

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: HARDIEPLANK FIBER CEMENT
SIDING LITIGATION

Case No. 12-md-2359
MDL No. 2359

THIS DOCUMENT RELATES TO

JOHN J. HERNANDEZ,

Plaintiff,

v.

**MEMORANDUM OF LAW &
ORDER**

Civil File No. 14-4655 (MJD)

JAMES HARDIE BUILDING PRODUCTS, INC.,

Defendant.

Karin Ciano, Karin Ciano Law PLLC; Melissa W. Wolchansky and Clayton D. Halunen, Halunen & Associates; Robert K. Shelquist, Elizabeth R. Odette, and Eric N. Linsk, Lockridge Grindal Nauen P.L.L.P.; William Anderson and Charles J. LaDuca, Cuneo Gilbert & LaDuca, LLP; Michael A. McShane, Audet & Partners, LLP; Charles E. Schaffer, Levin Fishbein Sedran & Berman; and Shawn J. Wanta, Baillon Thome Jozwiak Miller & Wanta, Counsel for Plaintiff John J. Hernandez.

Aron J. Frakes and Rachna Sullivan, Fredrikson & Byron, P.A.; Christopher M. Murphy and Steven P. Handler, McDermott Will & Emery LLP, and Heidi A. O.

I. INTRODUCTION

This matter is before the Court on Defendant's Motion to Dismiss Claims of John Hernandez. [Docket No. 16] The Court heard oral argument on March 6, 2015. For the reasons that follow, the Court denies Defendant's motion.

II. BACKGROUND

A. Factual Background

Defendant James Hardie Building Products Inc. manufactures a fiber-cement exterior siding. (Compl. ¶ 1.) In its advertising, Defendant stated that its siding had a 50-year transferable warranty and was designed and engineered to tolerate extreme weather. (Id. ¶¶ 2, 24-25.)

Plaintiff John Hernandez "purchased the Siding from one or more intermediaries on or about October 20, 2006, and a licensed contractor installed the Siding on Plaintiff's home and cistern shed on or about December 2006." (Compl. ¶ 17.) He "chose to purchase James Hardie Siding for his home due to the 50-year warranty advertised by Defendant." (Id. ¶ 16.) Plaintiff's home and shed are located in Colorado. (Id. ¶ 7.)

In the fall of 2013, Plaintiff noticed that the siding on his home exhibited “discoloration, delamination, flaking, and deterioration due to moisture penetrating the Siding.” (Compl. ¶ 19.)

Plaintiff asserts that the anticipated life of the siding was much less than 50 years; some siding components were warranted for a period of time substantially less than 50 years; and some siding components were not warranted at all. (Compl. ¶ 29.) He further claims that Defendant had reason to know that the siding was defective, but it did not attempt to inform him or other customers of the defects. (Id. ¶ 66.) It continued to represent that the siding was durable and long-lasting. (Id.)

In November 2013, Plaintiff filed a warranty claim with Defendant. (Compl. ¶ 20.) In response, Defendant offered to pay Plaintiff \$3,100.00, if Plaintiff would sign a Release of Claim. (Id.) Plaintiff declined to sign the Release of Claim. (Id. ¶ 21.)

B. Procedural History

After their individual cases were consolidated in this Court as a Multidistrict Litigation, Plaintiffs, not yet including Hernandez, filed a Consolidated Complaint. [MDL Docket No. 33] On July 15, 2013, this Court

denied in part and granted in part Defendant's motion to dismiss the Consolidated Complaint. [MDL Docket No. 60]

On October 9, 2014, Hernandez filed a Complaint against Defendant in the District of Colorado. [Docket No. 1] The Complaint alleges eight counts: Count 1: Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-105, et seq.; Count 2: Colorado Products Liability Act, Colo. Rev. Stat. §§ 13-21-401, et seq.; Count 3: Breach of Express Warranty; Count 4: Breach of Implied Warranties of Merchantability and Fitness for a Particular Purpose; Count 5: Failure of Essential Purpose; Count 6: Negligence; Count 7: Negligent Failure to Warn; and Count 8: Declaratory and Injunctive Relief.

In November 2014, the Judicial Panel on Multidistrict Litigation transferred this case to this Court as a tag-along action pursuant to a Conditional Transfer Order. [Docket Nos. 5-6] Defendant has now filed a motion to dismiss Counts 1, 2, 6, and 7. Defendant does not challenge Counts 3, 4, 5, or 8. Plaintiff concedes to dismissal of Counts 2, 6, and 7, and requests that such dismissal be without prejudice so that the claims can be repleaded if discovery uncovers damage to the structure of his home caused by the defective siding. Thus, only Count 1 is now at issue.

III. DISCUSSION

A. Motion to Dismiss Standard

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move the Court to dismiss a claim if, on the pleadings, a party has failed to state a claim upon which relief may be granted. In reviewing a motion to dismiss, the Court takes all facts alleged in the complaint to be true. Zutz v. Nelson, 601 F.3d 842, 848 (8th Cir. 2010).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Thus, although a complaint need not include detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Id. (citations omitted).

In deciding a motion to dismiss, the Court considers the complaint and "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned." Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 931 n.3 (8th Cir. 2012) (citation omitted).

B. Choice of Law

“When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located. When considering questions of state law, however, the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.” In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir. 1996) (citations omitted). Thus, the “transferee court must apply the ‘choice-of-law rules of the states where the actions were originally filed.’” Id. (quoting In re Air Crash Disaster Near Chicago, Ill., 644 F.2d 594, 610 (7th Cir. 1981)).

Colorado employs the “the most significant relationship to the occurrence and parties test.” AE, Inc. v. Goodyear Tire & Rubber Co., 168 P.3d 507, 507 (Colo. 2007). Hernandez filed his Complaint in Colorado. He is a Colorado resident, and his home, on which the siding was installed, is located in Colorado. He also brought a statutory claim under Colorado law. Colorado law applies.

C. Count 1: Colorado Consumer Protection Act

In Count 1, Hernandez asserts a class claim under the Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-105, et seq. (“CCPA”). He asserts that

Defendant misrepresented and failed to disclose material facts about the siding; misled consumers as to the quality of the ingredients used in the siding or the benefits of the siding; and misrepresented that the siding was of a particular quality – i.e., that it was free from defects in materials and workmanship for 50 years – when it knew it was not. (Compl. ¶¶ 78-79.)

Defendant argues that Count 1 should be dismissed because no class action is permitted for monetary relief under the CCPA and because, as an individual claim, Count 1 fails on the merits.

1. Elements of CCPA Claim

To prove a private claim for relief under the CCPA, a plaintiff must show:

(1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury.

Crowe v. Tull, 126 P.3d 196, 201 (Colo. 2006) (citation omitted).

CCPA claims based “on fraudulent conduct must meet Rule 9(b)'s heightened pleading standard.” In re Porsche Cars N. Am., Inc., 880 F. Supp. 2d 801, 833 (S.D. Ohio 2012). Therefore, a plaintiff must identify the “who, what,

when, where, and how.” Parnes v. Gateway 2000, 122 F3d 539, 550 (8th Cir. 1997).

2. Causation

Defendant asserts that Hernandez’s CCPA claim fails because he has failed to plead a causal connection between Defendant’s alleged conduct and his damages as required by the fifth element.

“[T]o maintain a private claim for relief, a plaintiff must demonstrate an injury in fact to a legally protected interest caused by the challenged deceptive trade practice.” Crowe, 126 P.3d at 209. The Supreme Court of Colorado has held that “a consumer was harmed by a defendant’s violation of the CCPA if that consumer had been exposed to the defendant’s deceptive advertisements and had either made purchases or had undertaken any other activities in reliance on the advertisements.” Id. at 210.

The Court concludes that, at this stage, Hernandez has met the CCPA’s causation element by pleading that he saw and relied on Defendant’s advertisement of its warranty. The Complaint alleges that Hernandez “chose to purchase James Hardie Siding for his home due to the 50-year warranty advertised by Defendant.” (Compl. ¶ 16.) Defendant objects that its siding did

come with a 50-year warranty, so the advertisement was accurate, and that Hernandez's claim merely replicates his breach of warranty claim. While it is true that "[a] breach of contract claim, without additional conduct, cannot constitute an actionable claim under the CCPA," a CCPA claim will lie if the plaintiff alleges that a contract term was a misrepresentation because "the promisor did not intend to honor [the promise] at the time it was made." Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 148 (Colo. 2003). Here, Hernandez has sufficiently alleged that, at the time that Defendant promised a 50-year warranty and a long-lasting siding product, it did not intend to warrant the siding for 50 years and honor its warranty, and it also knew that the product would not be long-lasting. (See, e.g., Compl. ¶¶ 23, 29, 43-44, 66, 79.) He explicitly pleads that he chose Defendant's siding based on the advertised 50-year warranty and was damaged as a result. Thus, Hernandez has pled that Defendant made a promise for a 50-year transferrable warranty at the time the contract was made, but only intended to provide a 50-year limited warranty, which it did not intend to honor; and the warranty term itself was a misrepresentation and a deceptive act under the CCPA. He pled that he relied on the advertisement of the warranty and the warranty, establishing a causal link

between Defendant's alleged misrepresentation and Plaintiff's injury.

Defendant's motion to dismiss the individual CCPA claim for lack of causation is denied.

3. Class Claim

Defendant asserts that Hernandez's class CCPA claim fails because the CCPA does not allow a plaintiff to seek monetary relief on behalf of a class.

The CCPA provides:

Except in a class action or a case brought for a violation of section 6-1-709, any person who, in a private civil action, is found to have engaged in or caused another to engage in any deceptive trade practice listed in this article shall be liable in an amount equal to the sum of:

(a) The greater of:

(I) The amount of actual damages sustained; or

(II) Five hundred dollars; or

(III) Three times the amount of actual damages sustained, if it is established by clear and convincing evidence that such person engaged in bad faith conduct; plus

(b) In the case of any successful action to enforce said liability, the costs of the action together with reasonable attorney fees as determined by the court.

Colo. Rev. Stat. § 6-1-113(2) (emphasis added). The parties dispute whether, based on the above-quoted language, the statute permits a class to recover monetary damages under the CCPA.

At this point, the Court need not decide whether a class may claim monetary damages under the CCPA because, even if such relief is barred, Hernandez has pled a class request for injunctive relief under the CCPA. Count 8 enumerates the declaratory and injunctive relief sought by Hernandez and on behalf of the class. Count 8 is not tied to a particular theory of liability, but rather, appears to enumerate relief sought overall under all counts. Moreover, the Prayer for Relief, which also applies to the Complaint as a whole, seeks injunctive relief from Defendant. (See Compl. at 35.) The CCPA does not bar class claims for injunctive relief. See Colo. Rev. Stat. § 6-1-113(2).

Therefore, at a minimum, Hernandez states a class claim under the CCPA upon which relief may be granted because he pleads a class CCPA claim seeking injunctive relief. Should the question of the availability of monetary relief become material at a later stage of the proceedings, such as if and when a class is certified, the Court will address the issue at that time.

Accordingly, based upon the files, records, and proceedings herein, **IT IS**

HEREBY ORDERED:

1. Defendant's Motion to Dismiss Claims of John Hernandez [Docket No. 16] is **DENIED** as to Count 1.
2. Counts 2, 6, and 7, are **DISMISSED WITHOUT PREJUDICE**.

Dated: April 27, 2015

s/Michael J. Davis
Michael J. Davis
Chief Judge
United States District Court