

<b>Love v BMW of N. Am., LLC</b>
2017 NY Slip Op 30528(U)
February 21, 2017
Supreme Court, Richmond County
Docket Number: 150653/16
Judge: Kim Dollard
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

-----x  
KEVIN B. LOVE,

*Plaintiff,*

*-against-*

BMW OF NORTH AMERICA, LLC,  
BMW OF MORRISTOWN, and BMW OPEN ROAD EDISON,

*Defendants,*  
-----x

DCM Part 4

Present:  
Hon. Kim Dollard

**DECISION AND ORDER**

Index No. 150653/16  
Motion Nos. 2510-001  
3032-002  
3834-003

The following papers numbered 1 to 5 were fully submitted on the 2<sup>nd</sup> day of December, 2016:

Pages  
Numbered

Notice of Motion to Dismiss  
by Defendant BMW of North America, LLC,  
with Supporting Papers and Exhibits  
(dated June 17, 2016).....1

Notice of Cross Motion to Dismiss  
by Defendants BMW of Morristown and BMW Open Road Edison,  
with Supporting Papers and Exhibits  
(dated July 25, 2016).....2

Notice of Cross Motion for Leave to Amend Complaint  
by Plaintiff, with Supporting Papers and Exhibits  
(dated September 16, 2016).....3

Reply Affirmation  
by Defendants BMW of Morristown and BMW Open Road Edison  
(dated November 29, 2016).....4

Reply Affirmation  
by Defendant BMW of North America, LLC  
(dated November 30, 2016).....5

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Upon the foregoing papers, the motion (No. 2510-001) and cross motion (No. 3032-002) for dismissal of the complaint as against defendants BMW of North America, LLC (hereinafter "BMW NA"), BMW of Morristown (hereinafter "Morristown") and BMW Open Road Edison (hereinafter "Open Road") are denied; plaintiff's cross motion (No. 3834-003) for leave to amend his complaint is granted.

To the extent relevant, plaintiff entered into a three-year lease of a 2010 BMW 750Li for the period commencing in January 2010 and running through January 2013 (*see* Verified Complaint, paras 9-10). It is undisputed that the subject vehicle was leased from defendant “Open Road” and serviced at defendant Morristown’s facility during the period of the lease (*id.* at 10-12).<sup>1</sup> Plaintiff maintains, *inter alia*, that he has been “denied the benefits of the lease for the last twelve months”, during which he has been precluded from driving said vehicle (*id.* at 10). However, plaintiff concedes that he was supplied with a “loaner” vehicle during the period of alleged inoperability (*id.* at 30,51).

As more particularly stated in the complaint, plaintiff alleges that between June 18, 2010 and April of 2012, the subject vehicle required unscheduled service on numerous occasions notwithstanding defendant Morristown’s claim that the automobile was in proper working order (*id.* at 13-17, 43). Plaintiff disagrees, and contends that the subject vehicle was and is defective, causing it to become inoperable and requiring that the transmission be replaced (*id.* at 17-19, 23-27, 37). In addition, plaintiff alleges that the vehicle’s fuel pumps were defective, causing BMW to recall nearly 200,000 vehicles in order to install a replacement (*id.* at 46). Plaintiff further alleges that as a result of the foregoing, the subject vehicle was caused to remain at defendant Morristown’s repair facility from March 2012 until the expiration of the lease term, *i.e.*, the period during which plaintiff claims that he was “denied the benefits of the lease” (*id.* at 30, 51), and that despite his making all of the monthly payments required under the lease, the subject vehicle was repossessed by BMW NA on January 31, 2013, citing plaintiff’s failure to pay sum of \$61,929.44 purported to be due and owing under the terms of the lease (*id.* at 53).

On July 11, 2012, plaintiff commenced a pro se action against the above entities (*see* BMW NA’s Exhibit “B”), in which it was alleged that he “was forced to tow” the subject vehicle due, *e.g.*, to “transmission malfunctions that prevented him from safely operating the subject vehicle” (*id.* at

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<sup>1</sup>As shall hereinafter appear, defendant BMW Open Road Edison is an automotive retailer, BMW of Morristown operates an automotive service facility and BMW of North America, LLC is engaged in the manufacture of BMWs (*see* Verified Complaint, paras 6-8).

4).<sup>2</sup> In addition, plaintiff claims that BMW NA wrongfully demanded that he pay the sum of \$20,000 for repairs to the vehicle. As a result, plaintiff sought reimbursement for the cost of the lease and insurance payments made with reference to the subject vehicle (*id.* at 5-7).

On July 14, 2014, the parties entered into a stipulation discontinuing the above action without prejudice. Among its key terms was a provision stating that plaintiff “may file a new complaint under a new index number...[and that d]efense counsel agree[d] to accept service of same on behalf of their clients”. The stipulation further provided that “[a]ny defenses available to the current parties will be as they existed at the time of the original complaint. For example, for statute of limitations purposes, the statute will [remain] as it was when the initial complaint was filed and not the date of the new complaint” (*see* BMW NA’s Exhibit “C”).

The current action was commenced by the filing and service of a “new” or second complaint on or about May 27, 2016, in which plaintiff asserted 11 causes of action against BMW NA, Open Road and Morristown, including: (1) violation of the Fair Credit Reporting Act (15 USC 1681s-2); (2) breach of the lease; (3) negligence; and (4) intentional tort (*see* BMW NA’s Exhibit “A”). Presently before the Court is the motion and cross motion to dismiss of each defendant, wherein it is claimed, *inter alia*, that plaintiff’s causes of action are barred by the statute of limitations.<sup>3</sup>

In opposition, plaintiff has cross-moved for leave to amend his complaint to assert additional causes of action for fraud and breach of warranty against defendants Open Road and Morristown, as well as additional causes of action against BMW NA for (1) false advertising pursuant to General Business Law §350; (2) deceptive trade practices pursuant to General Business Law §349; and (3) fraud. Plaintiff also proposes to withdraw his causes of action for defamation, libel, invasion of privacy, intentional infliction of emotional distress and preliminary restraint. In support of his motion, plaintiff submits a personal affidavit confirming the history and factual allegations contained in the

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<sup>2</sup>Plaintiff’s pro se action was filed in the Supreme Court of Richmond County under Index No. 102361/12.

<sup>3</sup>Defendants BMW of Morristown and Open Road BMW adopt and rely on the factual history and legal arguments presented in the motion by co-defendant BMW NA.

proposed amended verified complaint (*see* Affidavit of Plaintiff Kevin Love).

At the outset, plaintiff's cross motion for leave to amend is granted. CPLR 3025(b) provides that leave to amend "shall be freely given" so long as the proposed amendment is not "palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*Garafola v. Wing Inc Specialty Trades*, 139 AD3d 793, 793-794 [2<sup>nd</sup> Dept 2016]). In deciding the application, it is well settled that the burden of establishing prejudice is on the opposing party (*id.*), and that an opponent's mere exposure to greater liability will not suffice to justify a denial. Rather, the opposing papers must indicate that the party claiming prejudice has been hindered in the preparation of its case, or has been prevented from taking some measure in support of its position (*id.*). Here, since the proposed additional claims are premised on the same factual allegations as those set forth in the original complaint, any claim that defendants will be substantially prejudiced or surprised by the proposed amendment is untenable.

Equally without merit is defendants' claim the causes of action set forth in the present complaint are barred by the applicable statutes of limitations. To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the above ground, the moving defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired (*see Stewart v. GDC Tower at Greystone*, 138 AD3d 729 [2<sup>nd</sup> Dept 2016]). Only then does the burden shift to plaintiff to demonstrate the action is timely, or "to raise a question of fact as to whether the statute of limitations was tolled or [is] otherwise inapplicable" (*id.* at 730).

In the case at bar, it is undisputed that plaintiff executed the three-year lease in January of 2010, but that the defective condition which purportedly caused the vehicle to become inoperable did not manifest until March of 2012. It is, moreover, a matter of record that the initial (*pro se*) action was commenced only four month later, on July 11, 2012. As previously indicated, the present action was commenced on or about May 27, 2016, approximately two years after plaintiff's voluntary discontinuance of the prior action.<sup>4</sup>

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<sup>4</sup>Had the discontinuance been involuntary, plaintiff would have had only six-months within which to recommence the action (CPLR 205[a]).

Based on the terms of the stipulation of voluntary discontinuance, the Court opines that the causes of action pleaded in plaintiff's present complaint, *e.g.*, violation of the Fair Credit Reporting Act<sup>5</sup>, negligence<sup>6</sup>, intentional tort<sup>7</sup>, and breach of lease<sup>8</sup>, are legally sufficient<sup>9</sup>, and would have been timely if asserted in his pro se complaint. Accordingly, they must still be considered timely. In addition, even without reference to the stipulation, the causes of action sought to be dismissed are "timely" under the relation-back doctrine.<sup>10</sup>

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<sup>5</sup>According to 15 USCS §1681p, an action to enforce any liability created under the Fair Credit Reporting Act may be brought not later than the earlier of (1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs.

<sup>6</sup>CPLR §214 provides that an action claiming an injury to property as a result of negligence must be commenced within three years of the date of the occurrence.

<sup>7</sup>CPLR §215(3) provides that a claim to recover damages arising out of an intentional tort must be commenced within one year.

<sup>8</sup>CPLR 213(2) provides that an action upon a contractual obligation or liability must be commenced within six years.

<sup>9</sup>In determining the sufficiency of a complaint (*see* CPLR 3211[a][7]), the court is enjoined to 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 (CPLR 3211[a][7]; *see Leak v. Live Well Fin, Inc.*, \_\_AD3d\_\_, 2016 NY Slip Op 08854 [2<sup>nd</sup> Dept]). Alternatively, a Court may consider evidentiary material submitted in support of dismissal, but in that event, the operative question becomes whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it can be shown that a material fact claimed by the plaintiff is not a fact at all, and unless it can be determined that no significant dispute exists regarding it, the complaint will be deemed legally sufficient (*id.*). Here, accepting the allegations in the complaint as true, it sufficiently alleges the existence of facts supporting plaintiff's request for judicial intervention. In opposition, the evidentiary material submitted in support of dismissal "fails to refute those allegations such that it can be said that the allegations are not facts at all and that no significant dispute exists regarding them" (*id* at \*2-3). Thus, the complaint and, perforce, the proposed amended complaint are legally sufficient.

<sup>10</sup>The relation-back doctrine (CPLR 203[f]) permits a plaintiff to interpose a claim or cause of action in an amended complaint which would ordinarily be time-barred, where the allegations of the original complaint gave notice of the transactions or occurrences sought to be proven, and the cause of action would have been timely if interposed in the original complaint (*see Cady v. Springbrook NY, Inc.*, \_\_AD3d\_\_, 2016 NY Slip Op 08495 [2<sup>nd</sup> Dept]). Under this doctrine, even a new theory of recovery may be asserted, so long as it arises from the same transactions alleged in the original complaint. In other words, where the allegations in the original complaint give notice of the facts or occurrences underlying the new causes of action, their assertion in an amended complaint will be considered timely (*id.*). However, where the original complaint fails to provide defendants with notice of the need to defend against the

Likewise, since the additional causes of action sought to be pleaded in plaintiff's amended complaint, e.g., false advertising and deceptive business practices under General Business Law §§349, 350<sup>11</sup>, fraud<sup>12</sup>, and breach of warranty<sup>13</sup>, would have been timely if asserted in plaintiff's pro se complaint, they must be adjudged timely under the terms of the stipulation of voluntary discontinuance.

Here, plaintiff claimed in his pro se summons and endorsed complaint filed on July 11, 2012, that he "was forced to tow" the vehicle due to, e.g., "transmission malfunctions that prevented plaintiff from safely operating the subject vehicle"; that defendants wrongful demanded \$20,000 in repair costs; and that BMW NA's demand for past-due lease payments of nearly \$62,000.00 was devoid of merit (see BMW NA's Exhibit "B" at 4-7). As such, it is the opinion of this Court that the transactions or occurrences asserted in plaintiff's pro se complaint were sufficient to provide defendants with adequate notice of the facts, circumstances and proof underlying the causes of action sought to be asserted in the proposed amended complaint. Accordingly, they are entitled to be deemed timely under the relation-back doctrine memorialized in CPLR 203(f). The terms of the parties' stipulation renders any further analysis of the timeliness of the remaining causes of action i.e., those originally asserted in the action commenced by filing on or about May 27, 2016, unnecessary.

Accordingly, it is

ORDERED that the motion and cross motion to dismiss by defendants BMW of North America, LLC, BMW of Morristown and BMW Open Road Edison are denied; and it is further

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allegations in the amended complaint, the doctrine is unavailable (*id.*). Succinctly stated, if the new claim relates back to the facts, circumstances and proof underlying the original complaint, it will not be barred by the subsequent running of the statute of limitations (*id.*).

<sup>11</sup>Causes of action brought pursuant to General Business Law §§349, 350 are governed by a three-year statute of limitations set forth in CPLR 214(2) (see *Salvaggio v. American Express Bank, FSB*, 129 AD3d 816 [2<sup>nd</sup> Dept 2015]; cf. CPLR 213[8]; 215[4]).

<sup>12</sup>CPLR §213(8) provides that an action based on fraud must be commenced within the greater of six years from the date of accrual or two years from the date of discovery or the date the fraud could with reasonable diligence have been discovered.


<sup>13</sup>UCC 2-725 provides that an action for breach of any contract for sale be commenced within four years after the cause of action has accrued.

ORDERED that plaintiff's cross motion for leave to serve an amended complaint is granted;  
and it is further

ORDERED that the amended verified complaint is deemed served; and it is further

ORDERED that defendants' time to interpose an answer is extended until twenty (20) days  
after the service upon them of a copy of this Decision and Order with notice of entry.

ENTER,

  
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Kim Dollard, A.J.S.C.

Dated: February 21, 2017