

BMW Group LLC v Castle Oil Corp.

2014 NY Slip Op 33708(U)

September 5, 2014

Supreme Court, New York County

Docket Number: 650910/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 650910/2013
BMW GROUP LLC
vs.
CASTLE OIL CORPORATION
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____
MOTION DATE 4/30/14
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>123-125</u>
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). <u>135-136</u>

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 9/15/14

SHIRLEY WERNER KORNREICH
J.S.C. J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
BMW GROUP LLC, 2055 CRUGER, LCC, SKIVJANI
REALTY CORP., GLENHILL ASSOCIATES, LLC and
498 SEVENTH LLC, on behalf of themselves and all
others similarly situated,

Plaintiffs,

Index No.: 650910/2013

-against-

DECISION AND ORDER

CASTLE OIL CORPORATION,

Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.:

In this putative class action for breach of warranty and breach of contract, defendant Castle Oil Corporation (Castle) moves to dismiss the second amended complaint (SAC) for failure to state a cause of action. Plaintiffs oppose. For the reasons that follow, defendant’s motion is granted, and the case is dismissed.

I. Background

As this is a motion to dismiss, the following account is based on the allegations contained in the SAC. Plaintiffs BMW Group LLC (BMW), 2055 Cruger, LLC (Cruger), Skivjani Realty Corp. (Skivjani), Glenhill Associates, LLC (Glenhill) and 498 Seventh LLC (498 Seventh) are New York companies which own and operate various apartment or commercial buildings in New York City or Westchester (SAC ¶¶ 5—9). Castle is a distributor of fuel oil throughout New York City, Westchester and Long Island (*id.* at ¶ 12). Among the fuel oil it has sold are No. 4 and No. 6 fuel oil, commonly used to heat older apartment or commercial buildings.

Over the four year period from 2009 to 2013, plaintiffs purchased No. 4 and No. 6 fuel oil from Castle on multiple occasions (*id.* at ¶¶ 16, 36). In particular, the SAC alleges that Cruger received a delivery of Castle's No. 6 oil on August 2, 2010, Skivjani received a delivery of Castle's No. 4 oil on February 10, 2010, Glenhill received a delivery of Castle's No. 6 oil on December 1, 2009, and 498 Seventh received a delivery of Castle's No. 6 oil on November 6, 2009 (*id.* at ¶ 36).

The SAC alleges that Castle adds other oils, including lubricating oil, to its fuel oil products without disclosing this fact to its customers (*id.* at ¶¶ 29 & 33). The SAC states that lubricating oil differs from fuel oil in a number of ways: its boiling point is higher, it does not burn efficiently in non-industrial heating systems (*id.* at ¶¶ 24—25), it contains “chemical additives” not found in fuel oil (*id.* at ¶ 39) and, when it has already been used as lubricating oil, it can contain toxic “contaminants” (*id.* at ¶ 40). The constituent hydrocarbons of lubricating oil tend to be larger than the ones which make up fuel oil (*id.* at exhibit A, ¶ 17). Plaintiffs allege that purchasers of No. 4 and No. 6 fuel oil believed that they were receiving a product containing only fuel oil, and that a customer would not knowingly pay the same price for a blended fuel oil product as they would for pure fuel oil (SAC ¶ 41).

Plaintiffs commenced this action on March 14, 2013, by filing a summons and complaint and seeking a preliminary injunction against Castle's continued sale of oil which failed to conform to certain regulations. By a decision and order entered April 29, 2013, the court denied plaintiffs' motion (NYSCEF Doc. No. 53). On May 21, before Castle answered, plaintiffs filed an amended complaint. On Castle's motion, the causes of action for negligent misrepresentation and unjust enrichment and the claims under the Magnuson-Moss Act and General Business Law

§ 349 were dismissed with prejudice, and the remaining causes of action were dismissed with leave to replead (decision & order, Oct 21, 2013). Plaintiffs filed the SAC on November 1, 2013, alleging causes of action for breach of express and implied warranties, including the warranty of merchantability and breach of contract. Castle now moves to dismiss.

II. *Standard*

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 NY3d 491 [2009]; *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [citing *McGill v Parker*, 179 AD2d 98, 105 (1992)]; *Mazzai v Kyriacou*, 98 AD3d 1088, 1090 [2d Dept 2012]; *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 [1998]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames, id.* [citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro*, 60 NY3d at 491). “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” (*Skillgames*, 1 AD3d at 250 [citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994)]).

III. *Discussion*

A. *Notice*

Article 2 of the UCC addresses the sale of goods. UCC 2-607 (2) provides that acceptance of the goods precludes rejection but “does not of itself impair any other remedy provided by [UCC Article 2] for non-conformity.” However, “[w]here a tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy” (UCC 2-607 [3] [a]). Failure to notify of the non-conformity within a reasonable time after discovery precludes the buyer from seeking any remedy (*Suraleb, Inc. v International Trade Club, Inc.*, 13 AD3d 612, 613 [2d Dept 2004]; cf. *V. Zappala & Co., Inc. v Pyramid Co. of Glen Falls*, 81 AD2d 983, 984 [3d Dept 1981] [although defendant accepted goods, its timely notification of non-conformity permitted it to recover damages resulting from breach]).

“What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action” (UCC 1-204 [2]; see *J.N.K. Machine Corp. v TBW, Ltd.*, 81 AD3d 1438, 1440 [4th Dept 2011] [what is timely is question of fact for jury unless only one inference may be drawn as to reasonableness as where buyer waited five months to reject goods]; *Cliffstar Corp. v Cape Cod Biolab Corp.*, 37 AD3d 1073, 1075 [4th Dept 2007] [rejection not timely where it occurred one year after delivery and five months after action commenced]). Factors to consider in determining timeliness include not only the length of time between discovery of the nonconformity and the notice to the seller (see *J.N.K. Machine Corp.*, 81 AD3d at 1440) but also the purchaser’s diligence in inspecting the goods once delivered (see, e.g., *D.C. Leathers, Inc. v Gelmart Indus., Inc.* 125 AD2d 738, 739—40 [3d Dept 1986] [rejection timely when goods inspected only after arrival at final destination]). Moreover, the serving and filing of a complaint

may satisfy the purchaser's obligation under Section 2-607 (*Panda Capital Corp. v Kopo Intl., Inc.*, 242 AD2d 690, 692 [2d Dept 1997]).

Here, the SAC states that written notice of the non-conformity was given in March 2013, immediately before the commencement of this action. It is alleged that such notice was given “[w]ithin a reasonable time after Plaintiffs discovered Castle’s breach of warranty” (SAC ¶ 71), but the SAC does not relate the circumstances of this discovery. The record reveals, however, that plaintiffs’ counsel began an investigation into certain practices in the heating oil business no later than October 2011, an effort which culminated in November 2012 when counsel arranged for an oil delivery to be received by plaintiff BMW and for that delivery to be tested to determine whether it met certain specifications for fuel oil (affidavit of Anthony Valenti, sworn to on March 13, 2013 [NYSCEF Doc. No. 8] ¶¶ 2, 10 [k]; transcript, Oct 17, 2013 22:5—9). Although troubled enough by the results to use them¹ as the basis for seeking a preliminary injunction against Castle, BMW refrained for months (or, in the case of counsel, for years) from complaining to Castle.²

Nonetheless, plaintiffs’ burden of showing that notice was given in a reasonably timely fashion is very slight at the pleading stage. While a four-month silence *could* be enough to preclude a purchaser from suing for a non-conformity in accepted goods (*Gala Trading, Inc. v*

¹ Or, rather, the investigator’s account of them, the actual test results not having been submitted to the court (*see* decision & order, Apr 29, 2013 at *3).

² Counsel, at oral argument excused its failure to give notice earlier by claiming it did not want to interfere with an investigation being conducted by prosecutors into the fuel oil business, to which this class-action plaintiffs’ law firm had been made privy and which they claimed to be assisting (*see Mid-Island LP v Hess Corp.*, Sup Ct, NY County, transcript, June 17, 2014 [NYSCEF Doc. No. 54] 20—27).

Adrienne, Inc., 174 AD2d 478, 479 [1st Dept 1991]), it would be premature to hold at the dismissal stage that plaintiffs' notice was untimely as a matter of law. Accordingly, the court finds that the SAC's allegations, though conclusory, are sufficient to meet plaintiffs' burden to plead timely notice.

B. Damages

More problematic, however, is the question of damages. According to the SAC, Castle promised to deliver "fuel oil" to the plaintiffs. It is not alleged that Castle ever explicitly represented that its product would contain no additives or admixtures or would otherwise consist "100%" of fuel oil. Nevertheless, it is plaintiffs' claim that by calling its product "fuel oil," Castle was making an express warranty that its product was pure and unblended. Plaintiffs base this assertion not on any express law or regulation or any written standard concerning what may or may not be sold or marketed as "fuel oil,"³ but rather on their own claim that such is the common understanding of the term in the fuel oil market.

It should first be noted that both federal and state law permit and encourage burning used lubricating oil for fuel. In the Used Oil Recycling Act of 1980, Congress declared that "it is in the national interest to recycle used oil in a manner which does not constitute a threat to public

³ Contrary to plaintiffs' contentions, the definition of "fuel oil" found in New York's air pollution rules (6 NYCRR 225-2 [b] [2]) is immaterial: while the rules restrict the burning of what is defined as "waste fuel," there is no rule or law prohibiting the burning of anything other than what is defined there as "fuel oil," and certainly no rule concerning what can be marketed under that name. That subpart is also irrelevant as plaintiffs have not alleged that Castle's product met the definition of "waste fuel," and there is otherwise no reason to privilege that subpart's definition of "fuel oil" over, for example, the definition found in New York's Oil, Gas and Solution Mining Law (ECL § 23-2301 [1] ["all oil which has been refined, re-refined, or otherwise processed for the purpose of being burned to produce heat"]; *see also* decision & order, Apr 29, 2013).

health and the environment and which conserves energy and materials” (42 USC § 6901a).

Congress charged the Environmental Protection Agency (EPA) with issuing regulations “as may be necessary to protect the public health and the environment from hazards associated with recycled oil,” a term defined to mean “any used oil which is reused . . . for any purpose [including] oil which is re-refined, reclaimed, burned, or reprocessed” (*id.* at §§ 6935 [a], 6903 [37]). As a result, the EPA issued regulations setting standards for the management of used oil, including its re-use as fuel (*see* 40 CFR § 279.1, *et seq.*). Notably, the regulations provide that used oil that meets certain specifications is exempt from even these regulation and may be used as fuel without restriction (*id.* at § 279.11):

Similarly, New York State directs “[a]ll state and local officials . . . to encourage the use of re-refined oil” (*id.* at § 23–2303), a term defined to mean “used oil which has been refined to remove the physical and chemical contaminants so that it shall be suitable for lube stock or fuel oil” (ECL § 23–2303, –2301 [4]). “Used oil” is specifically defined in the statute as used lubricating oil (*id.* at § 23–2301 [1]). Like the EPA, New York’s Department of Environmental Conservation has promulgated rules governing the management of used oil and its use as fuel (6 NYCRR §§ 360–14 & 374–2). Also like the EPA, used oil that meets the State’s specifications and is burned for fuel is exempt from these regulations (*id.* at §§ 374–2.2 [b] [1], 360–14.1 [b] [9]). Thus, both New York and the federal government have put in place regimes to ensure that even toxic used oil is disposed of or burned in an efficient and safe manner, and both regimes provide that certain used oil which meets the specifications set forth by the applicable rules should simply not be treated as “used oil” subject to regulation.

Far from being some shady, quasi-criminal activity, then, burning used lubricating oil for fuel is actually both state and federal policy and can be done in a legal manner in certain instances, without any government oversight. However, contrary to Castle's arguments, this does not settle the question of whether fuel containing used oil (or some other material) can be legitimately held out as "fuel oil" without disclosing the presence of the filler. That the state and federal governments have held that it is *legal* to burn used oil for fuel does not necessarily mean that all fuel oil should be presumed to possibly contain used oil, nor is it obvious how disclosing the admixture of used oil into fuel oil would necessarily frustrate federal policy.⁴ This is essentially a question of commercial practice, one which does not appear to be addressed by any law or regulation but which plaintiffs maintain is barred by the common usage of the term "fuel oil" in the trade.

However, while the SAC expounds upon the differences between fuel oil and lubricating oil and the unfitness of lubricating oil for use in non-industrial boilers, it contains no particulars regarding the blended product that Castle actually delivered. In addition, the SAC does not allege that any injury was caused by *using* Castle's product as fuel, and it contains no allegations regarding the product's performance. Rather, plaintiffs' claim is based solely on "economic

⁴ It should be noted that this argument, though it fails here, is in fact supported in principle by statute: according to federal law, recycled oil which is determined to be substantially equivalent to new oil with respect to a particular end use *must* be labelled strictly in accordance with rules set forth by the Federal Trade Commission, which labels *cannot* indicate or "connote" that the recycled product is less than substantially equivalent to the virgin product (42 USC § 6363 [c]—[e]). In this case, however, it has not been shown that the National Institute of Standards and Technology has ever developed a test for determining substantial equivalency between recycled oil and new oil for use as fuel, nor that Castle's product complied with any such standard.

damage” allegedly sustained by overpaying for heating oil they contend they reasonably believed was pure fuel oil, but in fact was not.

Claimed economic damages, however, without any allegations of how the breach affected the product’s performance or utility, are not sufficient to sustain a cause of action for breach of warranty. Hence, in *Feinstein v Firestone Tire & Rubber Co.*, 535 FSupp 595 (SDNY 1982) (Haight, J.), plaintiffs commenced a putative class action against the defendant tire manufacturer based on alleged defects in a certain type of tire that had been the subject of investigation by both the National Highway Traffic Safety Administration (NHTSA) and Congress (*id.* at 597). The plaintiffs there, as here, did not assert any claim for property damage, death or injury resulting from their use of the product, but rather merely sought damages for breach of the implied warranty of merchantability on the theory that “the purchase of a defective tire, ipso facto, caused economic loss,” even though in most cases the tire never failed (*id.* at 602). The court rejected the claim, holding that “[t]ires which lived full, productive lives were, by demonstration and definition, ‘fit for the ordinary purposes’ for which they were used” and, therefore, were merchantable (*id.*). Further, in rejecting plaintiff’s claims under the Magnuson-Moss Act, the court held that “tire owners whose tires performed to their entire satisfaction cannot demonstrate, as a matter of law, the ‘fact of damage’ necessary to state a claim under Magnuson-Moss” (*id.*).

Likewise, in *Hubbard v Gen. Motors Corp.*, 1996 WL 274018 (SDNY) (Schwartz, J.), the plaintiff commenced an action against defendant on behalf of all persons who “purchased or leased a model-year 1992, 1993, 1994 or 1995 Chevrolet Suburban,” following a NHTSA investigation into the vehicle’s braking system prompted by complaints about poor braking performance (*id.* at *1). The complaint claimed damages based on such performance issues, as

well as “a reduction in the resale value and the trade-in value of the vehicles” (*id.*). However, the named plaintiff, Hubbard, did not allege that the brakes on *his* car had ever failed or that he had “attempted to resell his Suburban only to discover that its value had decreased” (*id.* at *3). Plaintiff, there, claimed that the purchase of the car itself constituted his damages, as he would not have made the purchase had he known of the potential problem with the brakes (*id.*). Relying on, among other cases, *Feinstein*, the court rejected this argument, holding that “[p]urchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own” (*id.*). The plaintiff’s theory of damages again was rejected after the case’s consolidation pursuant to 28 USC § 1407. The court stated that “[d]amages based on lost resale value have been rejected as inappropriate under a breach of implied warranty theory,” and the allegation that plaintiffs “paid more for the vehicles than they were worth” was speculative where no attempt to sell the cars had been made (*In re Gen. Motors Corp. Anti-Lock Brake Prods. Liability Litigation*, 966 FSupp 1525, 1530 [ED Mo 1997] *aff’d sub nom. Briehl v Gen. Motors Corp.*, 172 F3d 623, 627—29 [8th Cir 1999]). This view was adopted by the Appellate Division, First Department, where it concluded that plaintiffs’ claim for, *inter alia*, breach of implied warranty could not proceed in the absence of an allegation that the defect alleged there (a front seat backrest allegedly prone to collapse) had actually caused an injury or had resulted in the car being sold at a loss (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002] *lv denied* 99 NY2d 502 [2002]).

Here, the SAC contains no allegations of actual faulty performance of the Castle fuel, or, in fact, any information about the characteristics of Castle’s oil, other than that it contained an unspecified amount of non-fuel oil. There is no indication that plaintiffs were unable to use

Castle's product to heat their buildings or suffered any ill effects in doing so.⁵ In other words, the SAC does not allege that Castle's product actually caused plaintiffs any harm. The sole basis for damages is the alleged difference in price between Castle's blend and the "pure" fuel oil which plaintiffs claim they believed they were receiving. As noted above, a theoretical defect that never manifests itself in a product's poor performance or causes harm is an insufficient ground upon which to base a damage claim. Certainly, if true for a durable product that can (and often is) resold, such as a car, it is even more true in relation to heating oil which met regulatory standards, was purchased for commercial purposes and was used for that purpose to no ill effect. If the purity level of the oil made no practical difference, it is could not have caused any actionable, non-speculative damages, a necessary element for any of plaintiffs' claims (*see Frank*, 292 AD2d at 121; *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 [1st Dept 1988]).

Plaintiffs, however, argue that the allegation that Castle's failure to deliver what was promised is sufficient to state damages for their breach of warranty claims. They analogize this case to instances where a consumer purchases food items or luxury goods that are not what they are described to be.⁶ Plaintiffs' choice of analogies is telling, however, for while it may be true that a consumer is entitled to have his choices respected even if "dictated by caprice or fashion or

⁵ Indeed, the SAC's allegation that plaintiffs' March 2013 letter to Castle was timely notice of nonconformity of a product that plaintiffs had been receiving since 2009 or 2010 necessarily implies that the difference between pure fuel oil and Castle's product could not be discerned through ordinary use (*see* UCC 2-607 [3] [a] [notice must be given within reasonable time after purchaser "discovers or *should have discovered* any breach"]).

⁶ In passing, the court notes that in making this argument plaintiffs have misleadingly presented a quote from *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 56 n 5 (1999) as the holding of the Court of Appeals, when the quote was a summary of an argument by *amicus curiae* (plaintiffs' brief 7).

perhaps by ignorance” (*Fed. Trade Commn. v Algoma Lumber Co.*, 291 US 67, 78 [1934]), it does not follow that businesses purchasing a quasi-industrial product for commercial use (and immediate destruction) should expect their whims to be similarly humored. It is plausible and understandable that non-utilitarian characteristics could, in the language of the UCC, form the “basis of the bargain” (UCC § 2–313) in a consumer transaction for olive oil, ground beef, a gold ring or a recreational fishing boat, but there is no precedent for a commercial enterprise⁷ seeking to recover for a non-conformity which is used as intended with no demonstrable, ill effect (*cf. Midwest Generation, LLC v Carbon Processing & Reclamation, LLC*, 445 FSupp2d 928, 934 [ND Ill 2006] [Bucklo, J.] [holding that purchaser’s claim that No. 6 fuel oil contained unspecified amounts of No. 2 and No. 5 fuel oil could not justify rejection where purchaser failed to demonstrate how presence of other oils impaired value of delivery]). Accordingly, it is

ORDERED that defendant’s motion to dismiss is granted, the second amended complaint is dismissed, and the Clerk, upon service of a copy of this order with notice of entry, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk.

Dated: September 5, 2014

ENTER

J.S.C.



⁷ As noted above, this court has already held that plaintiffs cannot seek recovery based on state or federal consumer-protection laws (decision & order, Oct 21 2013 [NYSCEF Doc. No. 114; *see also* NYSCEF Doc. No. 116).