2013 WL 9862552 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Orange County

Henry G. KOHLMANN and Ramona M. Kohlmann, Plaintiffs,

v.

SEARS HOME IMPROVEMENT PRODUCTS, INC; Coolin Air; Fernando Coolin ad Does 1 to 20, Defendants.

No. 30201300628282.
October 23, 2013.

Date: November 7, 2013
Time: 1:30 p.m.
Place: Dept. C-18

Opposition to Defendant Sears Home Improvement Products, Inc.'s Motion to Strike Portions of Plaintiffs' Second Amended Complaint

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MEMORANDUM OF POINTS AND AUTHORITIES

A traditional motion to strike differs from a demurrer in its ability to attack a part of the pleading smaller than a whole cause of action. Here, Defendant SEARS is using the motion to strike entire causes of action, simply duplicating the arguments in its Demurrer. There are no new arguments.

As a result, Plaintiffs oppose by merely repeating the arguments made in their Opposition to SEARS' concurrently-filed Demurrer to the Second Amended Complaint.

I. THE STATUTE OF LIMITATIONS DOES NOT BAR THE CONTRACT CAUSE OF ACTION

Defendant Sears wants it both ways. On one hand, it argues that the contract cause of action is barred by the statute of limitations applied to oral arguments. On the other, and without any further discussion, defendant claims there is a *fully integrated written contract* that bars the introduction of parole evidence. Both arguments lack merit.

A. THE CONTRACT CAUSES OF ACTION ARE NOT BARRED BY THE STATUTE OF LIMITATIONS SINCE THE DISCOVERY RULE APPLIES

An important exception to the general rule that a cause of action accrues when the allegedly wrongful result occurs is the “Discovery Rule”. The common law discovery rule, where applicable, postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. Pooshs v. Philip Momis USA, Inc. (2011) 51 Cal. 4th 788; Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623.

The "Discovery Rule" ameliorates the harshness of the general rule, under which a cause of action accrues on the date of injury, in cases in which it is manifestly unjust to deprive the plaintiffs of a cause of action before they are aware that they have been injured. *Moreno v. Sanchez* (2003) 106 Cal. App. 4th 1415.

Here, as noted in SEARS' moving papers, the Second Amended Complaint alleges (at page 7, lines 6-9), that Plaintiffs did not discover the facts giving rise to the discovery of the breaches until around February 4, 2012, since the leak was below the surface of the floor, and not within view. Thus, Plaintiffs had no way of knowing or discovering the various breaches, and no facts put them on notice to investigate.

> "[T]he discovery rule may be applied to breaches which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time."

April Enterprises, Inc. v. KTTV (1983) 147 Cal. App. 3d 805, 832.

Accordingly, the Discovery Rule applies here since Plaintiffs' pleadings clearly indicate they were unaware of the falsity of the terms of the oral portion of the agreement. It was not until around February 4, 2012, that they became aware of facts to make them aware of such breaches.

B. EVIDENCE OF ORAL REPRESENTATIONS MADE BY DEFENDANT SEARS IS NOT BARRED SINCE THERE IS NO INTEGRATED WRITTE AGREEMENT

In the recent case of *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n* (2013) 55 Cal.4th 1169, the California Supreme Court recently reviewed the parol evidence rule. It noted the following:
The parol evidence rule is codified in Code of Civil Procedure section 1856 and Civil Code section 1625. It provides that when parties enter an integrated written agreement, extrinsic evidence may not be relied upon to alter or add to the terms of the writing.4 (Casa Herrera, Inc. v. Beydoun (2004) 32 Cal.4th 336, 343, 9 Cal.Rptr.3d 97,83 P.3d 497 (Casa Herrera).) "An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." (Rest.2d Contracts, § 209, subd. (1); see Ailing v. Universal Manufacturing Corp. (1992) 5 Cal.App.4th 1412, 1433, 7 Cal.Rptr.2d 718.) (Emphasis added)

Riverisland Cold Storage, Inc. supra, at p. 1174.

Here, the writing does not appear to be a full integration of the terms agreed upon by the parties. Defendant did not do what the writing indicates is necessary to manifest its agreement to the writing. Specifically by its own terms, Exhibit A of the Second Amended Complaint expressly states (to Buyer): "You are entitled to completely filled-in copy of this agreement, signed by both you and the contractor [Defendant "Sears], before any work may be started." (*See* Exhibit A, page 2 toward bottom) This contractual provision is prescribed by California *Business & Professions Code* sections 7159, and 7159.10, and the failure of SEARS to provide it prior to commencing work was not only a separate violation of law that would subject defendant to discipline by the CSLB, but it was an evident failure to manifest assent to the terms of that writing.

The Second Amended Complaint alleges that although requested by Plaintiffs, no such signed copy was ever provided. (SAC at p. 6, ¶23).

Moreover, the language at the top of page two indicates that it is a "proposal" and "offer" which must be accepted by SEARS' management. The signature line for the Sears "Management Representative" was obviously intended to signify Sears' "acceptance" of the proposed terms.

Since no fully-executed copy was ever provided to Plaintiffs despite their request (and in violation of California law), and since it appears that it may not have been signed by Sears at all, it is disingenuous of SEARS now to argue that this was a fully-integrated agreement between the parties in order to trigger the application of the parol evidence rule.

If Sears is allowed to prevail on its argument that this was a fully-integrated agreement, Plaintiffs respectfully request leave to amend to allege a cause of action for breach of a *written* contract, to which a four-year statute of limitations would apply.

C. EVEN IF THE SUBSTANTIAL TERMS OF THE ORAL AGREEMENT VARIED FROM THOSE IN EXHIBIT A, THE FRAUD EXCEPTION TO THE PAROL EVIDENCE RULE APPLIES IN THIS CASE SINCE THE PROMISES ALLEGED DO NOT VARY FROM THE TERMS ON THE CONTRACT, AND SINCE RIVERISLAND BROADENED THE SCOPE OF THE FRAUD EXCEPTION

Even under pre-Riverrisland law, courts have routinely allowed parol evidence of a fraudulent promise where the promise was not at variance with the writing. (See *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263)

Although now only an academic point after Riverisland, that situation is exactly what this case presents. The alleged breaches of the oral portion of the contract are set forth in detail in the Second Amended Complaint at page 9, ¶36. None of the alleged breached terms vary with any particular term contained in the writing at Exhibit A.

Last, and most important, however, is the fact that Riverisland Cold Storage, Inc. supra, has broadened the applicable scope fraud-exception to the parol evidence rule by holding it applies even in situations where the terms of the oral promise varies from the writing, since "[i]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud." Riverisland Cold Storage, Inc., supra, 55 Cal.4th at 1182, quoting Ferguson v. Koch (1928) 204 Cal. 342 at 347) The Riverisland court expressly overruled the long standing rule of Pendergrass.

Accordingly, where there is evidence of oral fraud in the inducement, the issue of variance with the terms of an integrated writing is much less significant to the analysis as it was before, except as it pertains to justifiable reliance by the Plaintiff.

As a result, Defendant's arguments concerning the parol evidence rule are without merit. Plaintiffs respectfully request the court deny SEARS' motion to strike the paragraphs in this Cause of Action (paragraphs 35 through 38)

II. PLAINTIFFS' CAUSE FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY IS NOT BARRED BY A ONE-YEAR STATUTE OF LIMITATIONS

Under California's Song-Beverly Consumer Warranty Act ("Song-Beverly"), unless disclaimed, every retail sale and lease of consumer goods in California includes an implied warranty by the manufacturer and the retailer that the goods are merchantable. Civil Code sections 1791.3. 1792. And, the statute provides that the duration of an implied warranty of merchantability in no event shall be "less than 60 days nor more than one year following the sale [or lease] of new consumer goods to a retail buyer." Civil Code section 1791.1 subd. (c). This law establishes the length of the warranty.

In Mexia v. Rinker Boat Co., Inc. (2009) 174 Cal.App.4th 1297, the court of appeal first addressed the duration provision where a buyer alleged a latent defect that manifested itself more than one year after purchase. It concluded that the duration provision does not bar an action for breach of the implied warranty of merchantability when the action is based upon a latent defect, regardless of whether the defect is not discovered by the consumer or reported to the retailer or manufacturer within the one year maximum durational period.

In Mexia, a manufacturer and retailer had argued that the duration provision should be interpreted as barring an action for breach of the implied warranty of merchantability when the purchaser fails to discover and report the defect to the seller within one year. But, in a unanimous decision, the Mexia court rejected this argument, reasoning that the statute "merely creates a limited, prospective duration for the implied warranty of merchantability...[and] it does not create a deadline for discovering latent defects or for giving notice to the seller." Mexia, supra, at 1301.

The court acknowledged a "policy repeatedly expressed by the California courts of the need to construe the Song-Beverly Act so as to implement the legislative intent to expand consumer protection and remedies." Id. at 1311.

The court held that the implied warranty is breached at the time of sale where the defect is latent and the purchaser is not obligated to either discover or report the breach within the one year durational provision. Id. at 1310-1311.

The Mexia court recognized that discovery and trial might prove the allegation of latent defect incorrect, but the pleadings had to be accepted as true at the Demurrer stage. Mexia, supra, at 1308.

Notably, the Song-Beverly Act does not include its own statute of limitations. California courts have held, however, that the statute of limitations for an action for breach of warranty under the Song-Beverly Act is governed by the same statute that governing warranties arising under the Uniform Commercial Code: section 2725 of the Uniform Commercial Code. (See Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal.App.3d 205, at 215; Jensen v. BMW of North America, Inc. (1995) 35 Cal.App.4th 112)

Under Uniform Commercial Code section 2725 subd. (1), "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued...." As a result, a four-year statute of limitations applies to Plaintiff's claims herein.

Again, Plaintiffs action was filed well within the four-year statute of limitations, and even within one year of discovery of the facts of the defects, which did not take place until around February 4, 2012 (See Second Amended Complaint, p. 7, lines 6-9).

As a result, the motion of SEARS to strike the paragraphs of the Second Cause of Action must fail.

Additionally, the Second Amended Complaint contains ample allegations of the defective condition of the product at issue in this case. The core test of merchantability is fitness for the ordinary purpose for which such goods are used. Isip v. Mercedes-Benz USA, LLC (2007) 155 Cal.App.4th 19, 26. Such fitness is shown if the product "is 'in safe condition and substantially free of defects..."' (Id. at p. 27.)

Here, Plaintiffs' Complaint is replete with examples that the furnace was sold in an unsafe condition, and was not free from defects. Accordingly, Plaintiffs respectfully request the court deny SEARS' motion to Strike paragraphs 40 to 46.

III. PLAINTIFFS HAVE ALLEGED SUFFICIENT FACTS TO PLEAD A BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Plaintiffs Second Amended Complaint alleges fraudulent inducement committe by Sears, who told Plaintiffs that, inter alia, the furnace would be new, and not used. (SAC, page 4, ¶ 11(d)) In fact, the furnace that was sold was used (SAC, page 4, ¶ 12(d), and that Sears knew this fact, and other concealed facts. (SAC, page 5,¶ 17). These circumstances clearly deprived Plaintiffs from realizing the benefits of the agreement, and constituted a breach of the implied covenant of good faith and fair dealing.

Additionally, although the breach of the covenant of good faith and fair dealing ...finds particular application in situations where one party is invested with a discretionary power affecting the rights of another" (See Carma Developers (Cal.), Inc. v.

Marathon Development California, Inc. (1992) 2 Cal.4 th 342, 372) no authority suggests that the implied covenant is limited to only those situations.

Accordingly, Plaintiff respectfully requests the court deny SEARS' Motion to Strike paragraphs 48 to 50 of the Second Amended Complaint.

IV. PLAINTIFFS PLEADED THE REQUISITE ELEMENTS OF FINANCIAL ELDER ABUSE - NO FIDUCIARY OR CLOSE RELATIONSHIP NEED BE ALLEGED

California *Welfare and Institutions Code* section 15610.30 sets forth the statutory definition of **financial abuse** of an **elder**, in pertinent part, as follows:

(a) "**Financial abuse**" of an **elder** or dependent adult occurs when a person or entity does any of the following:
(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

*(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.*

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult.

SEARS cites no authority for its argument that there must be a "close or fiduciary relationship" between the parties for **elder abuse** to have occurred. It simply argues that because certain legislative notes had expressed a policy to protect the frail, the **elder abuse** statutes should not apply in this case.

Contrary to SEARS' implications, since its inception in 1994 (when the statute was limited to those who stood in a fiduciary relation), the legislature has expanded the application and reach of the **elder abuse** statutes. Indeed, for the 2000 amendments, the Assembly Floor Analysis heralded the bill as "a comprehensive approach to address the problems of **financial abuse** and misrepresentation directed against seniors." The analysis continued:
California seniors are losing millions of dollars by purchasing unnecessary **financial** products from [persons] who have a **financial** stake in the sale. Current statutes designed to protect seniors are weak and ambiguous and need to be strengthened. This bill's multifaceted approach will combat **elder abuse** through strengthening protections and assisting in the prosecution of perpetrators. Assembly Floor Analysis of A.B. 2107, 2 (Aug. 29, 2000).

Although the analysis above referred to "**financial** products", the text of the statute itself is not so limited. Under Section 15610.30, **financial abuse** of an **elder** occurs when someone obtains property of an **elder** for a wrongful use or with intent to defraud.

Here, Plaintiffs Second Amended Complaint sets forth all the required elements of fraudulent inducement to enter a contract and to pay money to Sears. Additionally, it is undisputed that said money was actually paid. Thus, under the statutory definition above, a **financial elder abuse** has been properly pleaded.

Defendant's argument that these Plaintiffs have not claimed "any frailty or mental weakness that might render them vulnerable to **abuse**" is equally unfounded. The legislature recognized that old age, by itself, renders people vulnerable to **financial abuse**, irrespective of whether they are legally mentally sound.

Specifically, Welfare and Institutions Code section 15600, subdivisions (a) & (b) provide:

(a) The Legislature recognizes that **elders** and dependent adults may be subjected to **abuse**, neglect, or abandonment and that this state has a responsibility to protect these persons.

(b) The Legislature further recognizes that a significant number of these persons are **elderly**. The Legislature desires to direct special attention to the needs and problems of **elderly** persons, recognizing that these persons constitute a significant and identifiable segment of the population and that they are more subject to risks of **abuse**, neglect, and abandonment.

Thus, it is clear that the **Financial Abuse** portions of the **elder abuse** statutes apply in the instant case, and that Plaintiffs have alleged facts sufficient to overcome SEARS' argument against the Sixth Cause of Action In the Second Amended Complaint.

For this reason, Plaintiffs respectfully request the court deny SEARS' Motion to Strike paragraphs 76-81.

V. CONCLUSION

For the reasons argued above, Plaintiffs respectfully request the Court deny SEARS' Motion to Strike in its entirety. If the Court is Inclined to grant any portion of the Motion, Plaintiffs respectfully request leave to amend.

Dated: October 23, 2013

Respectfully submitted,

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Attorney for Plaintiffs

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