

**Daniels v Forest Riv., Inc.**

2013 NY Slip Op 31474(U)

June 28, 2013

Supreme Court, Suffolk County

Docket Number: 07-4227

Judge: Daniel Martin

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In May 2006, plaintiff Anna Daniels purchased a 2006 All American Sport Trailer from defendant Walnut Ridge Family RV Sales, Inc., which operates a recreational vehicle dealership in Indiana. The recreational trailer was manufactured by defendant Forest River, Inc., and includes a living area and a cargo area, allowing users to haul motorcycles, snowmobiles, and other small outdoor vehicles when they travel. The chassis for the trailer was manufactured by defendant Lippert Components Manufacturing, Inc., s/h/a Lippert Components, Inc., and the axles mounted to the chassis were manufactured by defendant AL-KO Kober Corporation. Less than two weeks after its purchase, on May 14, 2006, the trailer, known as a fifth-wheel or gooseneck camper because of the way it attaches to the tow vehicle, was delivered by a transportation company to the Pennsylvania home owned by plaintiff Darren Daniels' parents. Plaintiffs, who are husband and wife and were at the parents' home when the trailer was delivered, allegedly conducted an inspection of the trailer after the transporter left. During the inspection, they discovered numerous alleged defects in the trailer, including a bent gooseneck hitch, an improperly installed hydraulic pump, and rust on the axles and the chassis.

The next day, Darren Daniels called Forest River to complain about the alleged defective condition of the trailer. A week or two later, Forest River had the trailer transported from Pennsylvania to its facility in Goshen, Indiana. By correspondence dated May 23, 2006, Darren Daniels advised Walnut Ridge Family RV Sales that he believed the trailer was unsafe, due to the alleged defects, and requested a refund of the purchase price and any other costs incurred in connection with the transaction. Attached to the May 23 letter was a list of 31 problems allegedly discovered during plaintiffs' inspection of the trailer. As relevant to the instant motions, item 2 on the list states "does not look like chassis was powder coated, looks to be painted and not well." Subsequently, in July 2006, after being advised by Forest River that plaintiffs had complained about the chassis, Lippert Components sent an employee to Forest River's Goshen facility to inspect the trailer. By correspondence dated July 25, 2006, Lippert Components advised Forest River its inspection revealed the chassis was manufactured in July 2005, that it was in good condition, with only minimal rust, and that it did "not appear to have any premature paint or rust issues." Lippert Components' letter also indicates that while the axles and gas lines on the trailer had indications of rust, such items were neither provided nor painted by it, and that issues involving paint or rust are outside its limited warranty. When Forest River contacted Darren Daniels to inform him that repairs had been made and that it wanted to deliver the trailer, Daniel's refused to accept delivery until he received documentation of the repairs that had been performed. The trailer finally was delivered back to plaintiffs in 2010. It is noted that approximately one month prior to their purchase of the 2006 All American Sport Trailer, plaintiffs had purchased a used 2003 trailer from Walnut Ridge Family RV Sales. Unhappy with the 2003 trailer, plaintiffs traded it in and purchased the new 2006 trailer.

In March 2007, plaintiffs commenced this action against Forest River, Walnut Ridge Family RV Sales, and Lippert Components seeking damages for economic losses allegedly related to the 2006 purchase of the fifth-wheel recreational trailer. In 2009, a third-party action was brought by Lippert Components against AL-KO Kober Corporation for indemnification. In January 2010, plaintiff served an amended complaint naming AL-KO Kober as a defendant, in addition to Forest River, Walnut Ridge Family RV Sales, and Lippert Components. The first cause of action in the amended complaint seeks relief under the Magnuson-Moss Warranty Act (15 USC § 2301 et seq.), alleging that defendants breached the terms of written and implied warranties by failing to timely repair the alleged defects to the trailer. The second cause of action seeks relief for breach of the express warranty provided for the 2006 All American Sport Trailer, and the third cause of action seeks damages for breach of the 2006 sale agreement based on

defendants' failure "to timely and properly repair the 2006 trailer." The fourth and fifth causes of action seek damages for breach of the implied warranties of merchantability and fitness for a particular purpose, and the sixth and seventh causes of action seek rescission of the 2006 sale agreement with Walnut River Family RV Sales. Lippert Components answer to the amended complaint includes a cross claim against AL-KO Kober.

Lippert Components now moves for an order awarding summary judgment in its favor, arguing, among other things, that it cannot be held liable for breach of the purchase agreement or breach of warranty as there was no contractual privity with plaintiffs. Lippert Components' submissions in support of its motion include copies of the pleadings and the bills of particulars, excerpts of the parties' deposition testimony, the limited warranty for the chassis, and the letter it sent to Forest River after its July 2006 inspection of the trailer. AL-KO Kober cross-moves for summary judgment dismissing the complaint and the cross claim against it on the grounds that no express warranty for the axles was extended to plaintiffs, and that no implied warranty exists as there was no privity with plaintiff. In addition, AL-KO asserts it can not be liable for contribution or indemnification, as no privity exists between it and Lippert Components. In support of its motion, AL-KO Kober submits copies of the pleadings, transcripts of the parties' deposition testimony, the purchase agreement for the 2006 trailer, the limited warranty it issues for its products, brochure by Forest River for the All American Sport Trailer, and an affidavit of Lawrence Revelino.

Plaintiffs oppose both motions on the ground they are untimely. As to the motion by Lippert Components, plaintiffs also argue that, "[b]y directly addressing the plaintiffs' claims and processing same in accordance with the limited warranty, Lippert, by its actions . . . has confirmed that privity existed between Lippert and plaintiffs." In addition, plaintiffs assert a triable issue exists as to whether a rust condition was excluded from the limited warranty it issued for the chassis. As to the cross motion by AL-KO Kober, plaintiffs argues that its submissions were insufficient to establish as a matter of law the absence of privity, and that an issue of fact exists as to whether AL-KO Kober's limited warranty excludes rust.

Initially, the Court rejects plaintiffs' argument that the instant motions must be denied as untimely. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). The note of issue in this action was filed on June 26, 2012, when copies of the note and an affidavit of service was filed with the Clerk of the Court (*see* CPLR 3402), and the motion and cross motion were made on October 18 and October 22, 2012 (*see* CPLR 2211). As the 120-day statutory period for making a summary judgment motion expired on October 24, 2012, both motions are timely.

A manufacturer who places a defective product into the stream of commerce may be liable for injuries or damages caused by such product (*Gebo v Black Clawson*, 92 NY2d 387, 392, 681 NYS2d 221 [1998]; *Liriano v Hobart Corp.*, 92 NY2d 232, 235, 677 NYS2d 764 [1998]; *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 532, 569 NYS2d 337 [1991]). Depending upon the factual circumstances, a person injured by a defective product may maintain causes of action under the theories of strict products liability,

negligence or breach of warranty (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398 [1983]). Whether an action is pleaded in strict products liability, negligence or breach of warranty, the plaintiff has the burden of establishing that a defect in the product was a substantial factor in causing the injury, and that the defect existed at the time the product left the manufacturer or other entity in the chain of distribution being sued (*see Beckford v Pantresse, Inc.*, 51 AD3d 958, 858 NYS2d 794 [2d Dept 2008]; *Clarke v Helene Curtis, Inc.*, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]; *Tardella v RJR Nabisco*, 178 AD2d 737, 576 NYS2d 965 [3d Dept 1991]).

To recover damages for breach of an express warranty, a plaintiff must show that there was an affirmation of fact or promise by the seller, the natural tendency of which was to induce the buyer to purchase, that the plaintiff relied upon the promise as part of the bargain, and that the promisor's breach of the promise was to the plaintiff's detriment (*see J.C. Constr. Mgt. Corp. v Nassau-Suffolk Lbr. & Supply Corp.*, 15 AD3d 623, 789 NYS2d 903 [2d Dept 2005]; *cf. Donahue v Ferolito, Vultaggio & Sons*, 13 AD3d 77, 786 NYS2d 153 [1st Dept 2004]; *Friedman v Medtronic, Inc.*, 42 AD3d 185, 345 NYS2d 637 [2d Dept 1973]). Remedies for breach of an express warranty may be limited by the terms of such warranty to the repair or replacement of the defective product (*see* UCC 2-316) and to the amount of damages (*see* UCC 2-719). However, an exclusive or limited remedy provision will not be enforced if it "fail[s] of its essential purpose," thereby denying the purchaser the benefit of the purchase (UCC 2-719 [2]; *see Laidlaw Transp., Inc. v Helena Chemical Co.*, 255 AD2d 869, 680 NYS2d 365 [4th Dept 1998]; *Cayuga Harvester, Inc. v Allis-Chalmers Corp.*, 95 AD2d 5, 465 NYS2d 606 [4th Dept 1983]). Moreover, privity between the parties is not required to maintain a cause of action for breach of an express warranty against a manufacturer, and an express warranty may include specific representations about a product made by a manufacturer in sales brochures or advertisements upon which the purchaser relied (*see Randy Knitwear v American Cyanamid Co.*, 11 NY2d 5, 226 NYS2d 363 [1962]; *Jesmer v Retail Magic, Inc.*, 55 AD3d 171, 863 NYS2d 737 [2d Dept 2008]; *Arthur Glick Leasing, Inc. v William J. Petzold, Inc.*, 51 AD3d 1114, 858 NYS2d 405 [3d Dept 2008]; *Imperia v Marvin Windows of N.Y.*, 297 AD2d 621, 747 NYS2d 35 [2d Dept 2002]).

A plaintiff seeking to establish liability for breach of the warranty of merchantability (*see* UCC 2-314) or breach of the implied warranty of fitness for a particular purpose (*see* UCC 2-315) must establish that the product at issue was not reasonably fit for the purposes for which it was intended, and that such product was the proximate cause of his or her injury (*see Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250 [1995]; *Bellevue So. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 298, 574 NYS2d 615 [1991]; *J.C. Constr. Mgt. Corp. v Nassau-Suffolk Lbr. & Supply Corp.*, 15 AD3d 623, 789 NYS2d 903; *Donahue v Ferolito, Vultaggio & Sons*, 13 AD3d 77, 786 NYS2d 153; *Saratoga Spa & Bath, Inc. v Beeche Sys. Corp.*, 230 AD2d 326, 656 NYS2d 787 [3d Dept], *lv dismissed* 90 NY2d 976, 665 NYS2d 953 [1997]; *see also Jacobs v Tile Shoppe Enters., Inc.*, 82 AD3d 1673, 919 NYS2d 440 [4th Dept 2011]). However, contractual privity between the parties is essential to a claim for breach of an implied warranty when only economic damages are claimed (*see Archstone v Tocci Bldg. Corp. of N.J., Inc.*, 101 AD3d 1059, 956 NYS2d 496 [2d Dept 2012]; *Jesmer v Retail Magic, Inc.*, 55 AD3d 171, 863 NYS2d 737 [2d Dept 2008]; *Arthur Glick Leasing, Inc. v William J. Petzold, Inc.*, 51 AD3d 1114, 858 NYS2d 405; *Catalano v Heraeus Kulzer, Inc.*, 305 AD2d 356, 759 NYS2d 159 [2d Dept 2003]; *Arthur Jaffee Assoc. v Bilsco Auto. Serv.*, 89 AD2d 785, 453 NYS2d 501 [4th Dept 1982], *aff'd* 58 NY2d 993, 461 NYS2d 1007 [1983]).

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Lippert Components and AL-KO Kober established their prima facie entitlement to summary judgment in their favor on the cause of action for breach of express warranty with evidence that no express warranties for their products were given to plaintiffs, and that plaintiffs did not rely upon any literature published by such defendants when purchasing the 2006 trailer (*see Arthur Jaffee Assoc. v Bilsco Auto. Serv.*, 89 AD2d 785, 453 NYS2d 501; *cf. Pronti v DML of Elmira, Inc.*, 103 AD2d 916, 478 NYS2d 156 [3d Dept 1984]). In opposition, plaintiffs, who admittedly had no contact with Lippert Components or AL-KO Kober prior to their purchase of the trailer, failed to present admissible evidence raising a triable issue as to whether they relied upon literature published by such manufacturers about the subject chassis and axles (*see Rome City School Dist. v New York Tele. Co.*, 188 AD2d 1008, 592 NYS2d 994 [4th Dept 1992]; *Luciano v Wold-Wide Volkswagen Corp.*, 127 AD2d 1, 514 NYS2d 140 [3d Dept 1987]; *cf. Catalano v Heraeus Kulzer, Inc.*, 305 AD2d 356, 759 NYS2d 159 ). Movants' submissions also are sufficient to establish a prima facie case of entitlement to judgment in their favor on the causes of action for breach of implied warranties on the ground there was no contractual privity with plaintiffs (*see Parker v Raymond Corp.*, 87 AD3d 1115, 930 NYS2d 27 [2d Dept 2011]; *Jesmer v Retail Magic, Inc.*, 55 AD3d 171, 863 NYS2d 737; *Arthur Glick Leasing, Inc. v William J. Petzold, Inc.*, 51 AD3d 1114, 858 NYS2d 405; *Lindsay v Colton Auto, Inc.*, 48 AD3d 1262, 852 NYS2d 519 [4th Dept 2008]; *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys.*, 272 AD2d 360, 707 NYS2d 657 [2d Dept 2000]; *Miller v General Motors Corp.*, 99 AD2d 454, 471 NYS2d 280 [1st Dept 1984], *affd* 64 NY2d 1081, 489 NYS2d 904 [1985]; *Hole v General Motors Corp.*, 83 AD2d 715, 442 NYS2d 638 [3d Dept 1981]). Plaintiffs' assertion in their opposition papers that contractual privity essentially was created when Lippert Components performed work on the chassis in response to a communication from Forest River that a complaint had been made by Darren Daniels after the trailer was purchased about the presence of rust is rejected.

Furthermore, in view of the determination that plaintiffs' failed to present sufficient evidence raising a triable issue as to whether Lippert Components and AL-KO Kober were obligated to them under express or implied warranties, summary judgment dismissing the cause of action against them brought under the Magnuson-Moss Warranty Act is granted (*see Arthur Glick Leasing, Inc. v William J. Petzold, Inc.*, 51 AD3d 1114, 858 NYS2d 405; *Lindsay v Colton Auto, Inc.*, 48 AD3d 1262, 852 NYS2d 519). Finally, as Lippert Components and AL-KO Kober were not parties to the sales agreement for the 2006 trailer, judgment is granted in their favor as to the causes of action for rescission (*see Jesmer v Retail Magic, Inc.*, 55 AD3d 171, 863 NYS2d 737 [2d Dept 2008]).

Accordingly, the motion by Lippert Components and the cross motion by AL-KO Kober for summary judgment in their favor is granted. The action is severed and continued as to the remaining defendants.

Dated: June 28, 2013

  
HON. DANIEL MARTIN, A.J.S.C.

\_\_\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION