

Ceradini v Mercedes-Benz Manhattan, Inc.
2010 NY Slip Op 30652(U)
March 22, 2010
Supreme Court, New York County
Docket Number: 108830/2006
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: *Hon. Ling-Cohan*

PART 36

Index Number : 108830/2006
CERADINI, AUGUST J.
vs
MERCEDES-BENZ MANHATTAN
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits	<u>3</u>
Replying Affidavits	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *by defendants for summary judgment is decided in accordance with the attached memorandum decision.*

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

FILED
MAR 29 2010
NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/22/10

[Signature]
JUDGE DORIS LING-COHAN
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 36

-----X

August J. Ceradini, Jr.
Plaintiff,

Index Number
108830/2006

against

Mercedes-Benz Manhattan, Inc. and
Mercedes-Benz USA, LLC,
Defendants.

Motion Seq. No.:
001

-----X

Doris Ling-Cohan, J.:

Mercedes-Benz Manhattan, Inc. (MB) and Mercedes-Benz USA, LLC (manufacturer) seek summary judgment dismissing plaintiff's complaint, contending that Florida law is applicable to the case, and that, since plaintiff has not satisfied the requirements of Florida law, the action should be dismissed.

Plaintiff's complaint has five causes of action: 1) refund under New York State's General Business Law § 198-a (the New York Lemon Law) for a 2004 Mercedes-Benz S600V (the car), 2) replacement of the car with a comparable motor vehicle under the New York Lemon Law, 3) express warranty, 4) implied warranty, and 5) refund pursuant to 15 USC. § 2304, the Magnuson-Moss Warranty Act (MMWA).

Plaintiff alleges that he resides in New York County (Notice of Motion, Exh. A, Complaint, ¶ 1), that the defendants manufactured Mercedes-Benz cars (*id.*, ¶ 4), that they owned and operated a dealership in Manhattan which sold and repaired Mercedes-Benz cars (*id.*, ¶ 5) and that they manufactured the car (*id.*, ¶ 6). He further alleges that, on July 23, 2004, plaintiff

purchased the car at the Manhattan dealership for \$135,937.50, pursuant to a purchase agreement (the purchase agreement, affirmation in opposition, exhibit A), (*id.*, ¶¶ 7, 9), that at that time, defendants warranted to plaintiff that the car was brand-new and free of any defects and the plaintiff bought it in reliance thereon (*id.*, ¶¶ 10, 11). He further claims that there were defects requiring repairs including a malfunctioning engine, which led to the car being out of service from March 25, 2005 until June 17, 2005 (*id.*, ¶ 12), that he reported these defects to defendants, exhausted the informal dispute settlement procedures under New York's Lemon Law and commenced this action on June 23, 2006.

Defendants state that MB is the dealer that sold plaintiff the car (Fox affidavit, ¶¶ 1, 4) and that it shipped the car to him at his Florida residence (*id.*, ¶¶ 4, 5). They also assert that plaintiff is a Florida resident, that the car is registered and used solely in Florida and that all repairs to the car were performed in Florida (plaintiff EBT, at 17, 24). They further contend that the engine problem was fixed in July 2005 (*id.* at 49) and that subsequent problems have also been fixed (*id.* at 57). They further contend the plaintiff never provided a statutory notice to the manufacturer to permit a final opportunity to fix the car as required by Florida Statute Annotate, title 39, § 681.101 et seq. (the Florida Lemon Law), that the plaintiff failed to file for arbitration as required by

the Florida Lemon Law, and that the car was repaired at no cost to plaintiff and is now working (*id.* at 14-15). They assert that, as a result, Florida's Lemon Law should apply and since plaintiff failed to comply with its notice and arbitration provisions, plaintiff's New York Lemon Law causes of action should be dismissed. They also assert that, since the car was repaired, the express and implied warranty causes of action should be dismissed, and that the MMWA applies state law and, therefore, the claim for a refund under MMWA should also be dismissed. Finally, they contend that any claims against MB, the dealer, should be dismissed since both the New York Lemon Law and the Florida Lemon Law limit liability to the manufacturer.

Plaintiff, in opposition, does not address either the express warranty, implied warranty and MMWA causes of action and focuses solely on the choice of law issue. He states that the sale occurred in New York, that he resides in New York (plaintiff EBT, at 15), that defendants are licensed to do business in New York and that the purchase agreement provides "You and I agree that this Agreement is governed by New York State Law" (affirmation in opposition, exhibit A, purchase agreement-additional term 12). He also states that, consequently, the New York Lemon Law applies and that defendants have delayed in making this motion for summary judgement.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law

in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b])."

Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Plaintiff asserts that defendants' motion should be denied due to laches. Here, however, laches is not appropriate since "(t)he mere lapse of time, without a showing of prejudice, will not sustain a defense of laches." *Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 (2003), cert denied 540 US 1017. Plaintiff has shown no prejudice and since this motion was made on August 27, 2009, within 60 days of the note of issue's filing on June 29, 2009, he has also not shown any significant delay.

No Conflict as to Dealer

Florida's Lemon Law provides, § 681.104 (2) (a):

"If the manufacturer, or its authorized service agent, cannot conform the motor vehicle to the warranty by repairing or correcting any nonconformity after a reasonable number of attempts, the manufacturer, within 40 days, shall repurchase the motor vehicle and refund the full purchase price to the consumer, less a reasonable offset for use, or ...replace the motor vehicle with a replacement motor vehicle acceptable to the consumer."

"Basically, the Lemon Law requires a motor vehicle manufacturer or service agent to make repairs that are necessary to conform the vehicle to its warranty. See § 681.103, Fla. Stat. (2002). If the manufacturer or its agent are unable to correct the nonconformities within a reasonable number of attempts, the consumer is entitled to a

replacement vehicle or a refund of the purchase price. See § 681.104, Fla. Stat. (2002)."

Loberly v Thor Indus., Inc. 908 So2d 486, 487 (Fl DCA, 5th Dist 2005). Similarly, "the remedy under the so-called (New York) Lemon Law runs only against the manufacturer." *General Elec. Capital Auto Lease v D'Agnese*, 239 AD2d 462, 463 (2d Dept 1997). The remedy under both statutes runs against the manufacturer.

Therefore, as to the dealer, there is no conflict between the Florida and New York Lemon Law and plaintiff's first and second causes of action are dismissed against the dealer, MB.

Conflict as to the Manufacturer

However, the choice of law issue is relevant because there are different requirements as to the manufacturer under New York and Florida's Lemon Laws. Florida's Lemon Law has stricter pre-conditions prior to a customer being able to sue and different requirements on the manufacturer than New York's Lemon Law. "An application for arbitration by the Arbitration Board is a precondition to the consumer filing a court action predicated on the (Florida) Lemon Law." *Chrysler Corp. v Pitsirelos*, 721 So 2d 710, 712 (Fla Sup Ct 1998). Defendants state that plaintiff has failed to file this notice and plaintiff has not controverted this. Florida's Lemon Law also permits "a final attempt by the manufacturer to repair the motor vehicle... and such nonconformity continues to exist" [§ 681.104 (3) (a)] or an "opportunity to inspect or repair the vehicle following receipt

of the notification" [*id.*, § 681.104 (3)(b)]. Thus, if Florida's Lemon Law applies, the action against the manufacturer would be barred.

In contrast, New York's Lemon Law does not require "a consumer to establish that the vehicle defect continued to exist until the trial;" [*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 662 (2006)] or that plaintiff provide written notification and a final attempt to cure [Cf § 681.104(1)(a)]. Defendants have not alleged that plaintiff did not follow the procedural requirements of New York's Lemon Law.

Choice of Law Rules

New York uses the "'center of gravity' or 'grouping of contacts' as the appropriate analytical approach to choice of law questions in contract cases." *Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 317 (1994). The factors to be considered are "the place of contracting, ...the places of negotiation and performance; the location of the subject matter; and the domicile or place of business of the contracting parties."

In this case, the place of contracting and negotiating was in New York, the subject matter (the car) was in Florida, the place of performance (of the repairs) was in Florida and plaintiff has given conflicting testimony as to whether his domicile is in Florida (plaintiff EBT at 8-9) or in New York (*id.* at 15).

There are two additional factors to weigh. First, the purchase agreement provided that "this Agreement is governed by New York State Law." Affirmation in Opposition, exhibit A, Additional term 12. This document was signed by MB and plaintiff. "Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction." *Welsbach Elec. Corp. v Mastec N. Am., Inc.*, 7 NY3d 624, 629 (2006). Since this issue arises in the context of a motion for summary judgment, the Court should read the opposing papers in the most favorable light. *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 (2007). On this issue, defendants have not set forth the relationship between the manufacturer and MB, the dealer, and the extent to which MB may have been acting as the manufacturer's agent when it sold the car to plaintiff. Finally, "Florida's choice-of-law rule applies the doctrine of *lex loci contractus* to contract actions and considers where the contract was executed." *Brisson v Ford Motor Co.*, 602 F Supp 2d 1227, 1230 (MD Fla 2009), *affd in part, vacated in part* 2009 WL 3326264, 2009 US App Lexis 22738 (11th Cir 2009).

The totality of the above factors justify applying New York law and, since defendants do not dispute that plaintiff followed the procedural requisites of New York's Lemon Law, dismissal of the first and second causes of action against the manufacturer is

denied.

The purchase agreement also contains a disclaimer of warranties, express or implied, except to the extent provided for in a separate document. In opposition, plaintiff has failed to identify any express or implied warranties for the car. Further, it is undisputed that the car has been repaired without any cost to him. Since plaintiff has failed to controvert defendants' motion seeking dismissal of these claims, the third and fourth causes of action are dismissed.

MMWA "creates no additional bases for liability but allows a customer to recover damages under existing state law, and attorneys fees." *Diaz v Paragon Motors of Woodside, Inc.* 424 F Supp 2d 519, 540 (ED NY 2006). Since it provides no additional bases for liability and plaintiff has also failed to address defendants' motion on this claim, the fifth cause of action is dismissed.

Based upon the above, defendants' motion for summary judgement of dismissal is granted to the extent that the action is dismissed as against MB and the third, fourth and fifth causes of action are dismissed as against the manufacturer and is otherwise denied.

Order

It is therefore

ORDERED that the motion to dismiss the complaint against

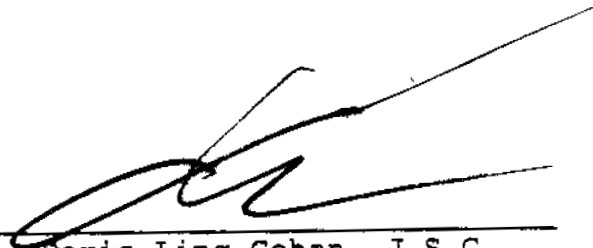
Mercedes-Benz Manhattan, Inc. is granted and the complaint is severed and dismissed against said defendant with costs and disbursements as taxed by the Clerk of the Court and the Clerk is directed to enter judgement accordingly; and it is further

ORDERED that the motion of Mercedes-Benz USA, LLC is granted to the extent of dismissing the third, fourth and fifth causes of action and is otherwise denied; and it is further

ORDERED that the action shall continue as to the first and second causes of action as against defendant Mercedes-Benz USA, LLC; and it is further

ORDERED that within 30 days of entry of this order, defendant Mercedes-Benz Manhattan, Inc. shall serve a copy upon all parties, with notice of entry.

Dated: 3/22, 2010



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\ceradini.mercedes.wpd

FILED
MAR 29 2010
NEW YORK
COUNTY CLERK'S OFFICE