SCAN

SHORT FORM ORDER

mg, md, mod

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

PATTI, J. KRIVISKY

Plaintiff,

-against-

GENERAL MOTORS CORPORATION and SARANT CADILLAC CORP.,

Defendants.

Motion Sequence #2, #3, #4
Submitted March 1, 2010

INDEX NO: 16446/08

The following papers were read on these motions for disqualification, summary judgment and leave to amend complaint:

Notice of Motion and Affs.....1-3
Memorandum of Law.....4
2nd Notice of Motion and Affs.....5-8
Notice of Cross-Motion and Affs.....9-12
Affs in Opposition and Reply.....13-15
Affs in Sur Reply.....16&17
Memoranda of Law.....18&19

Upon the foregoing papers, it is ordered that this unopposed motion by the defendants for an order pursuant to 22 NYCRR § 1200.29 [Rule 3.7] disqualifying Barry M. Krivisky, Esq. from representing his wife Patti J. Krivisky in the within action on the ground that Mr. Krivisky's representation of his wife violates the lawyer-witness rule of the New York Rules of Professional Conduct is granted.

This motion by the defendants for an order pursuant to CPLR § 3212 granting summary judgment in their favor dismissing the plaintiff's complaint in its entirety is determined as follows:

This cross-motion by the plaintiff for an order pursuant to CPLR 3025(b) granting leave to amend the complaint, adding Barry M. Krivisky as a party plaintiff, *pro se*; withdrawing Barry M. Krivisky, Esq. from representation of plaintiff, Patti J. Krivisky, who will proceed as plaintiff *pro se*; adding a breach of warranty claim under the Magnuson-Moss Warranty Act (P.L. 93-637) (15 U.S.C. § 2301 *et seq.*); adding a claim for violation of NY General Business Law §§ 349 and 350; and adding a demand for specific performance is determined as follows:

On December 30, 2003 plaintiff purchased a 2004 Cadillac automobile (the subject vehicle) from defendant Sarant Cadillac. After taking delivery of the vehicle, plaintiff allegedly experienced stalling issues on three different occasions and brought the vehicle to Sarant for service. The complaint alleges that on or about April 30, 2004 all systems including the steering stopped working and stalled in a dangerous location on or near Exit 48 of the Long Island Expressway. The vehicle had 2571 miles on the odometer. Plaintiff alleges Sarant was unable to repair the vehicle for 19 days, claiming it was a computer problem, an unknown problem and finally a kinked fuel line. On August 1, 2005 the vehicle suddenly stalled and ceased operation without warning while plaintiff was turning into her driveway. The vehicle was towed to Sarant. Plaintiff alleges after eight days, Sarant claimed the problem was a faulty fuel sending unit. Plaintiff alleges the vehicle again ceased operation suddenly and without warning and speed, at night at Exit 41S of the Northern State Parkway on January 4, 2006. After an additional four days of examining

the vehicle, the plaintiff alleges Sarant again claimed the problem was a "faulty fuel sending unit" and replaced same. In February 2006 plaintiff traded in the vehicle for a Lexus.

Plaintiff commenced the within action on September 2, 2008. The complaint contains the following causes of action: breach of contract; negligence; breach of implied warranty pursuant to UCC § 2-314 and revocation of acceptance UCC § 2-608; breach of express warranty; violation of NY GBL § 198-a; and violation of the common law duty to make the "vehicle safe and merchantable".

The vehicle was covered by a "bumper to bumper" "New Vehicle Limited Warranty" "the first 4 years or 50,000 miles whichever comes first" as set forth in the "2004 Cadillac Warranty and Owner Assistance Information Booklet," a copy of which is annexed as Exhibit D to affidavit of Davit Hurt, Jr..

In support of the defendants' motion for summary judgment, the defendants argue that the complaint be dismissed as time barred. Defendants assert the statute of limitations for negligence begins to run when the injury first occurs. (See CPLR 214). Plaintiff's claims for negligence against GM arise solely out of plaintiff's allegation that on April 30, 2004, GM's Cadillac Roadside Assistance negligently called the wrong police department to assist her after the vehicle stalled on the Long Island Expressway, leaving her waiting for 90 minutes before the proper police department was contacted. This alleged negligent act took place on April 30, 2004. Plaintiff had until April 30, 2007 to timely commence a negligence claim. Plaintiff, however, did not commence the instant action until September 2, 2008, will over the one (1) year after the three-year statute of limitations period had expired. Therefore summary judgment is granted in favor of

defendant and plaintiff's cause of action alleging negligence on the part of Sarant and GM is dismissed.

Further, defendants argue that the cause of action alleging violation of GBL § 198-a, New York's New Car Lemon Law be dismissed. A claim pursuant to GBL § 198-a is subject to a four-year statute of limitations running from the date of the original delivery of the motor vehicle to the consumer, see GBL § 198-a(j). In the within action, the original date of delivery of the subject vehicle to plaintiff was December 30, 2003. Plaintiff had until December 30, 2007 to commence her claim alleging a violation of the New Car Lemon Law. Plaintiff did not commence the instant action until September 2, 2008, eight (8) months after the statute of limitations period expired on her Lemon Law claim. Therefore, summary judgment is granted in favor of defendant and plaintiff's cause of action alleging a violation of GBL § 198-a, the New Car Lemon Law is dismissed as a matter of law.

Next, the defendants argue that the statute of limitations for any claims for breach of contract or express or implied warranties arising out of the sale of goods is four (4) years. (*See* UCC 2-725[1] (PLR 213[2]; *Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407). The vehicle was delivered on December 30, 2003. This action was commenced on September 2, 2008. Therefore, defendants assert the time to bring an action alleging breach of contract or express or implied warranties has expired.

In opposition, the plaintiff argues that she purchased a "Major Guard Agreement GM Protection Plan" extended warranty that expired on June 7, 2011. While an action for breach of an implied or express warranty must be commenced within four years after the cause of action accrued (UCC 2-725) which is ordinarily the date of delivery of the vehicle, (*Heller v U.S. Suzuki Motor Corp., supra*), an exception is made where the warranty

explicitly extends to future performance of the goods, in which event the cause of action accrues when the breach is or should have been discovered. (*Meron v Ward Lumber Co., Inc.*, 8AD3d 805; *Mittash v Seal Lock Burial Vault, Inc.*, 42 AD2d 573; *Sackman v Liggett Group, Inc.*, 167 FRD 6, 1996 U.S. Dist Lexis 7343). A question of fact exists as to whether the defendants had expressly warranted future performance pursuant to the extended warranty that runs to June 7, 2011. (*Weiss v Herman*, 193 AD2d 383, 384).

The defendants assert that the General Motors Protection Plan was with GMAC Service Agreement Corporation who is not a party defendant. Discovery is not complete. Therefore, it is not clear from the motion papers and opposition submitted to this Court whether the GMAC Service Agreement Corporation was a subsidiary of Motors Liquidation Company f/k/a General Motors Corporation and subject to a certain Sale Order and an Amended and Restated Master Sale and Purchase Agreement wherein the defendant General Motors Company assumed all the liabilities arising under express written warranties of the GMAC Service Agreement Corporation.

The contract of sale between Sarant and plaintiff stated that:

> WARRANTIES SELLER DISCLAIMS
> Unless the Seller makes a written warranty, or enters into a service contract within 90 days from the date of this contract, the Seller makes no warranties, express or implied, on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose.
> This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide.

The service invoices given to plaintiff by defendant Sarant in connection with repairs performed on May 1, 2004, in August 2005, and in January 2006 contained the following:

> Limited Express Warranty Labor and parts were warranted for one (1) year or 12,000 miles, whichever occurs first. The dealer hereby limits any implied warranties of merchantability and fitness to the same period.

The claims only against defendant Sarant pursuant to the "Limited Express Warranty" in the repair invoices are within the four (4) year statute of limitations as to the work performed by Sarant in August, 2005 and January, 2006.

In the interest of judicial economy and to insure transparency in these proceedings, the attorneys for defendants are directed to make available in writing forthwith to the plaintiff the relationship, if any, of the GMAC Service Agreement Corporation to defendant General Motors Corporation. It is not clear to this court that under the reorganization of the parent company, General Motors LLC f/k/a General Motors Company had no obligation to perform under the "84 month/84,000 mile extended warranty." Should it become necessary to do so, plaintiff has the right to amend the pleadings to join GMAC Service Agreement Corporation as a party defendant.

In opposition to so much of this motion which seeks an order adding Barry M. Krivisky as a party plaintiff, *pro se* (the husband of plaintiff Patti J. Krivisky) the defendants argue that Motors Liquidation Company f/k/a General Motors Corporation ("MLC") was substituted by defendant General Motors LLC f/k/a General Motors Company ("GM") and the plaintiff failed to serve a supplemental summons pursuant to CPLR 305(c) adding General Motors LLC f/k/a General Motors Company ("GM"). Just as with the GMAC Service Agreement Corporation, it is not clear from the pleadings and documentary evidence as to the technical names of the party defendants. There is no substantive prejudice at this time to add Barry M. Krivisky as a plaintiff *pro se*. Should it become

necessary to make a technical correction of the names of the party defendants, same can be done pursuant to CPLR 3025(c). "The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances." Therefore, plaintiff's application for an order adding Barry M. Krivisky as an additional plaintiff is granted.

Motions for leave to amend pleadings should be freely given in the absence of prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or devoid of merit and free from doubt. (*Goodleaf v Tzivos Hashem, Inc.*, 68 AD3d 817 citing *Lucido v Mancuso*, 49 AD3d 220, 222).

In addition, plaintiff seeks to supplement her breach of warranty claim under the UCC with a claim for a breach of the federal Magnuson-Moss Warranty Act (15 U.S.C. § 2301 *et seq.*) (MMWA) Plaintiff fails to indicate the specific section of the MMWA, on which she relies, other than agreeing with defendant that the claims under MMWA are similar to and arise from the same facts as alleged in the original complaint. Nor has plaintiff indicated any way in which she would be prejudiced by being limited to pursuing her claims only pursuant to New York State Law and the UCC. The only advantage plaintiff would gain by adding a MMWA claim to her UCC claim is the potential to recover attorney fees. To the extent that the plaintiff's husband's application to be added as a party *pro se* and to withdraw as counsel for his wife, is granted, the United States Supreme Court has unanimously held that attorneys acting *pro se* to enforce their rights under a federal statute such as the MMWA are not entitled to attorneys fees. (*Kay v Ehrler,* 499 US 432; *Matter of General Motors Corp. Engine Interchange Litigation* on 594 F2d 1106). Plaintiff's

application to add a cause of action pursuant to the Magnason-Morse Warranty Act (15 U.S.C. § 2301 *et seq.*) is denied.

Plaintiff seeks leave to amend the complaint to set forth a claim for violation of General Business Law §§ 349 and 350. In stating a cause of action to recover damages for a violation of GBL §§ 349 and 350 the plaintiff must identify consumer-oriented misconduct that is deceptive and materially misleading to a reasonable consumer. (*Stutman v Chemical Bank*, 95 NY2d 24).

Allegations of conduct made illegal by statute such as GBL §§ 349 and 350 are subject to a three year statute of limitations. Plaintiff's claim under GBL §§ 349 and 350 was time barred on April 6, 2007, three years after the plaintiff's first experienced a problem with the vehicle's operation. (*State of New York v Daicel Chemical Industries, Ltd.*, 42 AD3d 301; *Ito Dryvit Systems, Inc.*, 16 AD3d 554). The Court finds that even if the GBL §§ 349 and 350 claims were timely, plaintiff's argument that defendants' 40 years of advertising and promotion relied upon by the public constitutes deceptive practices in violation of GBL §§ 349 and 350 or that New York courts have permitted similar claims in tobacco litigation not withstanding government mandated health warnings on cigarette packs and advertising is conclusory and unsubstantiated with any basis in law or fact. Therefore, so much of this motion which seeks leave to amend the complaint to state a cause of action alleging violation of GBL §§ 349 and 350 is denied.

It is beyond cavil that only when the remedy at law and an award of damages is inadequate can the remedy of specific performance be invoked. Plaintiff's remedy, if any, would be to recover damages for breach of contract and breach of implied and express

warranty. (*Wirth & Hamid Fair Brooking v Wirth*, 265 NY 214, 219, 220-221). Thus plaintiff's motion for leave to amend the complaint to add a cause of action for specific performances is denied.

Finally, defendants' request not contained in a notice of motion, but rather in Defendants' Memorandum of Law that the complaint be dismissed due to plaintiff's spoliation of key evidence is denied. Defendants had the subject vehicle in their possession three times for at least 31 days to ascertain the problem and examine the subject vehicle. (*Steuhl v Home Therapy Equipment, Inc.*, 23 AD3d 825).

In conclusion, It is the order of the Court that Barry M. Krivisky, Esq. is disqualified from representing his wife Patti J. Krivisky; defendants motion for summary judgment is denied; plaintiff's leave to amend the complaint to add Barry M. Krivisky as a plaintiff *pro se* is granted; and the balance of plaintiff's motion to amend the complaint is denied with prejudice, having determined that those allegations were palpably insufficient and devoid of merit.

A Certification Conference shall be held before the undersigned Justice at an IAS Part 4 of this Court on June 2, 2010 at 9:00 a.m. at which time the plaintiff *pro se* and counsel for defendants familiar with this case must be present. In the event of settlement, a written copy of the stipulation of settlement should be sent to chambers.

Dated: May 4, 2010

UTE WOLFF LALLY, J.S.C.

TO: Barry M. Krivisky
Attorney for Plaintiff
400 Garden City Plaza, Suite 300
Garden City, NY 11530

The Rose Law Firm PLLC
Attorneys for Defendants General Motors and Sarant Cadillac Corporation
501 New Karner Road
Albany, NY 12205

kirvisky-generalmotors&sarantcadillac,#2,#3,#4/cplr