[* 1]

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

PRESENT: Helen E. Freedman Justice PART 39

Index Number : 602080/2007

TURBO ENTERPRISES, INC.

VS.

STRUCTURESTONE (UK), INC.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 03/20/08

H.H.D.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----------X

TURBO ENTERPRISES, INC.,

Plaintiff,

Index No. 602080/07

-against-

STRUCTURETONE (UK), INC., L.M. SCOFIELD COMPANY, ACE WESTCHESTER SPECIALTY GROUP, ILLINOIS UNION INSURANCE COMPANY and ACE INA HOLDINGS INC.,

Defendants.

----------X

HELEN E. FREEDMAN, J.:

This action arises in connection with the renovation of the third floor of the Tiffany store located at 727 Fifth Avenue, New York. Turbo Enterprises, Inc. ("Plaintiff" or "Turbo"), a subcontractor responsible for the floor, sues its general contractor Structuretone (UK), Inc. ("Structuretone") for breach of contract and negligence (first, second and third causes of action), L.M. Scofield Company ("Scofield"), the manufacturer of chemical compounds and products used in the flooring for breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose (fourth and fifth causes of action), and its insurers for breach of contract (sixth cause of action).

Scofield moves, pursuant to CPLR 3211(a)(1), to dismiss the breach of implied warranty of merchantability and implied warranty of fitness for a particular purpose, based upon documentary evidence. In its reply papers, Scofield raises an additional ground for dismissal pursuant to CPLR 3211(a)(7), claiming failure to state a cause of action. Plaintiff was afforded an opportunity to address that defense in a sur-reply affirmation and at oral argument; therefore,

the Court will consider Scofield's additional ground for dismissal. *See Held v. Kaufman*, 91 N.Y.2d 425 (1998).

For the reasons set forth below, Scofield's motion to dismiss the claims against it is granted.

Background

The Complaint alleges that in or about July 2004, Turbo, as a subcontractor of Structuretone, ordered and purchased "primer" and "leveling" material manufactured by Scofield from non-party distributor Extech Building Materials, Inc., for the flooring on that project. In mid-July 2004, Turbo applied Scofield's leveling products to the rough concrete floor of the store's third floor. The purpose of this treatment was to achieve a level and smooth surface upon which carpet would be laid. A few weeks later, a non-party agent of Structuretone installed the carpeting. Thereupon, the third floor was fitted out with store display cases and merchandise and open to the public.

In January 2005, however, Structuretone advised Turbo that the floor "was exhibiting raised areas and that in other areas the floor sounded hollow." Assuming that Scofield's products had separated from the rough concrete floor, Structuretone decided to remove the carpet, strip the entire area of the leveling materials and proceed to re-level the floor. After hiring other companies to perform the remedial work, Structuretone "backcharged" Turbo for the construction work done using Scofield's products.

In the fourth and fifth causes of action of the Complaint, Turbo alleges that Scofield's products were defective, and seeks to recover damages equal to its lost profits of approximately $400,000, based on Scofield's alleged breach of the implied warranties of merchantability and

fitness for a particular purpose as set forth in Sections 2-314 and 2-315 of the Uniform Commercial Code.

Contentions

Scofield contends that the claims against it should be dismissed as a matter of law because a remote purchaser, such as Turbo, does not have a cause of action for economic loss against a manufacturer based on implied warranties. Scofield also contends that the leveling materials purchased by Turbo were accompanied by a "Material Safety Data Sheet and Warranty," identifying and describing the products, as required by applicable OSHA regulations, and containing (i) a conspicuous written disclaimer of the implied warranties of merchantability and fitness for a particular purpose, and (ii) a limitation of remedies to refund or replacement of the defective products. It further maintains that the products' written specifications and labels contained a disclaimer of warranties, limitation of damages, and a reference to the "Material Safety Data Sheet and Warranty."

In opposition, Turbo contends that it never received Scofield's "Material Safety Data Sheet and Warranty" documents with its purchase, and that there was no warranty information on the containers or labels of the Scofield's products. Turbo also contends that the allegations in the fourth and fifth causes of action in the Complaint may alternatively be construed as making out a claim for breach of express warranty, and that such a claim may be maintained by a remote purchaser alleging economic loss only.

Discussion

Turbo's claims for breach of the implied warranties are dismissed because in the absence of a claim for personal injury or property damage, the implied warranties of merchantability and

fitness for a particular purpose, under UCC §§ 2-314 and 2-315, do not extend to a remote purchaser not in privity with the manufacturer. *See Arthur Jaffe Assoc. v. Bilsco Auto Serv.*, 58 N.Y.2d 993 (1983); *Miller v. General Motors Corp.*, 99 A.D.2d 454 (1st Dep't 1984); *Lexow & Jenkins, P.C. v. Hertz Commercial Leasing Corp.*, 122 A.D.2d 25 (2nd Dep't 1986); *Antel Olsdsmobile-Cadillac, Inc. v. Sirus Leasing Co.*, 101 A.D.2d 688 (4th Dep't 1984). Here, Turbo purchased the leveling products from a distributor. Inasmuch as Turbo was not in privity with Scofield and has alleged only economic loss, Scofield's implied warranties do not run to Turbo.

Turbo's alternative claim for breach of express warranty is also dismissed for failure to specify a particular warranty on which it could or did rely. Turbo relies on *Randy Knitwear v. American Cyanamid Co.*, 11 N.Y.2d 5 (1962), for its argument that statements made on Scofield's product's containers or labels may constitute express warranties that extend to a remote purchaser. In *Randy Knitwear*, a manufacturer of clothing sued a manufacturer of chemical resins that had represented by advertising, direct mail, and on labels for clothing, that fabric treated with its "Cyana Finish" would not "shrink or stretch out of fit." *Id.* at 6. The Court held that the plaintiff, who had purchased fabric accompanied by "Cyana Finish" labels from a fabric manufacturer, had a cause of action for breach of express warranty against the remote manufacturer because the express warranties were clearly passed on to plaintiff and plaintiff had relied on them. *Id.* at 14-16.

Here, unlike *Randy Knitwear*, the Complaint merely alleges that Turbo relied on "promises of fact made on the product's containers and labels," without specifying what representations or warrantics, if any, they contained. It is basic that to state a cause of action for breach of express warranty, a plaintiff must set forth the terms of the warranty upon which it

relied. *Davis v. New York City Housing Authority*, 246 A.D.2d 575, 576 (2nd Dep't 1998). Here, Turbo's allegations are wholly insufficient to support a claim for breach of express warranty.

Moreover, both the "Material Safety Data Sheet and Warranty" and the product labels furnished by Scofield in conjunction with the sale of its products to Extech, and which Scofield demonstrates was also furnished by Extech to Turbo, contain a valid limitation of warranties and damages which specifically states that "[a]ny liability is limited to the lesser of refund or replacement of defective materials." *See Mom's Bagels of New York v. Sig Greenbaum*, 164 A.D.2d 820 (1st Dep't 1990).

Based on the foregoing, it is hereby

ORDERED that defendant L.M. Scofield Company's motion to dismiss is granted as to all claims against it, and that the fourth and fifth causes of action in the Complaint are severed and dismissed, and it is further

ORDERED that the action is continued as to the first, second, third and sixth causes of action stated in the Complaint as to the remaining defendants, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that the parties are directed to appear for a status conference on April 8, 2008, at 9:30 a.m. in courtroom 208, 60 Centre Street, New York, New York 10007.

Dated: March 20, 2008

Enter:

Helen E. Freedman, J.S.C.