IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

BRYAN KEITH,	*	
	*	
Plaintiff,	*	
	*	
v.	*	1:19-CV-04816-ELR
	*	
BENTLEY MOTORS, INC.,	*	
	*	
Defendant.	*	
	*	

ORDER

Presently before the Court are Defendant Bentley Motors, Inc.'s "Motion to Dismiss Plaintiff's Complaint or, in the Alternative, Motion for More Definite Statement" [Doc. 4] and "Motion to Dismiss Plaintiff's Amended Complaint." [Doc. 9]. For the reasons below, the Court grants Defendant's motions.

I. Background

As set out in the Complaint, Plaintiff Bryan Keith filed this case against Defendant Bentley Motors, Inc. for allegedly selling him a faulty vehicle. See Compl. [Doc. 1-1]. On or about March 15, 2016, Plaintiff purchased a 2016 Bentley GTC for $280,000 from Defendant's authorized dealer. Id. ¶¶ 5–7. Shortly after taking possession of the vehicle, Plaintiff alleges "various defects included but not limited to the (a) engine, (b) electrical system, (c) check engine light, (d) [vehicle's]

drive[]ability, (e) stalling, and (f) loss of power." Id. ¶ 10. Plaintiff contends that Defendant's authorized dealer had a reasonable number of attempts to cure the defects but failed to do so; therefore, the defects remain uncorrected. Id. ¶¶ 12–13. Plaintiff also asserts that Defendant's failure to remedy the alleged defects caused Plaintiff to lose confidence in the vehicle's safety, reliability, and value. Id. ¶¶ 14–15. Based on this lack of confidence, Plaintiff contends he attempted to revoke acceptance of the vehicle, which Defendant denied. Id. ¶¶ 17–20. Thus, Plaintiff contends he continues to be financially harmed by Defendant's failure to (a) comply with the provisions of the written warranty and (b) provide Plaintiff with a merchantable vehicle. Id.

On August 29, 2019, Plaintiff filed this Complaint in the State Court of Gwinnett County, Georgia, against Defendant, asserting claims for breach of warranty and damages based on revocation of acceptance. Id. On October 25, 2019, Defendant removed the case to this Court. Notice of Removal [Doc. 1]. Shortly thereafter, Defendant filed the instant "Motion to Dismiss Plaintiff's Complaint or, in the Alternative, Motion for More Definite Statement." [Doc. 4]. On December 13, 2019, Plaintiff filed a "Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint or in the Alternative, Request for Leave to File an Amended Complaint." [Doc. 7]. In conjunction with this filing, Plaintiff attached a proposed amended complaint. [See Doc. 7-1]. On December 27, 2019, Defendant filed both

a reply to its original motion and a "Motion to Dismiss Plaintiff's Amended Complaint." [Docs. 8, 9]. These motions are now ripe for the Court's review.

II. Procedural Matters

Prior to reviewing the merits of Plaintiff's Complaint, the Court will address the procedural issue raised by Defendant concerning Plaintiff's proposed amended complaint. As noted above, Plaintiff submitted a proposed amended complaint in conjunction with his response to Defendant's motion to dismiss. [See Doc. 7-1]. Defendant asserts Plaintiff's request for leave to file an amended complaint does not comply with Federal Rule of Civil Procedure 7. [Doc. 9-1 at 16].[1] Consequently, Defendant contends the Court should deny Plaintiff's request for leave to file an amended complaint. [Id.]

Pursuant to Federal Rule of Civil Procedure 7(b)(1), "[a]n application to the court for an order shall be by *motion* which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (emphasis added). Accordingly, "a separate motion for leave to amend is the proper procedural vehicle for [Plaintiff's request.]" Posner v. Essex Ins. Co., Ltd., 178 F.3d 1209, 1222 (11th Cir. 1999). In other words, "where a request for leave to file an amended complaint simply is embedded within

[1] Defendant also contends that Plaintiff's request does not comply with Federal Rule of Civil Procedure 15 or Local Rule 7.1. [Doc. 9-1]. However, given the Court's analysis herein, the Court does not reach Defendant's alternative bases.

an opposition memorandum, the issue has not been raised properly." Baker v. Batmasian, 730 F. App'x 776, 781 (11th Cir. 2018).

Here, Plaintiff's request for leave to file an amended complaint is procedurally improper because it is included with his response to Defendant's motion to dismiss. [Docs. 7, 7-1]. Moreover, despite Defendant raising this procedural issue in its second motion to dismiss, Plaintiff did not respond to Defendant's arguments, nor did he submit a motion for leave to file an amended complaint. Accordingly, Plaintiff's proposed amended complaint is due to be rejected.

Nevertheless, Defendant alternatively made a motion for a more definite statement which would have given Plaintiff the opportunity to amend his Complaint. [See Doc. 4]. Based on this motion, the Court will consider the proposed amended complaint along with the original Complaint in its analysis.

III. Legal Standard

Having decided to consider both complaints, the Court turns now to Defendant's motions to dismiss. Defendant moves to dismiss the complaints pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court first sets out the legal standard before addressing the substance of Defendant's arguments.

When considering a 12(b)(6) motion to dismiss, the Court must accept as true the allegations set forth in the complaint drawing all reasonable inferences in the light most favorable to the plaintiff. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–

56 (2007); U.S. v. Stricker, 524 F. App'x 500, 505 (11th Cir. 2013) (per curiam). Even so, a complaint offering mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" is insufficient. Ashcroft v. Iqbal, 556 U.S 662, 678 (2009) (quoting Twombly, 550 U.S. at 555); accord Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1282–83 (11th Cir. 2007).

Further, the complaint must "contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 570). Put another way, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. This so-called "plausibility standard" is not akin to a probability requirement; rather, the plaintiff must allege sufficient facts such that it is reasonable to expect that discovery will lead to evidence supporting the claim. Id.

IV. Discussion

The Court now addresses the substance of Defendant's motions wherein it seeks to dismiss all claims asserted by Plaintiff. In the original Complaint, Plaintiff asserts claims for (1) breach of written warranty, (2) breach of implied warranty, (3) breach of express warranty, and (4) breach of implied warranty of merchantability. See Compl. Additionally, he seeks damages based on revocation of acceptance. Id.

In the proposed amended complaint, Plaintiff asserts additional claims for violation of the Magnuson-Moss Warranty Act and breach of contract. [See Doc. 7-1].

As an initial matter, Plaintiff's claim for violation of the Magnuson-Moss Warranty Act cannot stand. [Id. at 6]. "[T]he Act does not provide an independent cause of action for state law claims, only additional damages for breaches of warranty under state law." Fedrick v. Mercedes-Benz USA, LLC, 366 F. Supp. 2d 1190, 1200 n.14 (N.D. Ga. 2005). Thus, to the extent that Plaintiff bases his cause of action on the Act, it is dismissed. The Court discusses Plaintiff's remaining claims in turn.

A. Breach of Written/Express Warranty

The Court turns first to Plaintiff's claims for breach of written/express warranty.[2] Defendant contends Plaintiff's claims fail because there are no facts to demonstrate how Defendant had notice or reasonable opportunity to repair the alleged defects. [Doc. 4-1 at 7].

Pursuant to Georgia law, "a warranty is not breached merely because a vehicle is found on delivery or sometime thereafter within the warranty period to have a defective part or operational deficiency." Knight v. American Suzuki Motor Corp., 612 S.E.2d 546, 549 (Ga. Ct. App. 2005) (internal marks and citation omitted).

[2] The Court reviews these claims collectively because both must satisfy the same elements and Plaintiff alleges the same facts for both counts. See Knight v. American Suzuki Motor Corp., 612 S.E.2d 546, 549 (Ga. Ct. App. 2005) (analyzing plaintiff's breach of express warranty claim pursuant to the law for breach of written warranty claims).

Instead, to establish a claim for breach of written (and express) warranty, "a plaintiff must allege the warrantor (1) had notice of the defect and (2) had reasonable opportunity to repair the defect." Id. Regarding the second element, "when the purchaser returns the product to the dealer and makes the product available for repair, refusal to repair, unsuccessful repair, or repeated failures of the repair constitute a breach of the express warranty." McDonald v. Mazda Motors of Am., Inc., 603 S.E.2d 456, 460 (Ga. Ct. App. 2004).

In this case, Plaintiff provides the express warranty issued by Defendant as a part of the purchase to support his claim. Specifically, Plaintiff contends that "[the] Manufacturer warranted the Vehicle was free from all defects in material or workmanship, and that if any such defects were discovered within a specified period[,] Defendant Manufacturer would repair of the vehicle free of charge to the Plaintiff." Compl. ¶ 50. Plaintiff alleges he discovered various defects after possessing the vehicle. Id. ¶¶ 10, 52. Plaintiff further asserts that "Defendant breached its obligations under the warranty by failing to reasonably repair the vehicle's defects after being afforded a reasonable number of attempts to cure." Id. ¶¶ 30, 55. Lastly, Plaintiff claims, "Defendant was notified of the breach within a reasonable period of time." Id. ¶¶ 31, 52.

Defendant categorizes Plaintiff's allegations as conclusory statements. [Doc. 4-1 at 6]. More specifically, Defendant contends "Plaintiff has failed to plead

facts that show Defendant had notice of the alleged defects or [was] given a reasonable opportunity to repair the alleged defects." [Id. at 8]. Defendant also emphasizes that "there are no facts pleaded that would show that Defendant refused or failed to remedy the alleged facts within a reasonable time." [Id.] Upon review, the Court agrees.

When considering the allegations in the light most favorable to Plaintiff, the Court finds that Plaintiff fails to meet the plausibility standard set forth in Iqbal. Plaintiff has not alleged any facts to demonstrate how or when Defendant had notice and a reasonable opportunity to cure the alleged defects. Instead, Plaintiff merely states that notice was given, and that Defendant had numerous failed attempts to repair the alleged defects. Compl. ¶¶ 30–31, 51–52.

Moreover, Plaintiff's allegations lack any supporting detail. In his Complaint, Plaintiff has not alleged the dates or form of communication that would have provided Defendant notice, whether Defendant received or responded to the alleged notice, or the dates of the alleged attempts to repair the defects. See Compl.; cf. Johnson v. Jaguar Cars, Inc., No. 1:05-CV-3161-RLV, 2006 WL 1627125, at *4–5 (N.D. Ga. June 6, 2006) (holding plaintiff survived a motion to dismiss against his claim for breach of express warranty because plaintiff provided a written letter sent directly to the manufacturer to demonstrate notice, the dates of turning in his vehicle to the manufacturer, and a written letter from the manufacturer requesting thirty days

to review their complaint). Unlike Johnson, Plaintiff has not provided any indication of how Defendant had notice or reasonable opportunity to repair the alleged defects. See Compl. Thus, Plaintiff's claims for breach of written/express warranty fail.

B. Breach of Implied Warranty/Breach of Implied Warranty of Merchantability

The Court turns second to Plaintiff's claims for breach of implied warranty/breach of implied warranty of merchantability.[3] With regards to these claims, Defendant contends Plaintiff has failed to allege facts that demonstrate the claimed defects existed at the time of sale. [Doc. 4-1 at 11]. Accordingly, Defendant argues that the claims must be dismissed. [Id.]

Under Georgia law, "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." O.C.G.A. §11-2-314(1). For goods to be merchantable, "they must at least (a) pass without objection in the trade under the contract description . . . and (c) [be] fit for the ordinary purposes for which such goods are used." O.C.G.A. §11-2-314(2)(a,c). "Cars are fit for their ordinary purpose of transportation under O.C.G.A. § 11-2-314(2)(a) so long as their driveability or usefulness is not affected by the defect alleged." Horne v. Claude Ray Ford Sales, Inc., 290 S.E.2d 497, 499

[3] The Court reviews these claims collectively because both must satisfy the same elements and Plaintiff alleges the same facts for both counts. See Amin v. Mercedes-Benz USA, 301 F. Supp. 3d 1277, 1277 (N.D. Ga. 2018) (assessing plaintiff's implied warranty claim by determining whether the car was merchantable under the requirements set forth in O.C.G.A §11-2-314(2)).

(Ga. Ct. App. 1982). In addition to the requirements set forth in O.C.G.A. §11-2-314(2), "an essential element to this claim [requires] the defects or conditions *existed at the time of the sale*." Dildine v. Town & Country Truck Sales, Inc., 577 S.E.2d 882, 886 (Ga. Ct. App. 2003) (emphasis added).

Here, Plaintiff contends the vehicle failed to meet his reasonable expectations, perform with reasonable safety, efficiency, and comfort, and provide dependable transportation. Compl. ¶¶ 39–41. Therefore, Plaintiff alleges a breach of the implied warranty of merchantability because Defendant sold Plaintiff a vehicle of insufficient quality. Id. ¶ 38. Consequently, Plaintiff declares the vehicle would not "pass without objection in the trade under the contract description" and does not conform to the promises or affirmations of fact made by Defendant. Id. ¶ 42.

Upon review of the facts set forth in the Complaint, the Court finds that Plaintiff has failed to plead sufficient allegations to support his claim. Plaintiff has not alleged any facts to render the vehicle undriveable or to demonstrate that the defect existed at the time of sale. See Compl. Without such key allegations, Plaintiff's claim fails. Cf. Johnson, 2006 WL 1627125, at *13 (the plaintiff's implied warranty of merchantability claim survived a motion to dismiss because his complaint included the date the vehicle was purchased and the dates when the brakes failed causing multiple collisions).

C. Revocation of Acceptance/Breach of Contract

Lastly, the Court turns to Plaintiff's claims for revocation of acceptance and breach of contract. Defendant challenges both due to the lack of privity. The court first addresses revocation of acceptance.

Pursuant to O.C.G.A. § 11-2-608, "[a] buyer [has the] right to revoke acceptance within reasonable time for nonconformity not within [the] purchaser's knowledge at time of acceptance if such nonconformity substantially impairs its value to the buyer." Jacobs v. Metro Chrysler-Plymouth, Inc., 188 S.E.2d 250, 253 (Ga. Ct. App. 1972). This right is enforced when "revocation of acceptance [] occur[s] within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects." O.C.G.A. § 11-2-608(2).

In this case, Plaintiff alleges he revoked acceptance of the vehicle in a manner consistent with Georgia law. Compl. ¶ 17. Plaintiff contends the defects substantially impaired the value of the vehicle. Id. ¶ 15. Additionally, Plaintiff alleges the defects were not reasonably discoverable prior to his purchase. Id. ¶ 16. However, Defendant asserts Plaintiff's claim is faulty because there is a lack of privity. [Doc. 4-1 at 12]. Defendant contends Plaintiff's claim for revocation of acceptance requires privity of contract, and thus, may only be asserted against a

seller. [Id.] Defendant argues that Plaintiff has not pled any facts that establish privity of contract. [Id.]

Georgia courts have provided differing opinions on the privity requirement. Some courts have held privity only exists between the buyer and seller. See Frederick v. Mercedes Benz USA, LLC, 366 F. Supp. 2d 1190, 1200 (N.D. Ga. 2005) (citing O.C.G.A § 11-2-608; Sofet v. Roberts, 364 S.E.2d 595, 596–97 (Ga. Ct. App. 1987)). However, other courts denote an exception to the privity requirement where the manufacturer has extended the warranty to a third party as a basis of the bargain. See Jones v. Cranman's Sporting Goods, 237 S.E.2d 402, 406 (Ga. Ct. App. 1977) ("The weapon here was 'fully guaranteed' by the distributor to the ultimate consumer. As such it became part of the bargain of sale and thus privity existed."); see also EMJ Corp. v. Laticrete Int'l, Inc., 934 F. Supp. 2d 430, 433–34 (M.D. Ga. 1996) (noting that a warranty that becomes a basis of the bargain "seems to eliminate the privity requirement almost entirely").

Here, Plaintiff provides no facts to demonstrate that the warranty was the basis of the bargain to establish privity of contract between the Parties. See Compl. Additionally, Plaintiff does not cite to any authority that enables a plaintiff to seek damages based on revocation of acceptance without privity. Id. Plaintiff's Complaint alleges purchasing the vehicle from an authorized dealer but makes no indication of Defendant's involvement and/or warranty influencing his decision. Id.

Therefore, the Court concludes that Plaintiff's claim for damages based on revocation of acceptance fails. See Johnson, 2006 WL 1627125, at *14–16 (dismissing plaintiff's claim for revocation of acceptance because there was no privity between plaintiff and automobile manufacturer and plaintiff failed to cite any supportive case law for an exception to the privity requirement). Similarly, Plaintiff's breach of contract claim fails also due to a lack of privity. See R.F. Burton Co. v. Southern Marine Associates Inc., 202 S.E.2d 544, 545 (Ga. Ct. App. 1973) (holding that plaintiff was not in privity of contract with the third party and could not maintain an action against him for breach of the contract).

V. Summary

In sum, despite the improper submission of Plaintiff's proposed amended complaint, the Court considered both it and the original Complaint, and finds they both fail to state a claim upon which relief can be granted. Accordingly, Plaintiff's case must be dismissed.

VI. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendant Bentley Motors, Inc.'s "Motion to Dismiss Plaintiff's Complaint or in the Alternative, Motion for More Definite Statement" [Doc. 4] and "Motion to Dismiss Plaintiff's Amended Complaint." [Doc. 9]. The Court **DISMISSES** all claims against Defendant Bentley Motors, Inc. and **DIRECTS** the Clerk to **CLOSE** the case.

SO ORDERED, this 23rd day of June, 2020.

Eleanor L. Ross

Eleanor L. Ross
United States District Judge
Northern District of Georgia