UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN GRAYSON and DOREEN MAZZANTI, individually and on behalf of themselves and all others similarly situated,	:	**3:13cv1799 (WWE)**
Plaintiffs,	:	
v.	:	
GENERAL ELECTRIC COMPANY,	:	
Defendant.	:	

RULING ON MOTION TO DISMISS

In this action, plaintiffs Glen Grayson and Doreen Mazzanti bring a putative class action on behalf of consumers who purchased microwave ovens manufactured by General Electric Company ("GE") with a dangerous design defect that caused the glass door on the ovens to shatter and explode. Specifically, plaintiffs allege (1) breach of express warranty on behalf of the nationwide and New York and Ohio subclasses; (2) implied warranty of merchantability on behalf of the nationwide and New York and Ohio subclasses; (3) violation of the Magnuson-Moss Warranty act on behalf of the nationwide class; (4) violation of the New York and Ohio unfair and deceptive trade practices act; (5) violation of state consumer protection laws; and (6) unjust enrichment on the behalf of the nationwide and New York and Ohio subclasses.

Defendant GE has filed a motion to dismiss the action in its entirety. For the following reasons, the motion to dismiss will be granted in part and denied in part.

BACKGROUND

For purposes of this ruling, the Court assumes that the allegations of the complaint are true.

Plaintiff Grayson is a citizen of the state of New York, and plaintiff Mazzanti is a citizen of the state of Ohio. Defendant GE is a New York corporation with its principal place of business in Fairfield, Connecticut.

GE-branded microwave oven models JEB1095, ZMC1090 and ZMC1095 contain defects that render them unreasonably dangerous and unsuitable for their intended use because the glass on the oven doors will shatter. GE expressly warranted through its user manuals, advertisements, pamphlets, brochures, circulars, samples and models that these models were fit for the ordinary purpose for which such goods are used.

GE has known, or reasonably should have known, that the models were defective since at least September 2002, when it first received reports that its models contained defects that cause the glass on the oven door to shatter. GE sent out service bulletins to its technicians alerting them to the problem. However, these bulletins were only available to service professionals. GE did not issue a recall, warn consumers or take any affirmative steps to correct the problem.

On March 2, 2004, Grayson purchased his GE-branded microwave oven. On May 23, 2007, the glass door to the oven shattered while the oven was not in use. Grayson reported the incident to GE, which told him that it was anomalous and charged him for a replacement and installation of a new door. The service technician informed Grayson that the door came with a five-year warranty.

On January 9, 2011, the glass door on Grayson's microwave shattered while it was not in use. Grayson reported the incident to GE, which again represented that it

was anomalous. GE refused to honor Grayson's five-year warranty but it later agreed to cover a portion of the cost of a replacement and the installation. However, when the new door arrived, it had shattered in its package. In March 14, 2011, GE located and shipped another replacement door to Grayson. A service technician installed the replacement door.

In March 2007, Mazzanti purchased a GE-branded microwave oven. On December 13, 2009, the oven door shattered while it was not in use. After Mazzanti reported the incident to GE, GE sent her a replacement which she installed herself.

DISCUSSION

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distrib. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. Hishon v. King, 467 U.S. 69, 73 (1984). The complaint must contain the grounds upon which the claim rests through factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A plaintiff is obliged to amplify a claim with some factual allegations to allow the court to draw the reasonable inference that the defendant is liable for the alleged conduct. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

With regard to allegations of fraud or fraudulent conduct, a plaintiff must comply with the higher pleading standard required by Federal Rule of Civil Procedure 9. In order to satisfy Rule 9(b), a complaint must: (1) specify the statements that the plaintiff

contends were fraudulent; (2) identify the speaker; (3) state where and when the statements or omissions were made; and (4) explain why the statements or omissions were fraudulent. Antian v. Coutts Bank (Switzerland) Ltd., 193 F.3d 85, 88 (2d Cir. 1999). A plaintiff may make general allegations of malice, intent, knowledge or other state of mind, but the facts must give rise to a strong inference of fraudulent intent. Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994). The purpose of the specificity requirement is: (1) to ensure that a complaint provides defendant with fair notice of plaintiff's claim; (2) to safeguard defendant's reputation from improvident charges; and (3) to protect defendant from a strike suit. O'Brien v. Nat'l Prop. Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991).

Defendant argues that plaintiffs have failed to state a claim for breach of express and implied warranty, violation of Magnuson-Moss Warranty Act, violation of Ohio and New York state consumer protection statutes, and the unjust enrichment. Defendant also argues that Connecticut law does not apply to the claims asserted by residents of New York and Ohio.

Choice of Law

In diversity cases, a Connecticut federal court will apply Connecticut's choice of law rules. Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386, 393 (2d Cir. 2001). Plaintiffs' breach of warranty and unjust enrichment claims that relate to the alleged breach of warranty sound in contract. See Szollosy v. Hyatt Corp., 396 f. Supp. 2d 159, 163 n.8 (D. Conn. 2005). Choice of law for a contract claim should be determined according to the most significant relationship test of the Restatement (Second) Section 188, which provides that unless another state has an overriding policy-based interest in

the application of its law, the law of the state in which the bulk of the contracting transactions took place should be applied. Reichhold Chemicals, Inc. v. Hartford Accident & Indemnity Co., 243 Conn. 401, 414 (1997). Section 188(2) lists five contacts to be considered: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." For purposes of this motion, the Court will assume that the law of the state where each plaintiff resides applies.

Statute of Limitations/Fraudulent Concealment

Defendant argues that the relevant statutes of limitations bar plaintiffs' claims of breach of warranty, violation of the Magnuson-Moss Warranty Act, unjust enrichment, and Ohio and New York consumer protection statutes. Plaintiffs counter that the defendant's fraudulent concealment, as alleged in the complaint, tolls the statute of limitations.

In general, a statute of limitations may be equitably tolled when the plaintiff was prevented from learning of the cause of action within the statutory period. Veltri v. Building Service 32B-J Pension Fund, 393 F.3d 318, 322 (2d Cir. 2004). Defendant asserts that plaintiffs' claim of fraudulent concealment fails for lack of pleading with particularity.

Here, plaintiffs allege that: A defect caused the door to explode; defendant knew of the defect by 2002 but failed to disclose this information or issue a recall at the time that plaintiffs' purchased their microwaves; defendant sent out service bulletins only to its technicians alerting them of the defect; and defendant made affirmative

misrepresentations that the exploding door was an anomalous event when plaintiff Grayson reported it to defendant. In this instance, the allegations identify the date of defendant's knowledge, specific failure to disclose and specific affirmative misrepresentations. These allegations are adequately grounded in such factual allegations so that this Court is satisfied that plaintiffs are not asserting a strike suit. Because the claim of fraudulent concealment is adequately pled, the Court will deny the motion on the grounds of the statute of limitations.

Breach of Express Warranty

Plaintiffs alleged that defendant expressly warranted the microwave models as fit for the ordinary purpose in which such goods are used; and that defendant breached this warranty by refusing to repair the models or replace the microwave oven parts damaged by the defects. Defendant asserts that plaintiffs have failed to allege a breach of express warranty. Specifically, defendant claims that a limited of warranty of one year from the purchase date applied to the plaintiffs' microwave ovens.

To sustain a claim for breach of express warranty under New York and Ohio law, a plaintiff must plead an actual breach of the terms of the warranty by alleging that defendant refused or failed to perform its obligations under the terms of the warranty. Ohio Rev. Code § 1302.26; N.Y. U.C.C. § 2-313. Defendant points out that plaintiffs have not alleged that defendant refused to repair during the warranty period.

An express warranty is contractual in nature and the language of the warranty controls the obligations and rights of the parties. LaSalle Bank Nat'l Ass'n v. Merrill Lynch Mortgagte Lending, Inc., 2007 WL 2324052, *7 (S.D.N.Y. 2007); Continental Cas. Co. v. Honeywell Int'l, Inc., 2009 WL 313127, *9 (N.D. Ohio). Under Ohio and New

York law, the seller may legitimately limit the buyer's remedies to repair of the defective product so long as it is not unconscionable. Szymczak v. Nissan N. Am., Inc., 2011 WL 7095432, *10 (S.D.N.Y. 2011); Zaremba v. Marvin Lumber & Cedar Co., 458 F. Supp. 2d 545, 549 (N.D. Ohio 2006). Unconscionabiity includes both an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. See Szymczak v. Nissan North America, Inc., 2011 WL 7095432, *10 (S.D.N.Y.); Holbrook v. Louisiana-Pacific Corp, 2015 WL 1291534 (N.D. Ohio 2015).

Here, plaintiffs allege that defendant knew of the latent defect prior to their purchase of the model with the one-year warranty. A manufacturer's knowledge that a part will fail after expiration of the warranty period is insufficient to provide a basis for a breach of express warranty. Canal Electric Co. v. Westinghouse Electric Co., 973 F.2d 988, 993 (1st Cir. 1992) (noting that "case law almost uniformly holds that time-limited warranties do not protect buyers against hidden defects—defects that may exist before, but typically are not discovered until after, the expiration of the warranty period). However, courts have also recognized that a manufacturer's undisclosed knowledge of a latent defect can render unconscionable a warranty's durational limitation due to the inequality of the parties' bargaining power. See Carlson v. General Motors Corp., 883 F.2d 287, 296 (4th Cir. 1989). Construing the allegations most favorably to plaintiffs, the Court finds that plaintiffs have stated a plausible claim for breach of express warranty.

Breach of Implied Warranty of Merchantability

Defendant maintains that plaintiffs' implied warranty of merchantability claims lack any allegation that privity existed between the parties as required under Ohio and

New York law. Plaintiffs do not oppose dismissal of the implied warranty claims of Mazzanti under Ohio law.

Under New York law, a plaintiff must show that the product was defectively designed or manufactured; that the defect existed when the manufacturer delivered it to the purchaser or user; and that the defect is the proximate cause of the accident. Engler v. MTD Product, Inc., 2015 WL 900126, *19 (N.D.N.Y. 2015). Absent privity of contract, a claim for breach of warranty cannot be sustained except to recover for personal injuries. Weisblum v. Phophase Labs, Inc., 2015 WL 738112, *10 (S.D.N.Y.). Here, plaintiff Grayson has not alleged breach of implied warranty for recovery any personal injuries. Accordingly, his claim will be dismissed.

Breach of Magnuson-Moss Warranty Act

Defendant asserts that plaintiffs have failed to satisfy the jurisdictional prerequisite of the Magnuson-Moss Warranty Act, which allows for suit in federal court for a claim related to sales of consumer products with a written warranty as long as the amount in controversy for each individual claim is more than $25, the total amount in controversy is above $50,000, and the action is brought as a class action with more than 100 plaintiffs. Abraham v. Volkswagen of America, Inc., 795 F.2d 238, 241 (2d Cir. 1986).

However, where the jurisdictional prerequisites of the Class Action Fairness Act ("CAFA") are satisfied, the court may exercise subject matter jurisdiction over a claim under the Magnuson-Moss Warranty Act regardless of whether that statute's jurisdictional prerequisites have been met. Weisblum, 2015 WL 738112, at *8-9.

Defendant contends that plaintiffs have failed to comply with the pre-suit notice

requirement of 15 U.S.C. § 2310(e), which provides that plaintiff afford the defendant an opportunity to cure the defect prior to suit. Courts have held such pre-suit notice is not required when the seller has actual knowledge of the alleged product defect at the time of the sale. Miller v. Hypoguard USA, Inc., 2005 WL 3481542 (S.D. Ill. 2005); Radford v. Daimler Chrysler Corp., 168 F. Supp. 2d 751, 754 (N.D. Ohio). Here, defendant is alleged to have known of the latent defect prior to plaintiffs' purchase of the microwave ovens; and therefore, defendant had ample opportunity to cure, thereby satisfying the underlying intent of Section 2015(e). The Court finds that dismissal on this basis is not merited. The Court will allow the Magnuson-Moss Warrant Act claim to proceed on the basis of breach of the express warranty claims.

Unjust Enrichment Claim

Defendant asserts that the unjust enrichment claim should be dismissed because plaintiffs have alleged the existence of a valid governing contract. It is well established that plaintiffs may plead in the alternative for recovery under contract or unjust enrichment. See Fed. R. Civ. P. 8(d)(2). The motion to dismiss will be denied on this claim.

Ohio Consumer Sales Practice Act

Defendant sets forth that plaintiff Grayson has failed to allege a proper claim pursuant to the Ohio Consumer Sales Practice Act, which prohibits unfair, deceptive and unconscionable practices in consumer sales transactions. Ohio Rev. Cod §§ 1345.02 and 1345.03. "[I]f the violation is an act or practice that was declared to be deceptive or unconscionable by a rule adopted by the Attorney General before the consumer transaction on which the action is based, or if the violation is an act or

practice that was determined by a court to violate the CSPA and the court's decision was available for public inspection . . . before the consumer transaction, the consumer may seek additional relief, including damages or other appropriate relief in a class action . . . ." Marrone v. Philip Morris USA, Inc., 850 N.E.2d 31, 33 (Ohio 2006). Such prior decisions or rules should be alleged in the complaint. See Phillips v. Philip Morris Companies Inc., 290 F.R.D. 476, 478 (N.D. Ohio 2013); Dunkelman v. Cincinnati Bengals, 866 N.E.2d 576, 579 (Ohio App. 1 Dist. 2006).

Here, plaintiffs have not alleged any such prior decision or rules in their complaint. However, plaintiffs maintain that numerous opinions available in the Ohio Attorney General's public Information file declare that failure to honor an express warranty given in connection with the sale of appliances is a violation of the Ohio Consumer Sales Practice Act. The Court will grant the motion without prejudice and will afford plaintiffs opportunity to replead this claim.

Material Under Seal in Connection with Opposition to the Motion to Dismiss

Plaintiffs appended certain documents concerning defendant's analysis of consumer injuries and complaints of defective microwaves. After the Court initially granted a defense motion to seal the documents as confidential and proprietary information, plaintiffs filed an appeal and a motion for reconsideration of that order. Upon reconsideration, the Court vacated the order to seal, holding that defendant's interest in preserving its confidential analysis of consumer complaints and injuries did not outweigh the presumption of public access and the public interest in product safety. Defendant filed an emergency motion to stay so that it could file a motion for reconsideration of the order unsealing the documents.

The Court does not agree that its order on reconsideration constitutes error. However, in ruling on the motion to dismiss, the Court has not relied upon the documents submitted that are the subject of the sealing order. The Court's ruling has focused only on the allegations of the complaint. Accordingly, the Court will strike as irrelevant the materials that are the subject of the motions to seal and unseal. These materials will remain under seal because they did not inform this Court's analysis in its ruling on the motion to dismiss.

CONCLUSION

For the foregoing reasons, the motion to dismiss (doc. 38) is GRANTED in part and DENIED in part. The Court DISMISSES the breach of implied warranty claim with prejudice and the Ohio consumer Sales Practice Act without prejudice. Within 21 days of this Ruling's issuing date, plaintiffs should file an amended complaint that complies with this Ruling.

Dated this 30th day of April 2015 at Bridgeport, Connecticut.

_____/s/_____
Warren W. Eginton
Senior United States District Judge