

**E & B Giftware, LLC v Fungoplay, LLC**

2014 NY Slip Op 31431(U)

May 28, 2014

Sup Ct, New York County

Docket Number: 450188/2014

Judge: Melvin L. Schweitzer

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## Background

E & B is a designer and marketer of niche accessories designed for the fitness, gift, and travel markets (Ex. 1 to notice of motion, complaint, ¶ 1). FunGoPlay, which had its principal place of business at 545 West 45<sup>th</sup> Street, 5<sup>th</sup> floor, New York, New York, is a business which operated an online virtual theme park (*id.*, ¶ 3). Its website was an online video game that required players to engage in sports, using its interactive sporting goods, such as soccer balls and frisbees, in the real world to score points to advance in the online game (Exh. 3 to notice of motion, answer, ¶ 50). The soccer balls and frisbees were equipped with a sensor that recorded the motion of the object, and the time spent playing (*id.*, ¶ 51). The player would then upload the data from the ball or frisbee to the FunGoPlay virtual world (*id.*).

FunGoPlay asserts that, because it lacked the expertise to design the interactive sporting goods, initially it hired a design firm, 628 Design, to develop the concept for the goods. The concept 628 Design produced, however, did not include schematics or specifications (*id.*, ¶ 52). FunGoPlay, therefore, sought to partner with E & B, an experienced sporting goods developer and manufacturer, to design and manufacture the balls and frisbees (*id.*, ¶ 53). In addition, in the summer of 2011, FunGoPlay and E & B negotiated for E & B to become a licensee of the sports products so that it could also sell the items directly to retailers (*id.*, ¶ 54).

In late June 2011, FunGoPlay made its initial orders, and in late summer and fall 2011, E & B began delivering the first several thousand soccer balls and frisbees (*id.*, ¶¶ 55, 58). According to FunGoPlay, as the products were delivered to customers, a series of latent defects became apparent, such as, problems with the batteries of both products. For example, the battery case of the soccer balls would become dented when kicked, which caused the power to the

sensors in the ball to cut off, making it useless, degrading the battery life, and causing it to record “junk” data which did not reflect the player’s actual use (*id.*, ¶ 59). Similarly, the frisbees had faulty circuitry which drained the battery, and replacement batteries were drained at an even faster rate (*id.*, ¶ 60). Moreover, there were problems with duplicated serial numbers on the products, which prevented the uploaded data from being appropriately matched for the customer online (*id.*, ¶ 61). FunGoPlay communicated the problems to E & B, which tried unsuccessfully to fix them, and FunGo Play also tried to correct the problems itself to mitigate its damages (*id.*, ¶¶ 62-63). No solution was found, and eventually FunGoPlay stopped offering the products, and cancelled its launch of the online world (*id.*, ¶ 64). E & B acknowledged the problems, and took back the products to store them in the hopes that corrections could be found (*id.*, ¶ 65).

In its counterclaim, FunGoPlay alleges that the parties entered into a valid and binding contract in which E & B agreed to design, manufacture, and deliver to FunGoPlay the goods identified in the purchase orders and invoices (*id.*, ¶ 68). It alleges that the goods were defective as a result of E & B’s defective design and manufacture, and as such, E & B breached the parties’ agreement. Through E & B’s involvement in the development of FunGoPlay’s business, and in attempting to become a licensee, E & B was expressly aware that delivery of defective goods would destroy the FunGoPlay launch, and its business, and render the money it spent on development, advertising, and other costs, a complete loss. Thus, FunGoPlay seeks recovery of these costs and expenses as foreseeable damages of E & B’s breach (*id.*, ¶¶ 66, 70).

E & B seeks dismissal based on documentary evidence, and for failure to state a claim.

The motion is denied for the following reasons.

### Discussion

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court may consider documents referenced in the complaint, other evidentiary submissions, or affidavits submitted by the plaintiff, to assess the viability of the pleading (*id*; see e.g. *Mayerhoff v Timenides*, 269 AD2d 369, 369 [2d Dept 2000] [court may consider evidentiary submissions to assess pleading on CPLR 3211 (a) (7) motion]; *CIBC Bank & Trust Co. v Credit Lyonnais*, 270 AD2d 138, 138-139 [1st Dept 2000] [CPLR 3211 (a) (7) dismissal based on documentary evidence]). Under CPLR 3211 (a) (1), a pleading will be dismissed only if the movant presents documentary evidence that definitively disposes of the claim (see *Leon v Martinez*, 84 NY2d at 88; *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5-6 [1st Dept 2004]).

Here, E & B fails to make such a showing regarding FunGoPlay’s counterclaim. First, with respect to E & B’s contention that the counterclaim should be dismissed because FunGoPlay is not authorized to do business in New York (Limited Liability Company Law § 808 [a]), this argument is rejected. FunGoPlay resolved any issue with respect to its capacity to maintain its claim by filing for and obtaining authority to do business in New York pursuant to section 805 of the Limited Liability Company Law (see letter of John J.D. McFerrin-Chancy, dated March 7, 2014 and Exhs. 1 and 2 annexed thereto). This is sufficient (see *Matter of Mobilevision Med. Imaging Servs., LLC v Sinai Diagnostic & Interventional Radiology, P.C.*, 66 AD3d 685, 685-686 [2d Dept 2009] [Limited Liability Company Law § 808 [a] is analog of BCL

§ 1312 [a], and petitioner was entitled to reasonable opportunity to cure noncompliance with statute]; *Showcase Limousine v Carey*, 269 AD2d 133, 133-134 [1st Dept 2000] [dismissal for failure to comply with BCL § 1312 (a) should have been conditioned on plaintiff's failure to establish within a reasonable time that it complied with the statute]). The court also notes that E & B brought this part of its motion under the wrong subsection of CPLR 3211 (a). Dismissal pursuant to Limited Liability Company Law § 808 (a), as an analog of Business Corporation Law § 1312 (a), is not for failure to state a claim, but, rather, is a challenge to the company's legal capacity to sue under CPLR 3211 (a) (3) (*see Digital Ctr., S.L. v Apple Indus., Inc.*, 94 AD3d 571, 572 [1st Dept 2012]).

The remainder of E & B's motion seeking dismissal of the counterclaim also is denied. The counterclaim clearly alleges that the goods E & B sold FunGoPlay, evidenced by the purchase orders and invoices, were defective. The sale of these goods is governed by Article 2 of the Uniform Commercial Code (UCC). Specifically, FunGoPlay alleges that it lacked the expertise necessary to design the interactive sporting goods, and that it sought to partner with E & B, as an experienced sporting goods developer and manufacturer, for the detailed design work and manufacture of the goods (answer, ¶ 53). Under UCC § 2-314, "[u]nless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." A claim may arise under UCC § 2-314 if the goods sold are not of merchantable quality. "For goods to be of merchantable quality they need to be reasonably fit for their intended purpose" (*Saratoga Spa & Bath v Beeche Sys. Corp.*, 230 AD2d 326, 330 [3d Dept 1997]). FunGoPlay alleges that E & B is

a sporting goods merchant, and that the balls and frisbees it sold FunGoPlay were not reasonably fit for the intended purpose of the online world.

In addition, UCC § 2-315, titled “Implied Warranty: Fitness for Particular Purpose,” provides that

“[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”

The plaintiff asserting such a breach of warranty must allege six elements, that: (1) the plaintiff purchased the goods for a particular purpose; (2) the defendant knew or had reason to know that the plaintiff wanted the goods for a particular purpose; (3) the plaintiff reasonably relied on the defendant’s skill and judgment in buying the goods; (4) the defendant knew that the plaintiff was relying on the defendant; (5) the goods were not fit for the particular purpose; and (6) the plaintiff notified the defendant within a reasonable time after it discovered that the goods were not fit for the particular purpose (*see Saratoga Spa & Bath v Beeche Sys. Corp.*, 230 AD2d at 331; *Emerald Painting v PPG Indus.*, 99 AD2d 891, 891-892 [3d Dept 1984]; *see generally* PJI 4:40).

Here, the counterclaim plainly alleges each of these elements. It clearly asserts that FunGoPlay purchased the balls and frisbees for a particular purpose – for use in the online virtual world which required working sensors and batteries, and the ability to upload to the website, and to accurately pair the user with the amount of activity recorded on a particular ball or frisbee based on unique serial numbers (answer, ¶¶ 51-52). It alleges that E & B was aware of the particular purpose, and that FunGoPlay relied upon E & B’s skill and judgment (*id.*, ¶¶ 52-53,

56-57). Further, the counterclaim alleges that E & B was an experienced sporting goods developer and manufacturer, and was in the business of the design and manufacture of this type of goods, so that FunGoPlay was reasonable in relying upon it (*id.*, ¶ 53). It alleges that E & B was aware of FunGoPlay's business plans with regard to the goods, and the effects on its business were the products to malfunction (*id.*, ¶ 56). Finally, it alleges that the goods were not fit for the purpose, because the power sensors would cut on and off on the soccer ball when kicked and dented, it recorded "junk" data, the battery life was degraded, there were faulty circuits in the frisbees, and there were issues because the products did not have unique serial numbers (*id.*, ¶¶ 59-61). FunGoPlay further alleges that as soon as the defects became apparent, it communicated the problems to E & B, and E & B attempted unsuccessfully to remedy the problems (*id.*, ¶¶ 62-64). Virtually all of the frisbees were defective, and 70% of the soccer balls suffered from defects (*id.*, ¶ 64). This satisfies FunGoPlay's pleading burden.

As to the issue of damages, under UCC § 2-714, damages may be determined in any reasonable manner (*see Peak v Northway Travel Trailers, Inc.*, 27 AD3d 927, 929 [3d Dept 2006]). Specifically, under UCC § 2-714 (2), damages are measured as the "difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." UCC § 2-714 (3) provides that incidental and consequential damages may be recovered in accordance with section 2-715. UCC § 2-715 provides for the recovery of incidental damages, such as various expenses reasonably incurred in inspecting, receiving, or maintaining custody and care of rightfully rejected goods, expenses incurred in connection with

effecting cover, and other reasonable expenses incident to the delay or other breach. It further provides for consequential damages, including:

“(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.”

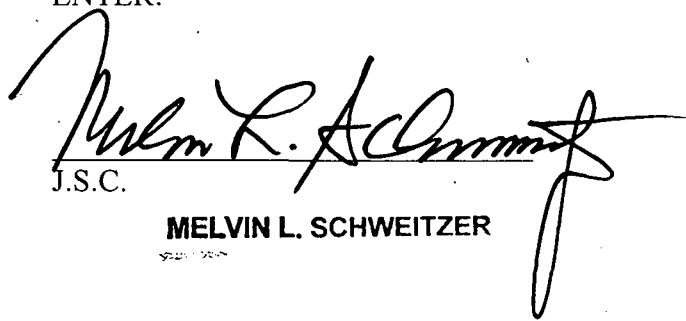
(NY UCC § 2-715). Thus, contrary to E & B’s argument, consequential damages are recoverable by FunGoPlay on its counterclaim.

Accordingly, it is

ORDERED that the plaintiff’s motion to dismiss the counterclaim is denied.

Dated: May 28, 2014

ENTER:

  
J.S.C.  
MELVIN L. SCHWEITZER