

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANTHONY BALL and
SHAARLYNN NEEMAN,

Plaintiffs,

v.

MEMORANDUM AND ORDER
05-C-307-S

SONY ELECTRONICS INC.,

Defendant.

Plaintiffs Anthony Ball and Shaarlynn Neeman commenced this consumer deception and breach of warranty action against defendant Sony Electronics, Inc., alleging that defendant knowingly sold camcorders with defective components. Plaintiffs also seek certification of a class of similarly situated consumers. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332. The matter is presently before the Court on defendant's motion to dismiss. Following is a summary of the relevant factual allegations of the amended complaint.

FACTS

Defendant manufactures and sells consumer electronics including camcorders. In 2003 and 2004 it introduced several new camcorder models including Model # DCR-TRV250. These camcorders contained a component known as a CDD imager which was defective

because it was likely to fail. Failure of the imager renders the camcorder inoperable and costs more than \$200 to repair. Defendant knew the CDD imagers were likely to fail. After introducing the new camcorders defendant received thousands of complaints of CDD imager failure.

Camcorder purchasers were provided a written manufacturers warranty¹ at the time of purchase:

LIMITED WARRANTY

Sony Electronics Inc. ("Sony") warrants this Product (including any accessories) against defects in material or workmanship as follows:

1. LABOR: For a period of 90 days from the date of purchase, if this Product is determined to be defective Sony will repair or replace the Product, at its option, at no charge, or pay the labor charges to any Sony authorized service facility. After the Warranty Period, you must pay for all labor charges.

2. PARTS: In addition, Sony will supply, at no charge, new or rebuilt replacements in exchange for defective parts for a period of one (1) year. After 90 days from the date of purchase, labor for removal and installation is available from Sony authorized service facilities or a Sony Service Center at your expense.

To obtain warranty service, you must take the Product, or deliver the Product freight prepaid, in either its original packaging or packaging affording an equal degree of protection, to any authorized Sony service facility.

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1

Although the warranty itself was not appended to the complaint, it is properly considered part of the pleadings because the warranty is referred to in the plaintiffs' complaint and is central to their claims. Venture Associates Corp. v. Zenith Data Systems Corp., 987 F.2d 429, 431 (7th Cir. 1993).

REPAIR OR REPLACEMENT AS PROVIDED UNDER THIS WARRANTY IS THE EXCLUSIVE REMEDY OF THE CONSUMER. SONY SHALL NOT BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES FOR BREACH OF ANY EXPRESS OR IMPLIED WARRANTY ON THIS PRODUCT, EXCEPT TO THE EXTENT PROHIBITED BY APPLICABLE LAW, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ON THIS PRODUCT IS LIMITED IN DURATION TO THE DURATION OF THIS WARRANTY.

Defendant's consumer support website addressed the potential black screen problem, identified very basic trouble-shooting suggestions, and if the suggestions failed to correct the problem encouraged the purchaser to send the camcorder in for repair. Defendant sent the following message to consumers who complained about the problem:

There is no picture or a black screen appears in the viewfinder or LCD when attempting to record.

Follow this procedure to troubleshoot if there is no picture or a black screen appears in the viewfinder or LCD when attempting to record.

1. Ensure the lens cap on the front of the camcorder has been removed.
2. Ensure a fully charged battery is inserted in the camcorder.
3. Ensure the **STANDBY/LOCK** switch is set to the **STANDBY** position.
4. Turn on the camcorder and set it to the **CAMERA** mode.
5. Look to see if an image can be seen in the viewfinder or LCD.

IMPORTANT: Some camcorders have both a viewfinder and LCD. To conserve power, the viewfinder and LCD will not display at the same time. To use the viewfinder, the LCD must be closed.

If the issue is not resolved, reset the camcorder to factory specifications.

NOTE: If the issue is still not resolved after completing all of the troubleshooting steps, service will be required.

On December 23, 2003 plaintiff Ball purchased a Sony Camcorder, Model DCR-TRV 250. Approximately one year after the purchase the CDD imager failed, rendering the camcorder inoperable. After learning that it would cost more than \$200 to repair, he has not repaired the camcorder.

In April 2003 plaintiff Neeman purchased a Sony Camcorder, Model DCR-TRV 250. Approximately two years after the purchase the CDD imager failed, rendering the camcorder inoperable. After learning that it would cost more than \$200 to repair, she has not repaired the camcorder.

MEMORANDUM

Defendant moves to dismiss plaintiffs' deceptive practices claim, Wis. Stat. § 100.18, on the basis that the allegations fail to support any affirmative statement which was deceptive or any reliance on a statement by plaintiffs in purchasing their camcorders. Defendant moves to dismiss the breach of warranty claims on the alternative bases of lack of privity to support a contract claim and failure to allege a breach of the express warranty. Finally defendants claim that a claim for unjust enrichment is precluded because it does not apply where the plaintiffs have an available contract remedy.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs

can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

DECEPTIVE PRACTICES ACT

Wisconsin Statute § 100.18 forbids statements made to induce the sale of a product which include "any assertion, representation or statement of fact which is untrue, deceptive or misleading." This provision requires an affirmative statement, and is not violated by a failure to disclose a known defect. Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, ¶40, 270 Wis. 2d 146, 677 N.W.2d 233. A civil claim based on a violation of the provision requires that the plaintiff has sustained a pecuniary loss as a result of the misrepresentation. Id. at ¶39. Defendant contends that plaintiffs have failed to allege any untrue, misleading or deceptive affirmative statement or, to the extent that they have alleged an affirmative statement, denies that the complaint alleges the statement was a cause of injury. Plaintiffs contend that their allegations are sufficient to satisfy both elements.

Plaintiffs' complaint alleges three statements which they argue meet the requirement of an affirmative untrue, deceptive or misleading statement: (1) the written manufacturers warranty included in the product box, (2) the troubleshooting information on defendant's website and (3) the allegation in paragraph 38c of the complaint that "Sony provided, disseminated, marketed and otherwise distributed false and misleading advertisements, technical data and other representations to consumers regarding the performance, reliability and quality of the Camcorder." None of these allegations are sufficient to sustain a claim.

Plaintiff maintains that the written warranty was a representation that the camcorder was free of defects. Quite the contrary, a written warranty of the type included with the camcorder is an express acknowledgment that the product may be defective and a promise by defendant to remedy such a defect in the manner and within the time period prescribed. Defendant's express promise to remedy defects in a product is not a representation that there are none, but an acknowledgment that there might be. Furthermore, even assuming the warranty might arise to a statement, there is no allegation that either plaintiff was aware of or relied on the warranty in purchasing the camcorder. In order to sustain the claim plaintiff must demonstrate that the warranty was a material inducement in the purchasing decision. Wis JI-Civil 2418 (cited with approval in Tietsworth, 2004 WI 32 at ¶39; See also

Werner v. Pittway Corp., 90 F.Supp. 2d 1018, 1034 (W.D. Wis. 2000) (plaintiff must demonstrate reliance on the misrepresentation to maintain a §100.18 claim).

The troubleshooting material on defendant's website includes nothing that could be deemed false, deceptive or misleading. The troubleshooting advice discusses a series of possible causes of a blank screen which can be remedied by relatively simple steps by the consumer. It does not suggest that these are the only possible causes of a blank screen. In fact, the website advises that if the described steps do not resolve the problem, service is required, clearly acknowledging that the cause of the blank screen might be beyond the ability of the consumer to repair. Furthermore, the very nature of website troubleshooting advice defies any suggestion that plaintiffs relied on it in purchasing the camcorders. Troubleshooting advice is almost always consulted after the purchase and after the product failure. In fact, the complaint alleges that the advice was sent to consumers after they complained about product failure. Plaintiffs do not suggest that they ever consulted the website, much less that they did so prior to the purchase.

Plaintiffs are left with the general allegation that defendant made "other representations to consumers regarding the performance, reliability and quality of the camcorder." This allegation cannot state a claim because it is too vague to satisfy pleading

requirements and because it describes in general terms claims of product quality which constitute non-actionable commercial puffery. See Tietsworth, 2004 WI at ¶41-45.

It is likely that plaintiffs' claims for violation of § 100.18 are subject to the heightened pleading requirements of Rule 9(b) which requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." It is not the particular cause of action that determines whether rule 9(b) applies, but rather whether the complaint seeks to allege fraudulent conduct. Robison v. Caster, 356 F.2d 924, 925 (7th Cir. 1966) (claim for breach of fiduciary subject to heightened pleading if based on a scheme to defraud). Should a claim under § 100.18 in some instances require proof of something less than the common law elements of intentional misrepresentation, plaintiffs' allegations, particularly paragraphs 38 through 42, are identical to those required for a common law fraud, thereby triggering the heightened pleading requirements of Rule 9(b). To comply with Rule 9(b) plaintiff must at least identify the statements alleged to be false or deceptive, not a general legal conclusion that such statements were made. See Sears v. Likens, 912 F.2d 889, 893 (7th Cir. 1990).

Ignoring the requirements of Rule 9(b) the allegations of paragraph 36(c) would not satisfy the requirement of Rule 8(a) that there be "a short and plain statement of the claim showing that the

pleader is entitled to relief." Rather the allegations describes typical commercial puffery in terms too vague to assess the nature of the claim. Finally, there are no allegations that plaintiffs heard or relied on any of the unidentified statements in making their purchases.

Accordingly, plaintiffs' complaint does not adequately allege either an affirmative misrepresentation or reliance as required to state a claim for relief under § 100.18.

BREACH OF WARRANTY

Defendant attacks plaintiffs breach of warranty claims on the alternative bases that there are no warranties because of a lack of privity and there is no allegation that the actual terms of the express warranty was breached. Plaintiffs contend that privity exists, that the warranty fails of its essential purpose and that the limitations are unconscionable.

The initial question is whether any warranty exists between plaintiffs and defendant. It is certain that there are no implied warranties. The implied warranties of merchantability and fitness for a particular purpose, Wis. Stat §§ 402.314 and 402.315, by their terms are created only between seller and buyer as part of the sales contract, except to the limited and inapplicable exception of § 402.318. Wisconsin affirmed the requirement that privity of contract exists between a buyer and seller in the

creation of implied warranties when it adopted strict liability as a tort concept, refusing to abrogate the privity requirement in warranty law. Dipple v. Sciano, 37 Wis. 2d 443, 452-558, 155 N.W.2d 155 (1967). A position which has been consistently recognized and affirmed. Twin Disc, Inc. v. Big Bud Tractor, Inc., 582 F. Supp. 208, 215 (E.D. Wis. 1984); Paulson v. Olson Implement Co., Inc., 107 Wis. 2d 510, 319 N.W.2d 855 (1982). Plaintiffs' amended complaint expressly alleges that "an authorized distributor" -- not defendant -- was the seller in the purchase transactions. Accordingly, plaintiffs are not in privity with defendant and are the beneficiary of implied warranties only from their immediate sellers.

In an effort to establish defendant as a "seller" plaintiffs argue that their sellers (who are not identified in the complaint) were acting as agents of defendant. The sole relevant allegation in the complaint is that plaintiffs' camcorders were "purchased from or supplied through a Sony authorized distributor." This single allegation is insufficient to sustain an inference of agency required to survive the motion to dismiss. Indeed, the development of strict products liability as a tort was premised in part on the fact that product distributors are ordinarily not agents of manufacturers so that implied warranty law was an unsatisfactory theory of liability in such cases. Dipple, 37 Wis. 2d at 450-455 (citing Smith v. Atco Co., 6 Wis. 2d 371, 383, n.2, 94 N.W.2d 697

(1959)). To sustain a claim of agency plaintiffs must at least identify the seller and its relationship to the defendant. The complaint must contain more than the single allegation that someone in the chain of distribution was authorized by defendant to sell the product.

Express warranties have received somewhat different treatment. In Paulson v. Olson Implement, 107 Wis. 2d at 517, a manufacturer not a party to the sales contract was held liable for breach of its express warranty under a theory that a distinct unilateral contract arose between the ultimate purchaser and the manufacturer providing the express warranty. In subsequent cases where the buyer was aware of the manufacturer's warranty and relied on it at the time of purchase the courts have held it bound to the warranty even though the manufacturer was not party to the sales contract. Midwey Powder Co. v. Clayton Industries, 157 Wis. 2d 585, 592, 460 N.W.2d 426 (Ct. App. 1990) (citing Sunnyslope Grading, Inc. v. Miller, Bradford and Risberg, Inc., 148 Wis. 2d 910, 921, 437 N.W.2d 213, 217-18 (1989)). In each of these cases the warranty was disclosed to and relied upon by the purchaser so as to become part of the basis of the bargain as required by Wisconsin Statutes § 402.313, a circumstance not alleged in the complaint.

Other courts have recognized and enforced express warranties to remote purchasers even in the absence of reliance based privity.

While a majority of courts recognize vertical privity as a defense to an implied warranty claim, the express warranty theory is not usually barred by this defense, since the courts recognize that the remote manufacturer is beaming the warranty at the ultimate purchaser, irrespective of intermediate links in the chain of distribution.

B. Clark and C. Smith, The Law of Product Warranties, § 4.1, p. 4-6 (2d ed. 2002). Recognition of such a claim is also consistent with recently adopted Uniform Commercial Code § 2-313A (not yet enacted in Wisconsin) which permits remote purchasers to enforce express written remedial promises included in the product package, the precise circumstance presented here. It is certainly conceivable that Wisconsin might extend the right to enforce the express warranty under the circumstances of this case.

However, even were plaintiffs legally entitled to enforce defendant's remedial promise to repair the camcorder, they have not alleged that defendant breached its promise. The written warranty was a promise to pay for parts and labor to repair the camcorder within 90 days of purchase and to pay for repair parts within one year of purchase. Plaintiffs do not allege that their camcorders failed or were presented to defendant for repair within the prescribed period. Accordingly, they have not alleged a breach of the express warranty.

Recognizing that the promise contained in the limited warranty has not been breached, plaintiffs seek to expand the express warranty by arguing that it fails of its essential purpose or is

unconscionable within the meaning of Wisconsin Statutes §§ 402.302(1) and 402.719(2). Neither argument has merit. A remedial promise by a manufacturer to a remote purchaser does not displace the implied warranties that arose between the purchaser and his or her immediate seller, but is an additional benefit independent of the sales contract accruing to the purchaser as a matter of unilateral contract. Such a promise is neither procedurally nor substantively unfair as required for unconscionability. See Deminski v. Arlington Plastics Machinery, 2003 WI 15, ¶ 27, 259 Wis. 2d 587, 657 N.W.2d 411. The following analysis reveals why such a unilateral promise is not subject to objection on unconscionability grounds.

Third party warranties should be distinguished from terms offered directly by the seller.... [A] third party warranty can only add to the deal, not take away. If what is added is limited, then the buyer still comes out ahead, and the buyer can still sue on the contract with the direct seller unless that seller in its own contract with the buyer has contractually limited all recourse against it.

Jean Braucher, Amended Article 2 and the Decision to Trust the Courts: the Case Against Enforcing Delayed Mass-Market Terms, Especially for Software, 2004 Wis. L. Rev. 753, 769.² Defendant's

2

The same "limited warranty" might be evaluated differently under unconscionability analysis if defendant was the direct seller of the product for the defendant would be disclaiming implied warranties and limiting rather than expanding the purchaser's rights.

offer to repair or replace the product under the circumstances enhanced rather than limited plaintiffs' contractual rights and is therefore not unconscionable.

A claim that the contractual remedy fails of its essential purpose under § 402.719(2) arises only after the contract has been breached. Plaintiff having made no suggestion that its camcorders failed during the warranty period or that they presented them for repair, have no basis to claim that the repair or replacement remedy failed of its essential purpose.

UNJUST ENRICHMENT

The doctrine of unjust enrichment is a quasi contractual theory which applies only in the absence of a contract. Continental Cas. Co. v. Wisconsin Patients Compensation Fund, 164 Wis. 2d 110, 118, 473 N.W.2d 584 (Ct. App. 1991). There is no question that plaintiffs entered into contracts for the purchase of their camcorders. Plaintiffs believe that they paid more than the camcorders were worth because they were defective. However, under such circumstances any remedy must be based on the law of contract and warranty, not unjust enrichment. Unjust enrichment is not a mechanism for supplementing that which a purchaser perceives as inadequate contractual remedies.

CONCLUSION

Plaintiffs entered into contracts with unnamed sellers for the purchase of camcorders manufactured by defendant. There are no allegations in the complaint that plaintiffs relied on any representation of defendant in making the purchases. Nothing in plaintiffs' complaint supports the inference that defendant was a party to the sales contract. The sole remaining claim against defendant is based on the manufacturers "limited warranty" included with the product in which defendant promised to repair the camcorder if it failed and was presented for repair within a certain period. However, the complaint does not allege that these prerequisites occurred, nor a breach of a promise. Under these circumstances there is no viable basis for a claim against defendant and plaintiffs' complaint must be dismissed.

ORDER

IT IS ORDERED that defendant's motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that judgment be entered dismissing plaintiffs' complaint.

Entered this 28th day of September, 2005.

BY THE COURT:
S/

JOHN C. SHABAZ
District Judge