability claims. *See, e.g., Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.], supra; Weiss v Polymer Plastics Corp.*, 21 AD3d 1095 (2nd Dept. 2005); *AKV Auto Transp., Inc. v Syosset Truck Sales, Inc.*, 24 AD3d 833 (3rd Dept. 2003). The plaintiffs, however, have advanced a claim sounding in fraudulent inducement, which has been permitted under these circumstances. *See, EED Holdings v Palmer Johnson Acquisition Corp.*, 387 F.Supp.2d 265, 278 (S.D.N.Y. 2004) (plaintiff's fraud claim that defendant fraudulently represented that "it had the capability and the wherewithal to properly construct the yacht sought by Goldman in a timely manner" was not barred by economic loss rule); *see also, Sofi Classics S.A. dec.v. v Horowitz*, 444 F.Supp2d 231 (S.D.N.Y. 2006); *Computech Int'l Inc. v Compaq Computers Corp.*, No. 02 Civ. 2628 (RWS), 2004 WL 1126320 at p. 10 (S.D.N.Y. 2004); *Dervin Corp. v Banco Bilbao Vizcaya Argentaria, S.A.*, 2004 WL 1933621 (S.D.N.Y. 2004); *but see, Shred-It USA, Inc. v Mobile Data Shred*, 222 F.Supp.2d 376, 379 (S.D.N.Y. 2002); *Orlando v Novurania of Am. Inc.*, 162 F.Supp2d 220, 225 (S.D.N.Y. 2001).

To rescind a contract on grounds of fraud, a plaintiff must establish by clear and convincing evidence that the defendant misrepresented a material fact or intentionally concealed a material fact upon which

plaintiff relied to his or her detriment. *Almap Holdings, Inc. v Bank Leumi Trust Co. of New York,* 196 AD2d 518, 518-519 (2nd Dept. 1993), *lv den.*, 83 NY2d 754 (1994); *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-407 (1958); *Simcuski v Saeli*, 44 NY2d 442, 452 (1978); 60 NYJur2d, Fraud & Deceit, § 11, at p. 446.

While a fraud claim is not permitted where the alleged fraud relates only to the contract, i.e., when the fraud is predicated on a promise to perform which the defendant never intended to keep (*see, Salvador v Uncle Sam's Auctions & Realty, Inc. ex. rel. Passono*, 307 AD2d 609 (3rd Dept. 2003), *lv dism.*, 1 NY3d 566 (2003); *Fourth Branch Assoc. Mechanicville v Niagara Mohawk Power Corp.*, 235 AD2d 962, 963 (3rd Dept. 1997). A misrepresentation of a present fact which induces and is collateral to the contract can support a fraud claim despite the advancement of a breach of contract claim, too *(Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 (1986); *First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287 (1st Dept. 1999) If a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also gave rise to plaintiff's breach of contract claim. In fact, the Court held in *First Bank of Americas v Motor Car Funding, Inc. (supra* at p. 292) that "[a] warranty is not a promise of performance, but a statement of present fact. Accordingly, a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim."

Although the window sticker stated "Equipment and Services Added by the Dealer" included the "dual exhaust system," WESTBURY JEEP has not established that the plaintiffs were ever told or were otherwise made aware that Dealer Added Options, including the dual exhaust system, were not covered under the manufacturer's warranty. WESTBURY JEEP's motion to dismiss plaintiffs' fraud claim is denied.

WESTBURY JEEP also seeks dismissal of the plaintiffs' claims on the grounds that the plaintiffs have refused to authorize it to repair their vehicle and have failed to mitigate their damages by allowing their insurance company to pay for the repair.

Plaintiffs' fraud claim is not obviated by Allstate's willingness to pay a portion of the cost of repairing the plaintiffs' Jeep. Plaintiffs maintain that the repair is not the result of an insurable event but rather WESTBURY JEEP's negligent installation of the dual exhaust system. In any event, via on their fraud in the

inducement claim, the plaintiffs seek not only the cost of repairing the Jeep, but rescission as well. And, contrary to WESTBURY JEEP's contention, under the circumstances, the plaintiffs' right to revocation is not defeated by their delay in seeking it as there is no evidence that they discovered or should have discovered the grounds for revocation until the gas tank leaked and they were denied coverage under their warranty. *See,* UCC2-608; *Ayanru v General Motors Acceptance Corp.*, 130 Misc.2d 440 (N.Y. City Civ. Ct. 1985).

The parties' submissions regarding what caused the exhaust pipe to cause the gas tank to leak have not been addressed as such a determination is irrelevant to the resolution of this motion. The plaintiffs allege fraud in that they were never informed that their manufacturer's warranty did not cover the dual exhaust system. WESTBURY JEEP has not established that the plaintiffs' damages would in any event not have been covered in their entirety even if the warranty had not been voided.

As to that portion of WESTBURY JEEP's motion seeking to dismiss the claim of punitive damages, that application is Granted. "[W]here 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." *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 605, 613 (1994), quoting *Walker v Sheldon*, 10 NY2d 401, 404-405 (1961). 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 Equitable Life Assur. Soc. of U.S., supra*, at p. 613; *see also, Amherst Magnetic Imaging Associates, P.C. v Community Blue*, 239 AD2d 892 (4th Dept. 1997); *Rochelle Associates v Fleet Bank of New York*, 230 AD2d 605 (1st Dept. 1996); *see also, In re Market XT Holdings Group*, 2006 WL 2864963 (Bankruptcy Ct. S.D.N.Y. 2006). The plaintiffs have failed to establish grounds for imposing punitive damages. According to the evidence presented this was the only vehicle WESTBURY JEEP modified in this fashion and there is no evidence that it has failed to divulge the limitations of the manufacturer's warranty to other customers. Thus, the plaintiffs' claim for punitive damages is dismissed.

It is, SO ORDERED.

Dated: Dec 13, 2007

HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

DEC 19 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE