

Mid Is. LP v Hess Corp.
2014 NY Slip Op 33709(U)
September 5, 2014
Supreme Court, New York County
Docket Number: 650911/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **SHIRLEY WERNER KORNREICH**

PART 54

Justice

Index Number : 650911/2013
MID ISLAND LP
vs.
HESS CORPORATION
SEQUENCE NUMBER : 003
DISMISS ACTION

INDEX NO. _____

MOTION DATE 7/30/14

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) 40-47

Answering Affidavits — Exhibits _____ | No(s) 49

Replying Affidavits _____ | No(s) 50-51

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

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

MULTIMEDIA IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

Dated: 9/15/14

SHIRLEY WERNER KORNREICH
[Signature]
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
MID ISLAND LP d/b/a MADISON MANAGEMENT
OF QUEENS and CARNEGIE PARK ASSOCIATES,
L.P., on behalf of themselves and all others similarly
situated,

Plaintiffs,

Index No.: 650911/2013

-against-

DECISION AND ORDER

HESS CORPORATION,

Defendant.

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

In this putative class action for breach of warranty and breach of contract, defendant Hess Corporation (Hess) moves to dismiss the amended complaint 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

Plaintiffs commenced this action on March 14, 2013. The complaint alleged that over a period of years, certain independent trucking companies retained by Hess to deliver fuel oil to its customers (including plaintiffs) had been adding used oil to the fuel oil Hess had promised to deliver. The complaint cited two deliveries from 2010 as specific examples of this practice. Though it was not alleged that Hess was aware of the substitution, plaintiffs, on behalf of all Hess customers who received the “adulterated product”, asserted several causes of action, claimed they were damaged, and sought to recover from Hess.

Hess moved to dismiss, and in a decision and order entered December 3, 2013, the court granted the motion, dismissing with prejudice the claims made under the Magnuson-Moss Warranty Act, New York's General Business Law Section 349 and the causes of action for unjust enrichment and negligence (NYSCEF Doc. No. 31 [Prior Decision]). The court also noted that while the complaint alleged that the "heat content" of the delivered product was lower than what had been ordered, plaintiffs did not explain how such "heat content" specifically differed from what they believed they had been promised and the detrimental effect, if any, of that difference (*id.* at *4). Further, while the plaintiffs alleged that using the Hess product shortened the useful lifespan of their boilers, plaintiffs were not seeking to recover for damaged boiler equipment (*id.*). Consequently, the complaint did not adequately allege damages, and the court dismissed the causes of action for breach of contract and breach of express warranty with leave to replead.¹

¹ The court stated: "It appears that plaintiffs were completely unaware that the oil they had received in 2010 was defective until they were so informed by their current counsel years later. So while plaintiffs have claimed that Hess's fuel was defective because its "heat content" was lower than what they had ordered, they appear to have been oblivious to this supposed shortfall until counsel apprised them that the chemical contents of the fuel were not what they thought they were. The claim for damages, therefore, does not appear to be based on any injury sustained through the use of the oil, but rather on the supposed difference in value between "pure" fuel oil and the product that was delivered. But plaintiffs are not oil merchants, and fuel oil is neither a durable good nor a collector's item: it is bought to be burned. It makes little sense to premise an action on the claim that Hess overcharged for its fuel, where plaintiffs apparently burned the fuel without a problem and have not identified how they were disappointed with the product's performance or a failure to comply with a warranty as to heat content (or anything else) upon which they actually relied . . . If plaintiffs have been harmed, they should explain how, rather than take refuge in scholastic inquiries into the true nature of fuel oil" (Prior Decision at *5—*6) .

In additional, the court found that the complaint did not allege the required timely notice and dismissed the breach of warranty claim with leave to replead (Prior Decision at *6—*8). On January 17, 2014, plaintiffs filed an amended complaint (AC) alleging breach of contract, breach of express warranty, and breach of the implied warranty of merchantability. Hess responded with the instant motion 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

The sale of heating oil is a sale of goods controlled by Article 2 of the UCC. UCC 2-607 [3] [a] provides: “Where 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 the breach or be barred from any remedy.” To maintain an action for breach of warranty for accepted goods, the purchaser must plead that it gave timely notice of the nonconformity to the seller (*Wayne County Vinegar & Cider Corp. v Schorr’s Famous Pickled Prods., Inc.*, 118 Misc2d 52, 61—62 [Civ Ct, Kings County 1983]). 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]).

The AC alleges that plaintiffs "first began to suspect" that Hess's oil was nonconforming in the "winter of 2013 as a result of an independent investigation" (AC ¶ 73). The record is somewhat more expansive than this rather circumspect statement. It appears that plaintiffs' counsel began an investigation into certain practices in the heating oil business no later than October 2011, and discovered the alleged substitution of used oil for fuel oil as early as December 2011 (affidavit of Anthony Valenti, sworn to on March 13, 2013 [NYSCEF Doc. No. 8] ¶¶ 2, 10 [p]). Nevertheless, counsel did not inform Hess, or, for that matter, their own clients, of the practice until more than a year later, a decision counsel justified by claiming that it did not want to interfere with an investigation being conducted by prosecutors into the fuel oil business, to which plaintiffs' law firm had been made privy and which they claimed to be assisting (transcript, June 17, 2014 [NYSCEF Doc. No. 54] 20—27). Since plaintiffs' burden of showing that notice was given in a reasonably timely fashion is very slight at the pleading stage, it is premature at the dismissal stage to hold that the delay between counsel's discovery of the practice and the commencement of this action constitutes an unreasonable delay precluding recovery. Accordingly, the court finds that the AC's allegations sufficiently plead timely notice.

B. Damages

Nonetheless, dismissal is required. The AC is still vague on the question of damages. The basic narrative of the AC is the same as that of the original complaint— plaintiffs ordered

fuel oil, but Hess delivered a product which contained oil that was *not* fuel oil.² Despite the court's directive in the Prior Decision that plaintiffs explain what adverse consequences, if any, they suffered, the AC fails to do so. Allusions to heat content and boiler damage mirror those in the original complaint. The AC bases its theory of recovery on the assertion that the product that Hess delivered was less valuable than the product plaintiffs paid for merely because it was not pure fuel oil.³

This is not enough. As the court held in the Prior Decision, economic damages supposedly arising out of the presence of a nonconformity are usually not actionable if no actual adverse consequences are alleged. In a number of cases involving alleged design defects with cars or car parts, courts have held that purchasers had no claim for breach of warranty where the alleged defect had never manifested itself, even on the theory that the defective design caused the car to be worth less than what the purchaser had paid for it (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002] *lv denied* 99 NY2d 502 [2002]; *Hubbard v Gen. Motors Corp.*, 1996 WL 274018 [SDNY] [Schwartz, J.]; *Feinstein v Firestone Tire & Rubber Co.*, 535 FSupp 595 [SDNY 1982] [Haight, J.] Thus, in *Feinstein, id.*, plaintiffs commenced a putative class action against the defendant tire manufacturer based on alleged defects in a certain type of tire that had

² While plaintiffs allege that “waste oil” was surreptitiously introduced into the Hess deliveries, the AC (in contrast to the original complaint [*see* complaint, ¶ 16]) is somewhat ambiguous as to what this term actually means. While it notes that New York regulations define “waste oil” to refer to certain substances (AC, ¶ 27), it is unclear as to whether that definition is being adopted by plaintiffs for purposes of the AC. Drawing all inferences in favor of plaintiffs, however, the court reads the AC as alleging that what was mixed into Hess's fuel was previously used oil, the allegation in the prior complaint.

³ *See* transcript, June 17, 2014, 9:17—20: “THE COURT: When were you harmed? That is what I'd like to know. MR. SCHREIBMAN: When we overpaid for a product.”

been the subject of investigation by both the National Highway Traffic Safety Administration (NHTSA) and Congress (*id.* at 597). The plaintiffs there did not assert any claim for property damage, death or injury resulting from their use of the tires, but rather 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 this idea, 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 were therefore 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.*).

Similarly, in *Hubbard*, 1996 WL 274018, 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 nevertheless 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.*). This theory of damages was later also rejected after the case’s consolidation pursuant to 28 USC § 1407, with the court there stating that “[d]amages based on lost resale value have been rejected as inappropriate under a breach of implied warranty theory,” and that 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 here by the Appellate Division, where the First Department 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 supposedly prone to collapse) had actually caused an injury or had resulted in a car being sold at a loss (*Frank*, 292 AD2d 118).⁴

As the above cases show, theoretical nonconformities do not automatically give rise to an economic loss that can sustain a claim for breach of warranty or breach of contract. The AC contains no information on what harm, if any, was caused by using the allegedly adulterated fuel.⁵ Indeed, as counsel explained at oral argument, plaintiffs “began to suspect” that there were issues concerning Hess’s oil not as a result of anything that plaintiffs actually noticed about their boiler equipment or the cost of heating their buildings, but rather because they were contacted by

⁴ Damages are also a necessary element for a cause of action for breach of contract (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 [1st Dept 1988]).

⁵ Plaintiff Mid Island LP is controlled by the Schron family, while plaintiff Carnegie Park Associates is controlled by The Related Companies (AC ¶ 9).

their current counsel, who informed them that their *own* investigation (the “independent investigation” referred to in the AC) had revealed that the oil they had been buying from Hess and happily using over the years without complaint may not have consisted entirely of fuel oil (tr, Jun 17, 2014, 11—14). If, as indicated above, this sort of economic loss is insufficient with regard to a durable good that can (and often is) resold, such as a car, it should be all the more true in relation to heating oil purchased by a building operator to be immediately burned as fuel. If the content of the fuel made no practical difference, then it is exceedingly difficult to see how it could have caused any actionable, non-speculative damages, particularly in this commercial context.

In opposition, plaintiffs argue that the allegation that Hess failed to deliver pure fuel oil, as promised, is sufficient to state damages for their breach of warranty claims. They compare 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 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,

⁶ In passing, the court notes that 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, as opposed to its mere summation of an argument made by *amicus curiae* (plaintiffs’ brief, 11—12).

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 without being able to articulate what difference the non-conformity made (*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]).

Having failed to remedy the original complaint by pleading damages, the AC must be dismissed, with prejudice. The court does not reach the question of whether it was proper for plaintiffs to add a new cause of action to the AC, and, as before, declines to consider defendants' objections to class certification (Prior Decision at *12). Accordingly it is

ORDERED that defendant's motion to dismiss is granted, and the 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.