

**Mercado v BMW of North America, LLC**

2007 NY Slip Op 34180(U)

December 7, 2007

Supreme Court, New York County

Docket Number: 0101725/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK / NEW YORK COUNTY

PRESENT: Judith J. Gische

PART \_\_\_\_\_

Justice

Index Number : 101725/2006

**MERCADO, VANESSA**

VS.

**BMW OF NORTH AMERICA**

SEQUENCE NUMBER : # 004

SUMMARY JUDGMENT

INDEX NO. 101725-06

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #004

MOTION CAL. NO. \_\_\_\_\_

read on this motion to/for B32/2

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

DEC 20 2007

NEW YORK COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**DEC 07 2007**

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----x

Vanessa Mercado,

Plaintiff,

-against-

BMW of North America, LLC and  
BMW of Manhattan, Inc.,

Defendants.

-----x

**Decision/Order**

Index No.: 101725/06

Seq. No. : 004

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Defs' n/m [§3212] w/PHC affirm, GS affid (sep back), exhs	1,2
Pltff's opp w/VM and DM (sep backs), exhs	3,4
Reply w/PHC affirm	5

**FILED**  
DEC 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

*Upon the foregoing papers the court's decision is as follows:*

GISCHE, J.;

This is plaintiff's action for breach of warranty pursuant to the Magnuson-Moss Warranty Act and General Business Law section 198-a ("Lemon Law") for an allegedly defective motor vehicle. The court has before it a pre-note of issue motion for summary judgment by the defendants. Plaintiff opposes the motion in all respects.

Since issue has been joined, but the time limitations of CPLR § 3212 have not yet been triggered, this motion is properly before the court and will be decided. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision is as follows:

### **The dispute and arguments presented**

Plaintiff purchased a brand new BMW car in July 2003. She claims the vehicle is a "lemon" because despite several repairs, it still does not run properly. Plaintiff contends the car repeatedly stalls out and has to be towed into the dealer. Plaintiff has asserted claims under the Lemon Law and the Magnuson Moss Act, which are consumer protection laws, specifically aimed at new cars which are defective.

On this motion, the service history for this vehicle is largely not in dispute. Thus, plaintiff alleges, and defendants do not deny that, plaintiff first had her car serviced in December 2003, only months after she bought the car. Plaintiff had subsequent repairs made on March 19, 2004, August 10, 2004, March 22, 2005, June 15, 2005, September 16, 2005, January 11, 2006, March 1, 2006, and at other times. The reported conditions fixed on the first three occasions involved misfirings. The March 22, 2005 repair was allegedly due to a contaminant being put into the fuel tank.

Defendants provide the sworn of its expert (Mr. Stanley) who contends the car was improperly maintained by plaintiff and the presence of a contaminant in the fuel tank caused plaintiff's car to shake and misfire. Defendant argues that this invalidated plaintiff's warranty because it does not cover malfunctions caused by improper or inadequate maintenance or the use of improper or contaminated fuel in the vehicle.

Defendants separately argue that plaintiff has no cause of action under the Lemon Law because there were only three attempts made to fix the alleged defect within the two year period following the plaintiff's purchase of the car. Defendants allege that because the Lemon Law requires, at a minimum, four attempts within two

years or 18,000 miles, whichever is soonest, their motion should be granted. Further, defendants claim that because the car was not out of service for a cumulative total of 30 days, she does not meet other requirements of the Lemon Law.

In opposition, plaintiff first contends that defendants have yet to provide certain responses to her discovery demands and therefore, their motion for summary judgment should be denied. On the merits, plaintiff relies upon her own sworn affidavit, various invoices issued by BMW and the sworn statement of her own expert witness (Mr. Manzari). Mr. Manzari opines that the defects in the car pre-existed any contamination of the fuel tank, and that defendant's expert's opinion is without any factual basis. He opines that plaintiff's complaints were assigned a specific trouble code by BMW each time she brought the car in for repairs, and that they attributed the problem to the misfiring of cylinder number 5. Mr. Manzari contends that this is irreconcilable with defendants' argument that the misfirings were due to contaminated fuel. Had that been so, he opines, all of the cylinders would have been damaged and misfired.

Plaintiff also raises a number of legal arguments in opposition to the motion by defendants which are not directly raised by defendants themselves. For example, plaintiff contends that because her car was under warranty, and they have not proved she did anything to invalidate it, all her warranty based claims await the resolution of her Lemon Law claims.

### **Discussion**

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

\* 5 ] .  
eliminate any material issues of fact from the case. ” Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985).

CPLR § 3212 (f) broadly provides that “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.” Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1<sup>st</sup> dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1<sup>st</sup> dept 2006) (internal citations omitted).

At the outset, the court finds that although discovery is incomplete, plaintiff has presented a strong case in opposition to defendants’ motion for summary judgment, notwithstanding her claims, that certain of her demands have not yet been complied with. Therefore, this is not a basis for the court to deny defendants’ motion for summary judgment.

Although defendants rely upon the opinion of an expert witness who purports to be familiar with the facts of this case, he opines that the plaintiff’s problems with the vehicle are solely due to her improper maintenance of the car, including the placement of antifreeze in the vehicle’s fuel tank, and then not quickly addressing that mistake. However, plaintiff’s car was serviced three times before the contaminant was reportedly

put into the fuel tank, and at each of those service calls, the diagnosis was a misfiring cylinder. This is not only supported by the invoices, it is conceded by defendant's reply. Consequently, the expert's opinion, that the problems with plaintiff's car followed the introduction of a contaminant in the gas tank sometime in March 2005, is not supported by the facts of this case, as developed on this motion.

In any event, summary judgment on this basis should be denied because there is a factual dispute about why this car has experienced misfiring and shakes. Each expert's opinion is based on the facts as the party offering them presents them, or believes them to be. The court's function on this motion is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y. 2d 395 (1957). Therefore, it is for the trier of fact to resolve these factual disputes at trial. See: Farkas v. Saary, 191 A.D.2d 178 (1<sup>st</sup> Dept 1993).

With respect to arguments about the Lemon Law itself, the Court's reasoning follows:

Under GBL 198-a (d) (1) and (2) of the Lemon Law, there is a "repair presumption" which provides as follows:

"It shall be presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties, if:

(1) the same nonconformity, defect, or condition has been subject to repair four or more times by the manufacturer or its agents or authorized dealers within the first 18,000 miles of operation or during the period of two years following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date, but such nonconformity, defect, or condition continues to exist; or

[\* 7 ] .

(2) the vehicle is out of service by reason of repair of one or more nonconformities, defects, or conditions for a cumulative total of 30 or more calendar days during either period, whichever is the earlier date.”

Under this repair presumption, the car plaintiff purchased would be presumed a lemon had there been a minimum of four repairs before the car reached the 18,000 milestone, or 2 years, whichever was soonest. Plaintiff purchased the vehicle in July 2003, but there were only three repairs made to the car before it had 18,000 miles on it. The 4<sup>th</sup> repair was in March 2005, within the first two years of ownership, but after the car had more than 18,000 miles on it. In addition, plaintiff has not proved that her car was out of service for a total of 30 or more days during either period. Although plaintiff has not met either of the alternative requirements for the statutory presumption, it only means that plaintiff is not entitled to the statutory presumption which would have lightened her burden. She can at trial still proceed to convince the trier of fact that her car is a “lemon.”

In connection with defendants’ motion for summary judgment, they have the burden of proving their defenses. Friends of Animals v. Associated Fur Mfrs., 46 N.Y. 2d 1065 (1979). Valid defenses to a cause of action under the Lemon Law are that the car has not been substantially affected because of the defects or malfunctions plaintiff alleges, or that the defects or malfunctions alleged were due to plaintiff’s actions. GBL §§ 198-a (c) (3) (i) and (ii). Defendants have not proved either one, therefore, their motion, to dismiss plaintiff’s cause of action under the Lemon Law is denied and it remains for trial.

Defendants have not met their burden with respect to plaintiff’s other claims

\* 8 ]  
under the Federal laws and the warranty, therefore their motion for summary judgment dismissing those claims is also denied.


Since defendants' motion for summary judgment is denied in all respects, but the Note of Issue has not yet been filed, the parties shall appear for the already scheduled status conference in Part 10 on **January 31, 2008** at 9:30 a.m. At that time the court will determine whether discovery is completed, and this case is ready for trial.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
December 7, 2007

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
DEC 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE