Supreme Court of the State of New York
County of Kings

Index Number 503344/2017

SEQ# 002

Part 91

LANCER INSURANCE COMPANY A/S/O KIM R. WILLIAMS,

Plaintiff,

against

GENERAL MOTORS INC. AND KRISTAL AUTO MALL CORP.,

Defendants.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2, 3
Replying Affidavits.....	4
Exhibits	
Other	

Upon review of the foregoing papers, defendant Kristal Auto Mall Corp.'s ("Kristal") motion to dismiss plaintiff's causes of action against it, and for default judgment on its cross-claims against its co-defendant, General Motors Inc. ("General Motors"), is decided as follows:

As alleged in the verified complaint, plaintiff paid its subrogor, Kim Williams, $85,000, when Ms. Williams's vehicle caught fire due to an electrical malfunction. As Ms. William's subrogree, plaintiff stands in the shoes of Ms. Williams and has no greater rights than Ms. Williams (*Spencer v Tower Ins. Group Corp.*, 130 AD3d 709, 710 [2d Dept 2015]). Plaintiff asserts causes of action for negligence, breach of express and implied warranty, negligent design, and negligence under the theory of res ispa loquitor. Plaintiff seeks monetary damages only for property damage to the vehicle and the cost of storage, but not for any bodily injury. Kristal asserts cross-claims against General Motors for express and implied indemnification and breach of fiduciary duty.

Kristal moves to dismiss plaintiff's causes of action pursuant to CPLR §3211(a)(1) and (7). "In considering a motion to dismiss a complaint for failure to state a cause of action

pursuant to CPLR 3211(a)(7), the allegations in the complaint should be accepted as true, and the motion should be granted only if the facts as alleged do not fit within any cognizable legal theory" (*Nagan Const., Inc. v Monsignor McClancy Mem. High School*, 117 AD3d 1005, 1006 [2d Dept 2014]). To dismiss a claim based on documentary evidence, the documents "must resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim" and they must be "unambiguous and of undisputed authenticity" (*VIT Acupuncture*, 28 Misc 3d 1230[A], 2010 NY Slip Op 51560[U], *1, quoting *Teitler v Max J. Pollack & Sons*, 288 AD2d 302, 302 [2d Dept 2001]).

The economic loss rule bars plaintiff's claims for negligence, negligent design and res ipsa loquitor against Kristal. As the Court of Appeals explained in *Bocre Leasing Corp. v Gen. Motors Corp. (Allison Gas Turbine Div.)* (84 NY2d 685 [1995]), a purchaser and seller are in the best position to determine risk relating to the product to be purchased at the time of the sale, and the result of this determination is the sale price. The remedies for a purchaser who bought a defective product are in breach of contract and breach of warranty, but not tort (*Bocre Leasing*, 84 NY2d at 688-89; see also *Suffolk Laundry Services, Inc. v Redux Corp.*, 238 AD2d 577, 578–79 [2d Dept 1997]). As plaintiff alleges only property damage and no physical injury or other collateral damage, the economic loss rule directs that plaintiff's tort claims for negligence, negligent design and liability under res ipsa loquitor are dismissed (*126 Newton St., LLC v Allbrand Commercial Windows & Doors, Inc.*, 121 AD3d 651, 652 [2d Dept 2014]).

In order to state a cause of action for breach of express warranty, plaintiff must allege an "'affirmation of fact or promise by the seller, the natural tendency of which [was] to induce the buyer to purchase,' and that the warranty was relied upon" (*Schimmenti v Ply Gem Indus.*, 156

AD2d 658, 659 [2d Dept 1989], quoting *Friedman v Medtronic, Inc.*, 42 AD2d 185, 190 [2d Dept 1973] [alteration in original]). Plaintiff must also allege the terms of the warranty on which it relied (*Cecere v Zep Mfg. Co.*, 116 AD3d 901, 902 [2d Dept 2014]).

Plaintiff alleges that its subrogee, Kim Williams, the owner of the vehicle, relied on a warranty provided on Cadillac's website. However, as this court held previously in this action, plaintiff does not allege that its subrogee relied on the warranty when she purchased the vehicle (Decision/Order, dated June 21, 2017, at 3). Plaintiff now seeks to correct this deficiency by submitting an opposing affidavit from Ms. Williams in which she states that she did rely on the warranty when she purchased the vehicle. However, the warranty that Ms. Williams refers to in her affidavit, and that plaintiff's counsel describes in her affirmation, appears to come from Cadillac's website. Plaintiff argues that Kristal is an agent of Cadillac because it is a "franchised GENERAL MOTORS dealer", and therefore the court should deem that the warranty came from Kristal. Plaintiff provides no support for this argument. Accordingly, plaintiff's cause of action for breach of express warranty is dismissed as against Kristal.[1]

With regard to plaintiff's breach of implied warranty claim, plaintiff must allege that the the vehicle Ms. Williams purchased was not fit for its ordinary purpose (*Pai v Springs Indus., Inc.*, 18 AD3d 529, 531 [2d Dept 2005]; *Gordon v Ford Motor Co.*, 260 AD2d 164, 165 [1st Dept 1999] citing UCC § 2–314). Plaintiff must also allege that there is privity between itself

[1] In its prior order dismissing General Motors, the court determined that plaintiff did not sufficiently allege the elements of a breach of express warranty against General Motors. However, there was no determination as to whether General Motors was responsible for a warranty issued by Cadillac, and plaintiff has not sought to serve an amended complaint against General Motors.

and Kristal (*Gordon*, 239 AD2d at 156). Plaintiff sufficiently makes these allegations in the complaint. Contrary to Kristal's argument, plaintiff need not allege personal injury.

Finally, Kristal's motion for default is denied. Kristal does not prove service of its cross-claims on General Motors and does not sufficiently establish the facts underlying its cross-claims against General Motors. Furthermore, in its prior order, this court dismissed General Motors from this action on the basis that plaintiff's allegations did not at that time support the causes of action asserted against General Motors. Because General Motors was no longer a defendant, Kristal could not assert cross-claims against it as a co-defendant. However, this dismissal is without prejudice to any third-party claim that Kristal may wish to assert against General Motors (*see, e.g., Singh v Singh*, 294 AD2d 487, 488 [2d Dept 2002]).

For the foregoing reasons, Kristal's motion is granted to the extent that plaintiff's causes of action for negligence, breach of express warranty, negligent design, and liability under res ispa loquitor against Kristal are dismissed. The remainder of Kristal's motion is denied, insofar as plaintiff's cause of action for breach of implied warranty is not dismissed, and the portion of Kristal's motion for default judgment is denied.

This constitutes the decision and order of the court.

August 6, 2018
DATE

DEVIN P. COHEN
Acting Justice, Supreme Court