STATE OF MAINE BUSINESS AND CONSUMER COURT

Cumberland, ss Location: Portland

DCCI, LLC	)	
Plaintiff,	)	
v.	)	Docket No.: BCD-CV-13-65
KENDRICK PARKER	)	
Defendant	)	

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to M.R. Civ. P. 56, Defendant Kendrick Parker has filed a Motion for Summary Judgment. Plaintiff DCCI, LLC ["DCCI"] opposes the Motion. The court elects to decide the Motion without oral argument. *See* M.R. Civ. P. 7(b)(7).

Factual Background

DCCI is a limited liability company operating in Oregon, and Robert Gonzales is its managing member and principal. Kendrick Parker is an individual resident of Fairfield, Somerset County, Maine. Mr. Parker has had a longstanding interest in the category of automobiles known as "muscle cars," and over the years has owned as many as 50 different muscle cars.

In 2006, Mr. Parker purchased a 1968 Plymouth Hemi GTX automobile ["the GTX"], which falls toward the high end of the muscle car category. Mr. Parker installed a new engine and clutch in the GTX and invested considerable time and resources in restoring it, including

obtaining various "date-coded" parts manufactured in or around 1968, the vehicle's year of manufacture, thereby enhancing the GTX's value. He also raced it a number of times.

In 2011, he decided to sell the GTX in order to raise money to buy a camp, and began to advertise the GTX for sale in online muscle car market media. Mr. Gonzales saw one of the online advertisements, and decided to purchase the vehicle through DCCI, subject to an inspection. DCCI and Parker negotiated a price of $60,000, substantially less than the originally advertised price of $85,000. The parties' contract is memorialized in a letter drafted by Mr. Gonzales on DCCI letterhead, signed by Mr. Gonzales on behalf of DCCI and by Mr. Parker, and reading as follows:

> To Whom It May Concern
>
> This letter is to assure that both parties, Mr. Rick Parker and Mr. Robert F. Gonzalez, are in agreement that check number 5334 in the amount of $5,000 is a deposit on the 1968 Plymouth GTX for $60,000 that Mr. Gonzalez found online and that we have discussed over the phone. Mr. Gonzalez has thirty (30) days to, either in person or by proxy, inspect the vehicle to make sure that it is numbers matching and as represented by Mr. Parker.
>
> It is understood that if the above mentioned car does not completely check out, for any reason, then the deposit is refundable. May it also be understood that Mr. Parker agrees to the above stated terms by depositing or cashing the above mentioned check.

Consistent with the letter, DCCI sent a $5,000 deposit to hold the vehicle, and retained a person named James Mott to inspect the GTX at Mr. Parker's premises. On February 23, 2012, Mr. Mott spent about four hours inspecting the vehicle. His inspection did not include a test drive for reasons that appear to be disputed. DCCI claims Mr. Parker refused to allow it; Mr. Parker denies that, and contends that winter conditions precluded a test drive.

In any event, after the inspection, DCCI sent the balance of the purchase price to Mr. Parker via wire transfer March 19, 2012, and the vehicle was shipped West for delivery to DCCI. According to Mr. Parker, Mr. Gonzales initially expressed satisfaction with the GTX during a telephone conversation, but sometime in late April or early May 2012 he began contacting Mr. Parker via email regarding what he said were various problems with the vehicle, including features that were not as represented in Mr. Parker's advertisement. None of Mr. Gonzales's email message submitted into the summary judgment record appears to request any specific relief in terms of rescission or money damages. Eventually Mr. Parker stopped responding to Mr. Gonzales' email messages, the last of which, according to Mr. Gonzales, was sent in July 2012, threatening criminal charges. After that, there appears to have been a lapse in communication until this action was filed in 2013.

DCCI's five-count Amended Complaint pleads claims of fraud (Count I), negligent misrepresentation (Count II), breach of contract (Count III), breach of warranty of fitness for particular purpose (Count IV), and breach of express warranty (Count V).

Defendant Parker seeks summary judgment on two somewhat narrow grounds. First, he claims that DCCI failed to give him timely notice of breach as required by the Maine Uniform Commercial Code (UCC), 11 M.R.S. § 2-607(3), barring DCCI from any remedy on Counts III-V of the Amended Complaint. Second, he asserts that DCCI's tort claims in Counts I and II are barred by the economic loss doctrine.

Analysis

I. Standard of Review

When a party files a motion for summary judgment, the court considers the parties' statements of material facts and any reasonable inferences that a fact-finder may draw from them, to determine whether the moving party is entitle to judgment as a matter of law. M.R. Civ. P. 56; *see Curtis v. Porter*, 2001 ME 158, ¶ 9, 784 A.2d 18. A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . show that there is no genuine issue as to any material fact set forth" in the parties' statements of material facts and "that [the] party is entitled to a judgment as a matter of law." M.R. Civ. P. 56(c); *accord Beal v. Allstate Ins. Co.*, 2010 ME 20, ¶ 11, 989 A.2d 733.

A party wishing to avoid summary judgment must present a prima facie case for each element of the claim or defense that is asserted against it. *See Reliance Nat'l Indem. v. Knowles Indus. Svcs.*, 2005 ME 29, ¶ 9, 868 A.2d 220. In addition to "If material facts are disputed, the dispute must be resolved through fact-finding." *Arrow Fastener Co. v. Wrabacon, Inc.*, 2007 ME 34, ¶ 18, 917 A.2d 123 (quotation marks omitted). A factual issue is genuine when there is sufficient supporting evidence for the claimed fact that would require a fact-finder to choose between competing versions of the facts at trial. *See Inkel v. Livingston*, 2005 ME 42, ¶ 4, 869 A.2d 745.

II. The Issue of Notice of Breach

The parties appear to agree that the GTX is a "good" for purposes of rendering Article 2 of the Maine UCC applicable to the sales transaction, and thus that at least DCCI's claims for breach of contract and breach of express warranty and implied warranty of fitness in Counts III-V of the Amended Complaint are governed by Article 2.

The undisputed facts indicate that DCCI accepted the GTX for purposes of section 2-606 of the Maine UCC after arranging to have it inspected. Mr. Parker further contends, correctly in the court's view, that the lack of any indication in the factual record that DCCI revoked or attempted to revoke acceptance means that its Article 2 remedies are limited to damages. Lastly, Mr. Parker contends that DCCI failed to give him the notice of breach mandated by Article 2, and that is the basis on which he seeks summary judgment on DCCI's contract and warranty claims.

Section 2-607(3) of the Maine Uniform Commercial Code provides in part: "

3. Where a tender [by the seller] has been accepted,

> (a). The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.

The requirement of notice under section 2-607(3)(a) is mandatory, and when the issue of compliance with section 2-607(3) is raised, the burden is on the buyer to prove compliance. *See generally* William H. Henning and William H. Lawrence, *A Unified Rationale for Section 2-607(3)(a) Notification*, 46 SAN DIEGO L. REV. 573 (2009). Whether requisite notice was given is a mixed question of law and fact, the existence, timing and extent of notice being factual questions, and the sufficiency of notice in light of the statutory requirement being a legal question. *See K & M Joint Venture v. Smith International, Inc.*, 669 F.2d 1106, 1111 (6th Cir. 1982).

The commentators to the Uniform Commercial Code have explained the section 2-607(3)(a) notice requirement as follows:

> The time of notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for notification from a retail customer is to be judged by different standards so that in his case it will be extended, for the rule of

> requiring notification is designated to defeat commercial bad faith, not to deprive a good faith customer of his remedy.
>
> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defect upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.
>
> Uniform L. Ann., UCC 2-607, cmt. 4.

In a pre-UCC decision, Judge Learned Hand observed, "The notice 'of the breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning." *American Mfg. Co. v. United States Shipping Board E. F. Corp.*, 7 F.2d 565, 566 (2d Cir. 1925) (L. Hand, J.). There is no formulaic recipe for sufficiency of notice for purposes of section 2-607(3)(a). Rather, "the critical question [is] whether the seller had been informed that the buyer considered him to be in breach." *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 972 (5th Cir. 1976).

The facts of record here indicate that within days or weeks of receiving the GTX (the exact date on which it was delivered to DCCI being unclear), DCCI through Mr. Gonzales notified Mr. Parker of various problems with the GTX. Although Mr. Gonzales's email messages do not contain any formal notice of breach, a fair reading of the messages leaves the inescapable impression that DCCI through Mr. Gonzales not only considered the GTX not to

be as represented, but also considered Mr. Parker to have misstated the condition of the GTX in the online advertisement that kindled Mr. Gonzales's interest in the car.

The court agrees with DCCI that these facts, as well as the fact that neither DCCI nor Mr. Parker appears to be a "merchant" in the business of buying and selling muscle cars, serve to distinguish this case from the case mainly relied on by Mr. Parker, *M.K. Associates v. Stowell Products, Inc.*, 697 F. Supp. 20, 21-22 (D. Me. 1988). Unlike the buyer in *M.K. Associates*, there is evidence in the present record to support a finding that Mr. Gonzales told Mr. Parker within days or weeks of receiving delivery that he believed the GTX was not as represented in what he considered to be material ways, and that Mr. Parker had misled him about the vehicle. The literal word "breach" was not used, but a fair reading of Mr. Gonzales's messages leaves little room for doubt about their import.

The fact that DCCI inspected the vehicle before completing the purchase and taking delivery has obvious implications for the merits of its claim, but the court is not prepared to declare notice to Mr. Parker under section 2-607 insufficient as a matter of law on the present record, and thus will deny Mr. Parker's motion for summary judgment on this ground. On the other hand, the court is also not rendering summary judgment against Mr. Parker on this issue. This Order concludes only that Mr. Parker has not shown he is entitled to judgment as a matter of law on the legal issue of sufficiency of notice.

The reason why the court is not in a position to render summary judgment for either party on the sufficiency issue is that the resolution of the issue may depend in part on a comparison between what was asserted in the notice given and what breach or breaches are

actually proved at trial. Thus, the burden at trial remains on DCCI to prove the sufficiency of notice.

III. The Economic Loss Issue

The Maine Law Court unequivocally adopted the economic loss doctrine in *Oceanside at Pine Point Condominium Owners Assn. v. Peachtree Doors*, 659 A.2d 267 (Me. 1995). In *Peachtree*, the Law Court defined economic loss as "damages for inadequate value, costs of repair and replacement of defective product, or consequent loss of profits --without claim of personal injury or damage to other property." *Id.* at 270 n.4 (quoting *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 449 (Ill. 1982)). The court noted that, absent evidence of personal injury or property damage, "[c]ourts generally . . . do not permit tort recovery for a defective product's damage to itself." *Id.* at 273; *see also In re Hannaford Bros. Co. Customer Data Security Breach Litig.*, 613 F. Supp. 2d 108, 127 (D. Me. 2009).

The Law Court in *Peachtree* further determined "[d]amage to a product itself . . . means simply that the product has not met the customer's expectations, or, in other words, that the customer has received 'insufficient product value.'" *Peachtree*, 659 A.2d at 270. The doctrine requires courts to "distinguish between a situation where the injury suffered is merely the 'failure of the product to function properly . . . [and] those situations, traditionally within the purview of tort, where the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or property.'" *Fireman's Fund Ins. Co. v. Childs*, 52 F. Supp. 2d 139, 142 (D. Me. 1999) (applying Maine law) (*citing East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 868 (1986)). Where there is no contractual relationship between the buyer and seller, the applicability of the economic loss doctrine can be

called into question, *see Fireman's Fund*, 52 F. Supp. 2d at 143-44; *Banknorth, N.A. v. BJ's Wholesale Club, Inc.*, 394 F. Supp. 2d 283 (D. Me. 2005).

DCCI argues that the rule of *Peachtree* does not apply at all to this case, because this case is not a classic "products liability" case, i.e., a case in which a product was "injured", i.e. failed, after being put into use. In other words, DCCI says *Peachtree* does not apply to cases in which the product never was what it was represented to be. This is a metaphysical distinction without a difference (at least when there is no allegation of fraud, as discussed below). Any claim for breach of warranty or negligent misrepresentation requires a showing that the product at issue was, from the outset, not as warranted or represented, even if the defect emerges later. That was the contention in *Peachtree* and is the contention here.

Notably, the plaintiff's complaint in the *Peachtree* case included a negligent misrepresentation count, *see* 659 A.2d at 269, and the Law Court upheld the grant of summary judgment on that count based on the economic loss doctrine. However, there was no fraud or intentional misrepresentation count in *Peachtree*, and the legal question whether the economic loss doctrine precludes a tort claim for fraud or intentional misrepresentation is still open under Maine law. DCCI's opposition to Mr. Parker's economic loss argument focuses on the fraud count and not on the negligent misrepresentation count. Although the court does not interpret DCCI's opposition to concede formally that *Peachtree* precludes the negligent misrepresentation claim in Count II of DCCI's Amended Complaint, the rule of *Peachtree* explicitly applies to negligent misrepresentation claims, and the court therefore will grant Mr. Parker's motion as to Count II.

However, for the following reasons, the court comes to a different conclusion as to the fraud claim in Count I. It is well settled in Maine law that "[f]raud in the inducement of a contract may vitiate the terms of that contract. *Barr v. Dyke*, 2012 ME 108, ¶ 16, 49 A.3d 1280, 1286, *citing Harriman v. Maddocks*, 560 A.2d 11, 12–13 (Me.1989). The rationale for precluding tort claims in favor of contractual remedies under the UCC disappears when a contract is voidable for fraud.

Moreover, two provisions of the UCC explicitly preserve common law fraud remedies in situations otherwise governed by the UCC. One of the general provisions of the Maine UCC provides in part: "Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy and other validating or invalidating cause supplement its provisions." 11 M.R.S. § 1-1103(2). There is no UCC section that displaces the common law remedy for fraud. The other section in question, section 2-721 of the Maine UCC, titled "Remedies for Fraud," makes UCC remedies available for fraud without displacing common law remedies: "Remedies for material misrepresentation or fraud include all remedies available under this Article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy" (emphasis added).

Taken together, these sections indicate that, although the UCC may in some sales cases furnish the exclusive remedies for "nonfraudulent breach," the UCC supplements and does not

preclude remedies for fraud.[1] Based on that conclusion, and because the legal issue is open in Maine, this court concludes that the Maine Law Court would likely decide that the economic loss doctrine does not bar a claim of fraud or intentional misrepresentation, even in a case involving sale of a good subject to Article 2 of the Maine UCC and not involving personal injury or damage to other property. Accordingly, Mr. Parker's Motion for Summary Judgment is denied as to Count I.

Conclusion

IT IS HEREBY ORDERED AND ADJUDGED: Defendant Kendrick Parker's Motion for Summary Judgment is granted as to Count II of the Amended Complaint and is otherwise denied.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this order into the docket by reference.

Dated April 30, 2015

/s
A. M. Horton
Justice, Business and Consumer Court

[1] One view attempts to distinguish between the types of fraud that are subject to the economic loss doctrine, holding claims of fraud in the inducement not to be barred by the economic loss doctrine and claims of "fraud interwoven with the breach" to be barred. *See Huron Tool v. Precision Consulting Servs.*, 532 N.W.2d 541, 544-45 (Mich. Ct. App. 1995), *discussed in* S. Tourek, T. Boyd & C. Schoenwetter, *Bucking the "Trend": The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 IOWA L.REV. 875, 938 (1999). The premise that fraud in the inducement is different than fraud "interwoven" with the breach may be doubtful, but the so-called distinction does not matter here, because DCCI's claim plainly is one of fraud in the inducement.