Krivisky v General Motors Corp.
2011 NY Slip Op 31575(U)
June 1, 2011
Sup Ct, Nassau County
Docket Number: 16446/08
Judge: Ute Wolff Lally
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

PATTI J. KRIVISKY and BARRY M. KRIVISKY,

Plaintiffs,

-against-

GENERAL MOTORS CORPORATION and
SARANT CADILLAC CORP.,

Defendants.

MD, MG

Motion Sequence #7, #8
Submitted March 30, 2011
XXX

INDEX NO: 16446/08

The following papers were read on these motions for summary judgment:

Notice of Motion and Affs..........1-5
Affs in Opposition..........6&7
Memorandum of Law..........8
Second Notice of Motion and Affs..........9-13
Affs in Opposition..........14-16
Affs in Reply..........17-19
Memoranda of Law..........20&21

This motion by the plaintiffs for an order pursuant to CPLR 3025(b) granting leave to serve an amended complaint adding claims for fraud, violation of General Business Law §§ 349 and 350 and violation of the Emissions Control Systems Warranty is denied. The motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment in favor of defendants General Motors LLC f/k/a General Motors Company and Sarant Cadillac Corp.'s (Sarant) dismissing the plaintiffs' complaint in its entirety is granted.

Motors Liquidation Corporation f/k/a General Motors Corporation (MLC) filed voluntary bankruptcy petitions for relief in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") under Chapter 11 of Title 11 of the United States Code. An order was entered approving the sale of substantially all of MLC's assets to General Motors Company, a new and independent company under Section 363 of the Bankruptcy Code. On July 10, 2009, MLC sold substantially all of its assets to General Motors Company pursuant to the Sale Order and an Amended and Restated Master Sale and Purchase Agreement. Section 2.3(a)(vii)(A) and (B) of the Amended and Restated Master Sale and Purchase Agreement, provides as follows: Section 2.3 Assumed and Retained Liabilities

> (a) The "Assumed Liabilities" shall consist only of the following Liabilities of Sellers:
>
> . . . .
>
> (vii) (A) all Liabilities arising under express written warranties of Sellers that are specifically identified as warranties and delivered in connection with the sale of new, certified used or pre-owned vehicles or new or remanufactured motor vehicle parts and equipment (including service parts, accessories, engines and transmissions) manufactured or sold by Sellers or Purchaser prior to or after the closing and (B) all obligations under Lemon Laws.

General Motors Company was substituted as a defendant in the within action in place of MLC. Simultaneously with the substitution of General Motors Company as the defendant, the action was discontinued without prejudice as against MLC. Plaintiffs stipulated that notwithstanding the causes of action or counts asserted in the complaint against MLC, plaintiffs shall only pursue in the within action the Assumed Liabilities as set forth in Section 2.3(a)(vii)(A) and (B) of the Amended and Restated Master Sale and

Purchase agreement against General Motors Company and agrees that any additional liabilities will be pursued only by filing a proof of claim in the Bankruptcy Court as against MLC.

On or about November 13, 2003, MLC completed final assembly of the vehicle which is the subject of this action, a 2004 Cadillac CTS, VIN: 1G6DM577140134031, and sold the vehicle to Paul Conte Cadillac, Inc., an authorized GM dealer in Freeport, New York. On December 26, 2003, the vehicle was acquired by defendant Sarant Cadillac Corp., an authorized GM dealer in Farmingdale, New York. On December 30, 2003, plaintiffs purchased and took delivery of the subject vehicle from defendant Sarant Cadillac. The Bill of Sale contained the following disclaimer:

> **5. Disclaimer of Warranties**: I UNDERSTAND THAT YOU EXPRESSLY DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND THAT YOU NEITHER ASSUME NOR AUTHORIZE ANY OTHER PERSON TO ASSUME FOR YOU ANY LIABILITY IN CONNECTION WITH THE SALE OF THE VEHICLE except as otherwise provided in writing by YOU in an attachment to this Agreement or in a document delivered to ME when the vehicle is delivered (emphasis in original).

The Retail Installment Contract contained a similar disclaimer:

> **4. 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 (emphasis in original).

MLC was not a party to the Purchase Contract. The legal relationship between MLC and Sarant Cadillac was set forth in a contractual agreement between MLC and Sarant Cadillac also known as Dealer Sales and Service Agreement. Article 17.1 of the Dealer Sales and Service Agreement provided:

> This Agreement does not make either party the agent or legal representative of the other for any purpose, nor does it grant either party authority to assume or create any obligation on behalf of or in the name of the other. No fiduciary obligations are created by this Agreement.

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 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 plaintiff alleges 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 alleged the following causes of action: breach of contract; negligence (*Id.* 16-17); breach of implied

[* 5]

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".

On May 4, 2010, the Court (Lally, J.) issued its prior order deciding plaintiff's prior Motion to Amend the Complaint, and on Defendants' Motion for Summary Judgment (Order dated May 4, 2010). This Court granted the Motion to Amend to the extent that Barry Krivisky was added as a party plaintiff but denied the Motion to amend the Complaint to add a breach of warranty claim under the Magnuson-Moss Warranty Act (P.L. 93-637) (15 U.S.C. § 2301 et seq.); a claim for violation of New York General Business Law §§ 349 and 350; and a demand for specific performance. This Court granted the defendants' motion for summary judgment to the extent that it dismissed the causes of action sounding in negligence and violation of the Lemon Law but denied with respect to the remaining counts on the basis that additional discovery was appropriate. Additional depositions have since been conducted of representatives of GM, of Sarant Cadillac and plaintiff Barry M. Krivisky. The basis for plaintiffs' motion to renew is the testimony at the deposition of David Hurt, Jr., a witness for the defendants, that the subject vehicle was initially delivered to Paul Conte Cadillac in Freeport. On December 26, 2003, which predates the delivery to the plaintiffs on December 30, 2003, the vehicle was transferred from Paul Conte Cadillac in Freeport to defendant Sarant. During delivery from Paul Conte Cadillac to Sarant, the subject vehicle required roadside service for which an invoice was generated showing repairs in the sum of $97.20.

Plaintiffs now move to amend the complaint to add additional causes of action. Plaintiffs seek to renew this Court's order dated October 21, 2010 wherein the application

to serve an amended complaint was denied because Mr. Krivisky who is an attorney and a party to the action submitted an affirmation, rather than an affidavit. Mr. Krivisky has rectified this error by now submitting an affidavit. Plaintiffs argue that the same facts that support the allegation of fraud, also support their allegations of a violation of Business Law §§ 349 and 350, to wit, the subject vehicle required roadside assistance and/or repairs prior to plaintiffs' purchase and defendants failed to disclose same. Defendants oppose the application to amend the complaint and cross-move for summary judgment dismissing the remaining causes of action.

CPLR 3025(b) provides that leave to amend a pleading should be freely given. However, leave to amend a complaint will be denied where the proposed amendment is insufficient as a matter of law and lacking in merit. The Court must examine the sufficiency of the merits of the proposed amendment. (*Morton v Brookhaven Memorial Hosp.*, 32 AD3d 381).

The ninth cause of action in the amended complaint alleges that the defendants "committed fraud by misrepresenting the vehicle and not disclosing the material facts about the vehicle." The basis of the fraud allegation is that "the defendants represented that the vehicle was new and in new, not defective condition, however, the vehicle was defective and had already broken down with 11 miles on the odometer and required roadside assistance and repair" prior to delivery by the dealer to the plaintiffs. The allegations set forth in the proposed amended complaint fail to meet the pleading requirements to support a cause of action sounding in fraud as a matter of law. [CPLR 3016(b); *Dumas v Fiorito*, 13 AD3d 332]. Moreover, a cause of action for fraud does not lie when the only fraud charged relates to a breach of contract. In the within action, the plaintiffs' claim for fraud

relates to the defendants' alleged breach of contract. (*Bella Maple Group, Inc. v Attias*, 78 AD3d 1092).

GBL § 396-P(5)(a) governs contracts for the sale of new vehicles. GBL § 396-P(5)(a) provides that:

> Prior to the sale and delivery of a new motor vehicle, a retail dealer or employee of a retail dealer shall provide written notification to the consumer of any repairs undertaken to repair physical damage with a retail value in excess of five percent of the lesser of the manufacturer's or distributor's suggested retail price performed after shipment from the manufacturer to the dealer, including damage to the vehicle while in transit. This notice requirement shall not apply to identical replacement of stolen or damaged accessories or their components. This dollar amount shall include the cost of the retail charge for parts and labor, at the dealer's stated labor rate.

No disclosure is required as a matter of law where the retail value of the repairs is 5% or less of the vehicle's suggested retail price. The amount of the alleged claim submitted was $97.00 or .2% of the purchase price of the Cadillac which was approximately $39,000.

To state a cause of action under GBL § 349 the plaintiff must plead (a) that the challenged act or practice was consumer orientated (2) it was misleading in a material way and (3) the plaintiff suffered injury as a result of the deceptive act. (*Lonner v Simon Property Group, Inc.*, 57 AD3d 100). 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). GBL § 350 relates to deceptive advertising which plaintiffs' new cause of action does not allege. Plaintiffs claims arise out of a transaction unique to

them, not encompassed by the statute. There is no allegation that the Cadillac was devalued due to the complaints. Plaintiffs allege they traded the Cadillac for a Lexus. There is no allegation or evidence that the trade-in amount was ever diminished due to the defects in the subject vehicle or that they suffered injury as contemplated by GBL § 349. Plaintiffs' motion to add an additional claim for violation of GBL § 349 and § 350 is denied.

The tenth cause of action in the proposed amended complaint alleges that the "defendants breached the Emission Control Systems Warranty and repeatedly failed to fix the defective parts on the vehicle" (Compliant, ¶ 34-35). Plaintiffs already allege breach of an express warranty. The allegation regarding a claim for violation of the emissions warranty is duplicative of plaintiffs' existing breach of warranty claims. (*See, Freiman v JM Motor Holdings NR 125-139, LLC*, 2011 N.Y. App. Div. Lexis 2548, 2011 NY Slip Op 2622 (N.Y. App. Div. 2d Dept. Mar. 29, 2011). Also, the plaintiffs fail to allege any way in which the emissions warranty was breached. Plaintiffs' pleadings are insufficient to support an amendment of the complaint to add a cause of action alleging breach of the emissions control systems warranty.

The Court will next address the defendants' summary judgment motion regarding the remaining four (4) causes of action in the complaint. The first cause of action alleges breach of contract causing the plaintiff "great anxiety and fear for her safety, breaching the contract with plaintiff" for failing to provide effective roadside assistance. The third cause of action alleges "a violation of the Implied Warranty of Law of Merchantability UCC 2-314 and Delivery of Non-Conforming Goods UCC 2-608". The fourth cause of action alleges "the vehicle violates the Law of Express Merchantability of the State of New York." The sixth cause of action alleges "the defendants failed to deliver and take appropriate action

to render the vehicle safe and merchantable".

In support of their motion for summary judgment the defendants argue that the statute of limitations for breach of contract and breach of warranty claims accrue on the date of delivery regardless of the date of alleged injury or the party's knowledge of the alleged breach. [See UCC 2-725(2); *Heller v U.S. Suzuki Motor Corp.*, 84 NY2d 407]. The only exception to the rule that the statute of limitations for breach of warranty claims accrues on the date of delivery is where the "warranty explicitly extends to future performance of the goods. [See UCC 2-725(2)]. The warranties in the within action do not warrant the future performance of the subject vehicle. The defendants have made an adequate *prima facie* showing of entitlement to summary judgment. (*Stillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395).

In an attempt to circumvent UCC 2-725(2) and *Heller v U.S. Suzuki Motor Corp. supra*, and its progeny (*Kaparos v Bay Ridge Mitsubishi, 249 AD2d 449; Doyle* v Happy Tumbler Wash-O-Mat, 90 AD2d 366; *Weinstein v General Motors Corp.*, 51 AD2d 335; *Constable v Colonie Truck Sales*, 37 AD2d 101) the plaintiffs argue that MLC issued a General Motors Protection Plan Agreement (GMPP), that the GMPP extended the written limited warranty, and that the GMPP warranty extended to future performance.

The promise of the GMPP is "WE will pay YOU or a repairer the COST to remedy any FAILURE using new, used or remanufactured parts . . . (emphasis in original). Plaintiffs argue that this is a warranty that extends to future performance based on the following syllogism: the agreement defines "failure" as an inability to function; the term "function" means performance, and therefore, the GMPP warrants the vehicle's

performance. The GMPP does not promise that the subject vehicle would function/perform/not fail, but merely promises to pay for repairs in the event of a failure. "A warranty of future performance is one that guarantees that the product will work for a specified period of time." (*Wyandanch Volunteer Fire Co., Inc., v Randon Const. Corp.*, 19 AD3d 590, quoting *St. Patrick's Home for the Aged and Infirm v Laticrete International, Inc.*, 264 AD2d 652, 657). "Warranties to repair or replace the product in the event that it fails to perform, without any promise of performance, do not constitute warranties of future performance." [*St. Patrick's Home for the Aged and Infirm v Laticrete International, Inc.*, *supra,* at p. 657; *see also, Parrino v Sperling*, 232 AD2d 618 (finding warranty did not extend to future performance where owner's manual for wheelchair stated that the wheelchair would "serve [the buyer] for many years to come.") *Shapiro v Long Island Lighting Company*, 71 AD2d 671 (warranty that provided that water heater would be replaced if it developed a leak within 10 years did not guarantee future performance.)] The language of the GMPP establishes that it did not extend to future performance of the product, but only promised to pay the cost of repairs in the event that it failed to perform.

Plaintiffs had the opportunity to review the purchase contracts prior to signing them. Plaintiff Mr. Krivisky has been a member of the New York Bar since 1977. A person who signs a document without reading it is presumed to know its contents and agree to its terms. (*Metzger v Aetna Ins.* Co., 227 NY411).

A court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated, and where there is nothing left to be resolved at trial, the case should be summarily decided. (*Andre v Pomeroy*, 35 NY2d 361). Other than merely stating

[* 11]

unsubstantiated allegations of fact and conclusions of law, plaintiffs fail to raise any issues of fact to preclude the granting of defendants' motion for summary judgment. (*Mallad Const. Corp. v County Fed. Sav. & Loan Ass'n*, 32 NY2d 285).

The Court has considered the plaintiffs remaining arguments and finds them to be without merit.

This decision is the order of the Court and terminates all proceedings under Index No. 016446/08.

Dated: JUN 01 2011

UTE WOLFF LALLY, J.S.C.

TO: Patti J. Krivisky
Pro Se Plaintiff
400 Garden City Plaza, Suite 300
Garden City, NY 11530

Barry M. Krivisky
Pro Se Plaintiff
400 Garden City Plaza, Suite 300
Garden City, NY 11530

The Rose Law Firm, PLLC
Attorneys for Defendants
501 New Karner Road
Albany, NY 12205

ENTERED
JUN 03 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

krivisky-gmac,#7,#8/sumjud