IN THE UNITES STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILLIP CALABRIA, D.D.S., and SUZANNE CALABRIA	:	CIVIL ACTION
v.	:	
NEWMAR CORPORATION, et al	:	NO. 98-4026

MEMORANDUM AND ORDER

Plaintiffs Phillip and Suzanne Calabria bring this diversity action against defendants Newmar Corporation and Spartan Motors, Inc. for damages arising from plaintiffs' purchase of a 1994 Dutchman motor home from non-party Leiser RV Center, Inc. Specifically, plaintiffs assert claims against both defendants for: (1) breach of express and implied warranties (Count I); (2) breach of contract (Count II); (3) fraud (Count III); (4) violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 to 201-9.2 (Count IV); and (5) violation of the Magnusson-Moss Warranty Act, 15 U.S.C.A. §§ 2301-2312, (Count V). Against defendant Newmar Corporation alone, plaintiffs also state a claim for strict liability (Count VI).

Presently before this Court is defendant Spartan Motors' motion to dismiss Count I, as it relates to implied warranties, and Counts II, III, and IV of plaintiffs' amended complaint pursuant to Rule 12(b)(6).[1] For the reasons discussed below, defendant's motion will be granted.

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint.

[1] Though defendant Spartan Motors also moves for the dismissal of Count VI, I will not address this part of the motion since Spartan Motors is not named as a defendant in that count.

However, a court may consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case without converting a Rule 12(b)(6) motion into a motion for summary judgment. Oshiver v. Levin. Fishbein, Sedran & Berman, 38 F.3d 1380, 1385, n. 2 (3d Cir. 1994).

In considering defendant's motion to dismiss, I must accept as true all well-pleaded factual allegations contained in the complaint and draw all reasonable inferences in plaintiffs' favor. I may grant defendant's motion only if I conclude that plaintiffs would not be entitled to relief under any set of facts consistent with their allegations. See Jordan v. Rothschild, O'Brien & Frankel, 20 F. 3d 1250, 1261 (3d Cir. 1994).

Defendant Spartan Motors first argues that its express warranty disclaims any and all implied warranties.[2] Under Pennsylvania law, the implied warranties of merchantability and fitness for a particular purpose arise by operation of law. Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d Cir. 1992). However, pursuant to the Pennsylvania Uniform Commercial Code--Sales (UCC), 13 Pa. C.S.A. §§ 2101-2725, these implied warranties may be disclaimed by the seller. To exclude or modify the implied warranty of merchantability, a seller's disclaimer must mention merchantability and, if in writing, must be conspicuous. 13 Pa. C.S.A. § 2316(b). To exclude or modify any implied warranty of fitness, the disclaimer must be in writing and conspicuous. Id. Under the UCC a clause or term is deemed "conspicuous" when it is "so written that a reasonable person against whom it is to operate ought to have noticed it". 13 Pa. C.S.A. § 1201. In determining whether a reasonable person should have noticed a warranty disclaimer, courts should consider: (1)

[2] A copy of this written warranty was marked as "Exhibit B" and attached to plaintiff's complaint.

the placement of the disclaimer in the document; (2) the size of the disclaimer's print; and (3) whether the disclaimer was highlighted or called to the reader's attention by being in a different type, style, or color. Hornberger v. General Motors Corp., 929 F. Supp. 884, 889 (E.D. Pa. 1996).

The written warranty provided by Spartan Motors contains a disclaimer which specifically excludes any and all implied warranties. Appearing at the bottom of this one-page document, the disclaimer reads as follows:

> **EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, WHICH EXTEND BEYOND THE DESCRIPTION IN THIS DOCUMENT.**
>
> SPARTAN MAKES NO WARRANTY OF MERCHANTABILITY IN RESPECT TO ITS CHASSIS AND MAKES NO WARRANTY THAT ITS CHASSIS IS FIT FOR ANY PARTICULAR PURPOSE.

(emphasis in the original). Besides language stating that the warranty will be null and void if the chassis registration is not sent to Spartan within 30 days after the date of purchase, this disclaimer is the only portion of the warranty set off in bold or block capital letters. It clearly satisfies the UCC requirement of specific, conspicuous language excluding the warranty of merchantability and of a conspicuous writing excluding any warranty of fitness. See e.g. Prousi v. Cruisers Div. of KCS Int'l, Inc., 975 F. Supp. 768, 774 (E.D. Pa. 1997) (buyer had no implied warranty claims where written warranty at issue specifically and conspicuously--in capital letters on the front page--excludes warranties of fitness and merchantability); Hornberger, 929 F. Supp. at 889 (warranty disclaimer at issue was "conspicuous", even though appearing in the middle of a 37-page booklet, as it was set forth in bold face print and was the only writing enclosed in a thick, dark-lined box). Accordingly,

I will dismiss Count I as it relates to breach of implied warranties against defendant Spartan Motors.[3]

Defendant Spartan Motors next argues that no contractual relationship existed between itself and plaintiffs. More specifically, defendant contends that it was not a party to the sales agreement between plaintiffs and Leiser's RV Center, the dealership which sold defendant's product, and thus cannot be liable for any breach of that agreement.[4] Plaintiffs acknowledge in their complaint that they purchased the motor home from Leiser's RV Center. According to plaintiffs' allegations, Spartan Motors' only connection to this transaction was as manufacturer and warrantor of the motor home. Indeed, the sales agreement does not name or even make reference to Spartan Motors. Since defendant Spartan Motors was not a party to the sales agreement, it cannot have breached that agreement. Accordingly, I will dismiss Count II of plaintiffs' complaint.

Finally, defendant Spartan Motors argues that plaintiffs have failed to plead with particularity the elements of their claim for fraud. Rule 9(b) of the Federal Rules of Civil Procedure states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). To meet this requirement, a plaintiff must plead "(1) a specific false representation of material fact; (2) knowledge by the person who made it of its falsity;

---

[3] Defendant Spartan Motors also argues --on what I assume are alternative grounds-- that all warranty claims are governed by an arbitration clause written in fine print and situated at the bottom of the one-page warranty. Though defendant cites ample authority requiring courts to enforce arbitration agreements, defendant offers no evidence of any such agreement with plaintiffs. "Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 648 (1986), quoting United Steelworkers v. Warrior & Gulf Navig. Co., 363 U.S. 574, 582 (1960). Indeed, defendant asserts in its motion that it did not have any contractual relationship with plaintiffs.

[4] A copy of the sales agreement between plaintiffs and Leiser's RV Center was marked as "Exhibit D" and attached to plaintiff's complaint.

(3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his or her damage." Shapiro v. UJB Fin. Corp., 964 F.2d 272, 284 (3d Cir. 1992). Conclusory allegations are insufficient because they do not state the circumstances constituting fraud with particularity. Lujan v. Mansmann, 956 F. Supp. 1218, 1228 (E.D. Pa. 1997), citing Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 645 (3d Cir.1989) (requiring that complaint's allegations be "accompanied by a statement of the facts upon which the allegations are based"). Put simply, Rule 9(b) requires a plaintiff to " inject precision and some measure of substantiation into [the] allegations [of fraud] . . . . who, what, when, where, and how: the first paragraph of a newspaper story would satisfy the particularity requirements." Sun Company, Inc. v. Badger Design & Contractors, Inc., 939 F. Supp. 365, 369 (E.D. Pa. 1996), quoting In re Chambers Dev. Sec. Litig., 848 F. Supp. 602, 616 (W.D. Pa. 1994).

In the present case, plaintiffs fail to plead fraud with the required particularity. They make no allegations of specific misrepresentations. Plaintiffs fraud claims simply reword the alleged grounds for breach of warranty and assert that this breach amounts to fraud. Even assuming defendant Spartan Motors did in fact breach the express warranty, the mere non-performance of a promise is not evidence of fraud. See Sun Company, 939 F. Supp. at 370; Oxford Indus., Inc. v. Luminco, Inc., No. CIV.A.86-6417, 1991 WL 87928, at *4 (May 22, 1991 E.D. Pa.). While plaintiffs may present allegations of breach of warranty, these allegations alone are too vague to satisfy the requirements of Rule 9(b). Accordingly I will dismiss Counts III and IV with leave to

amend within twenty (20) days hereof.[5]

AND NOW, this day of February, 1999, upon consideration of defendant Spartan Motor's motion to dismiss and plaintiffs' response thereto, it is hereby ORDERED that defendant Spartan Motor's motion is GRANTED:

(1) Count I, as it relates to implied warranties, is DISMISSED;

(2) Count II is DISMISSED; and

(3) Counts III and IV are DISMISSED with leave to amend within twenty (20) days of the date of this Order.

THOMAS N. O'NEILL, JR. J.

[5] In order to recover under the prohibition on fraudulent conduct established by the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 to 201-9.2, elements of common-law fraud must be proven. Heller v. Shaw Industries, Inc., No. Civ.A.95-7657, 1997 WL 535163, at *20 (E.D. Pa. Aug. 18, 1997); Prime Meats, Inc. v. Yochim, 619 A.2d 769, 773-74 (Pa. Super. Ct. 1993).