

Yakushin v Globalstar, Inc.

2020 NY Slip Op 30756(U)

March 11, 2020

Supreme Court, New York County

Docket Number: 156204/2019

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 156204/2019

VLADIMIR YAKUSHIN,
Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

GLOBALSTAR, INC, GLOBALSTAR USA, LLC,
and IMAGE MANAGEMENT SYSTEMS, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2-10
were read on this motion to dismiss.

By notice of motion, defendants move pursuant to CPLR 3211(a)(7) for an order
dismissing the complaint. Plaintiff opposes.

I. VERIFIED COMPLAINT (NYSCEF 4)

In 2015, plaintiff purchased property in an isolated and remote area of Alaska, Chleca
Lakes, where there are no roads, utilities, or other connections to populated areas, and is only
accessible via puddle jumper aircraft. Seeking to build a cabin on the property, plaintiff required
means to communicate beyond Chleca Lakes, and thus, in March 2016, he sought to purchase
from defendants a Globalstar satellite phone.

Plaintiff explained to defendants that because his property was at a remote location, he
needed a suitable phone. Defendants “made numerous and repeated representations” to him that
a Globalstar GSP 1700 phone would work in the Chleca Lakes region. Thus, plaintiff, relying on
defendants’ expertise, purchased the phone from defendant Image Management Systems, Inc.
(IMS) at its Manhattan store.

On June 23, 2016, plaintiff traveled to the property, and after several days, determined that building a cabin on the property was not feasible. When he attempted to use the phone to arrange for an airplane to pick him up, it did not work even after he tried to do so from multiple locations and at different times.

Unable to use the phone, plaintiff abandoned most of his supplies and equipment, and left the property on a small raft. As he attempted to travel to 90 miles downriver to McGrath, Alaska, plaintiff “spent several harrowing days fighting for his life.” He was eventually spotted by a ranger and rescued. Had he not been saved, plaintiff alleges, he likely would have died before reaching McGrath.

As a consequence, plaintiff alleges that he suffered physical injuries, psychic trauma, and financial harm, and that defendants knew or should have known that the phone could not be relied on or could not receive a signal where the property was located, and they made such representations with the intention that plaintiff rely on them. But for defendants’ representations, plaintiff maintains that he would not have traveled to the property.

Plaintiff advances causes of action for fraudulent misrepresentation, negligent misrepresentation, design/manufacturing defect, and breach of implied and express warranties.

II. CONTENTIONS

A. Defendants (NYSCEF 6)

Defendants contend that plaintiff has failed to plead the necessary elements of fraud, as he does not allege any material misrepresentations of fact, that defendants had knowledge of the falsity of their representations, or that they intended to induce reliance on the misrepresentations.

Plaintiff’s claim for negligent misrepresentation, defendants argue, must be dismissed, absent specification of what, how, and when the representations were made and who made them.

They observe that although there are three defendants, plaintiff does not attribute any specific representation to any of them. Moreover, they claim, plaintiff fails to allege the existence of a relationship that would impose a duty on them to correct any misrepresentation. They also contend that plaintiff does not establish the necessary elements of negligence.

To the extent that plaintiff advances a cause of action for defective design, defendants observe that he does not allege what elements of the phone's design were defective, how the phone could have been designed in a safer manner, or how the design injured plaintiff. Plaintiff's manufacturing defect claim also warrants dismissal, as plaintiff fails to specify how the product broke or malfunctioned. Defendants argue that merely stating that the phone was defective, absent other allegations, is insufficient to state a claim. Thus, absent allegations of a specific defect, plaintiff's design/manufacturing defect claim must fail. Defendants otherwise surmise that plaintiff's inability to place the call could have resulted from the phone being insufficiently charged, breakage during travel to Alaska, or other circumstances.

Defendants contend that plaintiff has not pleaded the elements of a breach of implied warranty, absent allegations that the phone was not fit for ordinary purposes, and that plaintiff's allegation that the phone did not work on his property does not comport with that element. Defendants maintain that phones do not, nor are they expected to, work everywhere. Plaintiff's claim for a breach of express warranty also fails because while he alleges that the express warranty was created due to conversations with defendants that the "phone was fit for its intended purpose," plaintiff does not set forth the content of those conversations or with whom they took place, nor does he allege which statements induced him to purchase the phone.

Defendants argue that plaintiff fails to allege causation sufficiently, observing that he was not injured by using the phone itself. Rather, "he chose to take a raft downriver in a remote

Alaskan wilderness after seriously misjudging whether he could live off the land in property he had purchased sight unseen.” They maintain that having abandoned his gear in attempting to go to McGrath, he performed an intervening act that was not a normal and foreseeable consequence of his inability to use the phone. Rather, the normal and foreseeable action would have been for plaintiff to wait at the property for help. Thus, plaintiff’s decision to do otherwise rendered him the sole proximate cause of his injuries.

B. Plaintiff (NYSCEF 9)

Plaintiff contends that he has stated a claim for fraudulent misrepresentation, having alleged that defendants falsely represented that the phone would work in the Chleca Lake region, intending that plaintiff rely on that representation and purchase the phone, and that he reasonably relied on that representation. He contends that the requirement that defendants knew the representation is false is satisfied by pleading that the representation was made with a reckless disregard for the truth, as alleged in the complaint which sufficiently details the facts constituting defendants’ fraud.

In pleading a negligent misrepresentation, plaintiff argues that he, a layperson without an understanding of how the phone should work, relied on defendants’ representations as they were the manufacturer and seller of the phone with the knowledge as to where it will and will not work. Thus, there arose a special relationship between the parties. Having alleged the misrepresentations, plaintiff denies a need to attribute the misrepresentations to a specific party as defendants comprise a “common enterprise.” To the extent more detail about the misrepresentation is needed, moreover, it will be revealed in discovery. Plaintiff argues that he sufficiently pleaded the elements of negligence, as they are virtually the same as those for negligent misrepresentation.

By alleging that the phone was defective and that defendants had placed it into the stream of commerce, plaintiff argues that he sufficiently states a products liability cause of action, and that other details about the defect may be identified through discovery. He contends that either the phone was defective or that defendants misrepresented the phone's capabilities.

The breach of express warranty claim should be sustained, plaintiff argues, because it is supported by allegations that defendants assured him that the phone would work in the Chleca Lakes region. And, as he alleged that defendants had held themselves out as experts in satellite communications, that he explained to defendants his need for the phone, and that he relied on their expertise when purchasing the phone, plaintiff contends that he states a claim for breach of implied warranty, and that defendants' contention that phones are not expected to function everywhere is immaterial as satellite phones are designed to work where other phones do not. Plaintiff submits quotes and screenshots from Globalstar's and IMS's websites reflecting defendants' contentions as to the phone's alleged capabilities.

Plaintiff asserts that causation is a factual issue, and that discovery is needed to determine whether plaintiff's injuries were proximately caused by his inability to communicate and arrange to be picked up.

If any causes of action are deemed inadequately pleaded, plaintiff seeks leave to replead.

C. Reply (NYSCEF 10)

Defendants observe that plaintiff has not cross-moved to amend his complaint, and to the extent he requests in his opposition for leave to do so, he does not provide an adequate basis to do so and does not attach a proposed amended complaint.

Defendants reiterate their earlier contentions and observe that plaintiff does not address whether their alleged misrepresentations were material and whether they were made with the

intent to deceive and to induce reliance. To the extent plaintiff argues that he need only demonstrate that the representations were made with reckless disregard of its truth, plaintiff must nonetheless plead intent.

While plaintiff need not plead the elements of ordinary negligence, defendants clarify that he fails to plead the elements of negligent misrepresentation, specifically the existence of a special or privity-like relationship, and argue that a buyer-seller relationship does not suffice. They reiterate their earlier contentions as to products liability and breach of warranty, and maintain that plaintiff's failure to allege facts supporting his claim that his inability to use the phone caused his injuries is fatal.

III. ANALYSIS

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must construe the pleading liberally, accept the facts alleged to be true, and afford the plaintiff "the benefit of every possible favorable inference." (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A. Fraudulent misrepresentation and negligent misrepresentation

To state a claim for fraudulent misrepresentation, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by

defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). To state a claim for negligent misrepresentation, plaintiff must allege “(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Each cause of action requires allegations that defendants misrepresented a fact to plaintiff, and while plaintiff need only state a cause of action, as opposed to proving he has one (*Maddicks v Big City Properties, LLC*, 34 NY3d 116, 123 [2019]), plaintiff must offer more than vague and conclusory allegations, especially for claims of misrepresentation for which “the circumstances constituting the wrong shall be stated in detail” (CPLR 3016[b]).

Here, plaintiff fails to identify the “[a]ctual specific false factual statements” and attribute the alleged misrepresentations to a specific defendant. (*MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 291 [1st Dept 2016], *lv denied* 28 NY3d 911 [2016]). Consequently, plaintiff’s causes of action for fraudulent and negligent misrepresentation lack the requisite specificity. (*See Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 480 [1st Dept 2015] [dismissing negligent misrepresentation claim where complaint contained only general allegations as to alleged misrepresentations and no information as to when and by whom representations were made]; *Gregor v Rossi*, 120 AD3d 447, 447 [1st Dept 2014] [dismissing fraud claim where plaintiff did not allege “the words used by defendants and the date of the alleged false representations”]; *Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 222 [1st Dept 1994] [defendant’s fraud counterclaim against plaintiff-company dismissed where

defendant did not allege which employee of plaintiff made representations]). To the extent that plaintiff offers quotes from and screenshots of defendants' websites, he does not claim to have relied on them in making his purchase.

Even if plaintiff's allegations as to the existence of a misrepresentation are sufficient, his fraud claim lacks non-conclusory allegations of scienter. (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495–496 [1st Dept 2006]; *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005] [assertion, without factual support, that defendant knew representations were false is insufficient]). While he need not demonstrate defendants' knowledge at the pleading stage (*Houbigant, Inc. v Deloitte & Touche LLP*, 303 AD2d 92, 97 [1st Dept 2003]), it is insufficient to state conclusorily that defendant had knowledge of the representation's falsity or recklessly disregarded the truth (*Credit All. Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 554 [1985], *amended* 66 NY2d 812 [1985]).

Moreover, for negligent misrepresentation, plaintiff must also allege "that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity." (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 [1992]; *Meiterman v Corp. Habitat*, 173 AD3d 593, 594 [1st Dept 2019] [plaintiff must allege existence of special or privity-like relationship]). Representations made by a seller of goods are not actionable unless the seller is someone with "unique or specialized expertise, or . . . in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]; *United Safety of Am., Inc. v Consol. Edison Co. of New York*, 213 AD2d 283, 286 [1st Dept 1995] [simple arm's length business relationship not enough]; *Pappas v Harrow Stores, Inc.*, 140 AD2d 501, 504 [2d Dept 1988] [there must be closer degree of trust than ordinary buyer-seller

relationship]).

Here, plaintiff alleges nothing more than an ordinary buyer-seller relationship between him and defendants. That defendants allegedly knew the capability of the phone and were aware that plaintiff needed a satellite phone does not alter the nature of the parties' arm's length, buyer-seller relationship. (*See Goshen v Mut. Life Ins. Co. of New York*, 1997 WL 710669, *11 [Sup Ct, NY County 1997], *affd* 259 AD2d 360 [1st Dept 1999], *mod on other grounds* 94 NY2d 330 [1999] [no special relationship is established "merely because (defendants') sales force was well versed in the products to be sold, and used that knowledge to gain the confidence of their 'prospects'"]).

B. Strict products liability and breach of express/implied warranty

When a plaintiff alleges injury by a defective product, she may advance causes of action sounding in negligence, strict products liability, and breach of express and/or implied warranty. (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106 [1983]). Strict products liability claims may be advanced where there is a mistake in manufacturing, improper design, or inadequate or absent warning for use of the product. (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 478-479 [1980]; *Mendez-Canales v Agnelli Macchine S.R.L.*, 165 AD3d 646, 647-648 [2d Dept 2018]). To state a cause of action for the breach of an express warranty, plaintiff must allege an "affirmation of fact or promise by the seller, the natural tendency of which it to induce the buyer to purchase," and "that the warranty was relied upon." (*Friedman v Medtronic, Inc.*, 42 AD2d 185, 190 [2d Dept 1973]; UCC 2-313). Claims for breach of implied warranty, including the warranty of merchantability (UCC 2-314) and/or the warranty of fitness for a particular purpose (UCC 2-315), depend on whether the product performed up to expectations set by those warranties. (*See Fahey v A.O. Smith Corp.*, 77 AD3d 612, 617 [2d Dept 2010] [defect

element of breach of implied warranty under UCC premised on contract principles and focuses on purchaser's disappointed expectations]).

For all varieties of breach of warranty and strict products liability claims, "a pleading must still be particular enough to provide the court and parties with notice of the transaction or occurrences to be proved." (*Travelers Ins. Co. v Ferco, Inc.*, 122 AD2d 718, 719 [1st Dept 1986]; CPLR 3013). That the phone did not work when and where it was supposed to work, absent any other details, is too vague and conclusory to give defendants notice of the defect at issue. (*See Rose v Gelco Corp.*, 261 AD2d 381, 382 [2d Dept 1999] [dismissing strict products liability and breach of implied warranty claim where allegations were vague and conclusory]). And while a cause of action for a breach of an express warranty does not require allegations of a defect, there must be allegations of how the product did not act in accordance with the alleged warranty.

Given plaintiff's deficient pleadings, the parties' remaining contentions are not addressed.

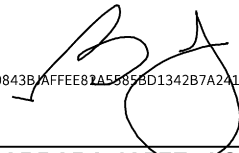
IV. CONCLUSION

While plaintiff requests leave to replead, he fails to submit a proposed amended pleading accompanied by an affidavit of merit. Consequently, leave to replead is denied. (*Parker Waichman LLP v Squier, Knapp & Dunn Commc 'ns, Inc.*, 138 AD3d 570, 571 [1st Dept 2016]).

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted, and the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

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BARBARA JAFFE, J.S.C.

3/11/2020

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE