

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PETER EDENHOFFER and
NET NEURODIAGNOSTIC CLINIC, PA,

Plaintiffs,

vs.

Case No. 2015-3440-CB

DAVID SCOTT ORLANDO and COMPLETE
MEDICAL SALES, INC., d/b/a COMPLETE
MEDICAL SERVICES, INC., also d/b/a COMPLETE
MEDICAL SERVICES,

Defendants.

OPINION AND ORDER

Defendants has filed a motion for summary disposition pursuant to MCR 2.116(C)(8). Plaintiffs have filed a response and requests that the motion be denied. In addition, Defendants have filed a reply brief in support of their motion.

I. Factual and Procedural History

On October 1, 2013, Plaintiffs placed an order with Defendant Complete Medical Systems, Inc. ("Defendant CMS") for the purchase of a Genoray Zen 7000 C-Arm medical device ("Zen 7000") and other items by means of a capital lease.

On September 28, 2015, Plaintiffs filed their complaint in this matter ("Complaint"). In the Complaint, Plaintiffs allege that Defendant CMS breached the terms of their agreement (Count I). The Complaint also contains claims for: Count II- Promissory Estoppel, Count III- Unjust Enrichment/Quantum Meruit, Count IV- Declaratory Judgment, Count V- Fraud, and Count VI- Violation of the Texas Deceptive Trade Practices Act. On March 22, 2016, Defendants filed their instant motion for

summary disposition pursuant to MCR 2.116(C)(8). Plaintiffs have since filed a response and request that the motion be denied. In addition, Defendants have filed a reply brief in support of their motion. On April 11, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc.*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

III. Arguments and Analysis

A. Count I (Breach of Contract)

In their motion, Defendants contend that a portion of Plaintiffs' breach of contract allegations fail to state a viable claim because many of the provisions that were allegedly breached were not contained in the agreement between the parties, and that any verbal promises are barred by the integration clause within the term and conditions to the parties' agreement.

Plaintiffs allege that to formalize the parties' agreement they signed a purchase agreement, which was supplemented with additional terms and conditions (purchase

agreement and subsequent terms and conditions, collectively as "Purchase Agreement"). (See Complaint, at ¶8.) Additionally, Plaintiffs defined the Purchase Agreement as the documents they attached the Complaint as Exhibit A. (Id.)

Exhibit A to the Complaint includes three documents: the equipment order/quote submitted by Plaintiffs ("Order"), Defendant CMS' terms and conditions that are executed by Plaintiffs ("First Terms"), and additional terms and conditions that are not signed by either party ("Second Terms"). In the Complaint, Plaintiff alleges that the Second Terms were agreed upon subsequent to the other documents but that the three documents are all included within the Purchase Agreement. The First Terms contains the following integration clause:

11. Entire Agreement. This Agreement constitutes the entire contract between [Plaintiff Edenhoffer] and [Defendant CMS].

(See Complaint, at Exhibit A.)

"Where a binding agreement is integrated, it supersedes inconsistent terms of prior agreements and previous negotiations to the extent that it is inconsistent with them." *Ditzik v. Schaffer Lumber Co*, 139 Mich App 81, 88; 360 NW2d 876 (1984). In their motion, Defendants contend that many of the bases for Plaintiffs' breach of contract claim are based on alleged promises made before the Purchase Agreement was executed, and that as a result the portions of Plaintiffs' breach of contract claim based on those allegations are barred by the integration clause.

First, Defendants assert that Plaintiffs' allegation that Defendants breached the Purchase Agreement by shipping the Zen 7000 in two separate shipments and by failing to arrange for "white glove" delivery fail as a matter of law because the Purchase Agreement does not provide for a specific method of delivery or a delivery deadline, and

provides that Defendants are not responsible for shipping delays (See Complaint, at Exhibit A, First Terms, at ¶14.). With respect to the “white glove” delivery, Plaintiffs alleged that the promise was made before the Purchase Agreement was signed. (See Complaint, at ¶7.) However, the promise was not included within the Purchase Agreement, and the integration clause bars Plaintiffs from maintaining a breach of contract claim based on prior verbal promises. Consequently, the Court is satisfied that Plaintiffs’ breach of contract claim must be dismissed to the extent based on Defendants’ failure to arrange for “white glove” delivery.

Similarly, the Purchase Agreement does not provide that the Zen 7000 was to be delivered in one shipment; further, the Purchase Agreement specifically provides that Defendants are not responsible for shipping delays. Consequently, the Court is convinced that Plaintiffs’ breach of contract claim must be dismissed to the extent based on shipping deficiencies.

Plaintiffs also allege that Defendants breached the Purchase Agreement by failing to provide a plastic cadaver to Plaintiffs as promised. (See Complaint, at ¶¶16, 22(a).) However, Plaintiffs have also alleged that Defendants’ promise regarding the plastic cadaver was made before the parties’ executed the Purchase Agreement. (Id. at ¶6.) Consequently, the portion of Plaintiffs’ breach of contract claim related to the cadaver must also be dismissed for the reasons discussed above.

In addition, Plaintiffs’ breach of contract claim is based on their allegation that Defendants failed to provide on location or paid-for training for Plaintiffs’ staff. (See Complaint, at ¶22(b).) Yet, once again the alleged promise was made before the

Purchase Agreement was executed. (See Complaint, at ¶¶7-8.) As a result, this portion of Plaintiffs' breach of contract claim must also be dismissed.

Plaintiffs also allege that Defendants failed to provide "applications training". (See Complaint, at ¶22(e).) The Purchase Agreement specifically provides that Defendants would provide such training. (See Exhibit A to Complaint.) Consequently, the integration clause does not bar such allegations and the Court is convinced that such an allegation is, on its face, a basis for its breach of contract claim.

Next, Plaintiffs allege that Defendants failed to provide timely and effective service on the equipment at issue. (See Complaint, at ¶22(c), (d) and (f).) In support of their allegation, Plaintiffs rely on the Quote portion of the Purchase Agreement which provides that the sale included "1 Year 100% Parts and Labor Warranty", "Free software update and troubleshooting for life of system", and "Remote diagnostic check for issue resolution to enhance warranty". (See Exhibit A to Complaint.) While the parties dispute whether the provisions in question required Defendants to service the equipment, the Court is convinced that the allegations, when viewed in a light most favorable to Plaintiffs, state a breach of contract claim upon which relief can be granted.

In addition, Plaintiffs allege that Defendants breached the Purchase Agreement by refusing to accept the return of the Zen 7000 or to rescind the Purchase Agreement within the first year. (See Complaint, at ¶25.) The alleged obligation is set forth in paragraphs 17 and 19 of the Second Terms. Paragraph 17 of the Second Terms permits Plaintiff to exchange the Zen 7000 within 60 days of delivery for an OEC 9800 for no additional cost or for a more expensive model by exchanging the Zen 7000 and making an additional payment. (See Exhibit A to the Complaint.) Paragraph 19

provides that Plaintiff can return the Zen 7000 during the first four years following delivery and receive a refund of a portion of the purchase price. (Id.) In the Complaint, Plaintiffs allege that second delivery of the Zen 7000 was on January 10, 2014. (See Complaint, at ¶11.) Further, Plaintiffs allege that they made a demand for a full refund or rescission of the Purchase Agreement on or around February 24, 2014, but that Defendants refused to honor their requests. (Id. at ¶25.)

While ¶¶ 17 and 19 allow Plaintiffs to exchange the Zen 7000, or to return it for a depreciated amount, neither paragraph authorizes Plaintiffs to obtain a full refund or to rescind the Purchase Agreement. Consequently, Plaintiffs have plead that they were denied a remedy that they were not entitled to under the Purchase Agreement. Consequently, Plaintiffs' claim fails to state a basis upon which relief can be granted. As a result, the portion of Plaintiffs' claim related to Defendants' alleged refusal to accept the return of Zen 7000 for a full refund or to rescind the Purchase Agreement must be dismissed.

In their response, Plaintiffs also aver that they have stated a claim for breach of the implied warranty of merchantability and fitness for a particular purpose under the Uniform Commercial Code ("UCC"), as well as the implied covenant of good faith and fair dealing implied in every contract. In response, Defendants contend that they disclaim all warranties. Specifically, Defendants rely on ¶2 of the First Terms, which provides that Defendants make "no warranties, express or implied, unless otherwise stated on the invoice, and approved by an approved representative of [Defendants]" (See Exhibit A to Complaint.)

As a preliminary matter, the implied covenant of good faith and fair dealing

cannot be disclaimed. See MCL 440.1102(3). Consequently, the extent that Defendants aver that they disclaimed that covenant, their position is without merit. With respect to the remaining warranties, the Court of Appeals has held: "Although the implied warranties of merchantability and fitness for a particular purpose arise by operation of law, MCL 440.2314; MCL 440.2315, both of these implied warranties may be excluded or disclaimed by the seller." *Heritage Resources, Inc v Caterpillar Financial Services Corp*, 284 Mich App 617; 774 NW2d 332 (2009); MCL 440.2316. While both the warranty of merchantability and fitness for a particular purpose may be disclaimed, MCL 440.2316(2) provides that in order to disclaim the warranty of merchantability the language of the disclaimer must mention the word merchantability and be conspicuous. In this case, the alleged disclaimer does not mention merchantability. Consequently, the disclaimer did not operate to disclaim the implied warranty of merchantability.

With respect to the implied warranty of fitness for a particular purposes, MCL 440.2316(2) provides that generic language providing that no warranties exist unless specifically provided is sufficient to disclaim the implied warranty of fitness for a particular purpose. In this case, such language is used in the First Terms. As a result, the Court is satisfied that the implied warranty of fitness for a particular purpose was disclaimed.

Additionally, in their response Plaintiffs state that they properly revoked their acceptance of the Zen 7000 on the basis that it was nonconforming. Defendants have not challenged this portion of Plaintiffs' claim. As a result, the Court will not address whether it is properly plead.

B. Counts II-IV (Quantum Meruit, Promissory Estoppel and Declaratory Judgment)

In their motion, Defendants contend that Count II-IV must be dismissed because it is undisputed that a contract between the parties existed. It is well established that a plaintiff may raise a breach-of-contract claim and allege in the alternative that a contract is invalid, meriting equitable relief. See *Morris Pumps v. Centerline Piping, Inc.*, 273 Mich App 187, 199; 729 NW2d 898 (2006). In this case, the parties dispute the scope of the Purchase Agreement and the enforceability of promises made outside of those specifically contained within the Purchase Agreement. Consequently, the Court is satisfied that Plaintiffs' alternative claims need not be dismissed at this stage of this matter.

C. Count V (Fraud)

In their motion, Defendants assert that Plaintiffs' fraud claim is barred by the economic loss doctrine. The economic loss doctrine provides that "[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." *Neibarger v Universal Cooperatives, Inc.*, 439 Mich 512, 486 NW2d 612 (1992). However, claims based upon fraud in the inducement are exempt from the economic loss doctrine. *Huron Tool and Engineering Co., v Precision Consulting Services, Inc.*, 209 Mich App 365; 532 NW2d 541 (1995). The standard for determining whether tort claims are barred by the economic loss doctrine was addressed in *Gen Motors Corp v Alumi-Bunk, Inc.*, 482 Mich 1080; 757 NW2d 859 (2008), where the Michigan Supreme Court adopted the dissenting opinion of the Michigan Court of Appeals written by Judge K.F. Kelly in *Gen Motors Cop v Alumi-Bunk, Inc.*, unpublished

opinion per curiam of the Court of Appeals, issued July 24, 2007 (Docket No. 270430)(Kelly, J, dissenting). In that case, General Motors (“GM”) submitted an offer to the defendants at a discount if the defendants agreed to “upfit” the vehicles before reselling them. GM’s breach of contract claim alleged that defendants breached the contract by failing to “upfit” the vehicles. GM’s fraud claim alleged that defendant fraudulently misrepresented that they would “upfit” the vehicles before selling them. After reviewing both claims, Judge Kelly concluded that “[c]learly, the fraud allegations are not extraneous to the contractual dispute as GM’s allegations of fraud are so intertwined with its allegations of breach of contract to be indistinguishable.” *Id.* at 5 (Kelly, J., dissenting.)

In this case, part of Plaintiffs’ breach of contract claim allege that Defendants breached the Purchase Agreement by failing to comply with various contractual provisions. Likewise, the majority of Plaintiffs’ fraud claim alleges that Defendants fraudulently misrepresented that they would comply with their contractual promises. (See Complaint, at ¶¶53-57.) Plaintiff’s fraudulent inducement claim alleges that Defendants induced them into entering into the Contracts by promising to comply with the contractual duties. Under the analysis utilized by Judge Kelly in *General Motors*, the majority of Plaintiffs’ fraud claim is not extraneous to their breach of contract claims as the claims allege the same facts as the basis for each claim. Accordingly, the Court is convinced that Plaintiffs’ fraud claim is barred by the economic loss doctrine to the extent it is based on Defendants’ alleged failure to satisfy its contractual promises.

Plaintiffs’ fraud claim is also based on allegations that they were induced into entering into the Purchase Agreement as a result of fraudulent misrepresentations.

While the facts of the case may ultimately determine that the economic loss doctrine also operates to bar the remainder of Plaintiffs' fraud claim, the Court is convinced that said portion of the claim does not fail on its face to state a claim. Consequently, the Defendants are not entitled to summary disposition of the remainder of Plaintiff's fraud claim pursuant to MCR 2.116(C)(8).

D. Count VI (Violation of the Texas Deceptive Practices Act)

In their motion, Defendants aver that Plaintiffs' claim for violation of the Texas Deceptive Practice Act is barred by the choice of law provision contained within the Purchase Agreement. Specifically, the Purchase Agreement provides:

8. Governing Law. The laws of the state of Michigan shall govern the enforcement and interpretation of this agreement and all other issues concerning the sale contemplated herein. [Plaintiffs] consent to the jurisdiction of Michigan courts and further agrees that the exclusive venue for any matter relating to payment for the equipment shall be in the courts of Macomb County, Michigan.

(See Exhibit A to Complaint.)

In their response, Plaintiffs contend that the above-referenced provision is a part of the unsigned Second Terms. However, the provision in question is a part of the First Terms, which were accepted in writing by Plaintiffs. (See Exhibit A to Complaint.) Consequently, Plaintiffs' position is without merit.

Plaintiffs' also contend that this Court should not apply the law of this jurisdiction, which is also the law contemplated by the parties' choice of law provision. In support of its position, Plaintiffs rely on *Martino v Cottman Transmission Systems, Inc.*, 218 Mich App 54, 60-61; 554 NW2d 17 (1996), *Chrysler Corp v Skyline Industrial Services, Inc.*, 448 Mich 113, 125; 528 NW2d 698 (1995), and *Busse v Pacific Cattle Feeding Fund No. 1, Ltd.*, 896 SW2d 807 (Tex App 1995). However, each of those cases involved

situations in which the plaintiff had brought suit in one state, but whether the parties' had contractually agreed to apply the law of a different state. In the above-referenced cases, the courts engaged in analysis to determine whether to apply the law of the jurisdiction where the case was filed or the law that parties had contractually agreed to apply.

In this case, the parties contractually agreed to bring any lawsuits arising from their relationship in this state and that this state's laws would apply. Consequently, the situation presented in this case is clearly distinguishable from those presented in the cases Plaintiffs rely upon. While the authority Plaintiffs rely upon would be on point had the parties contractually agreed to apply Texas law to their disputes, Plaintiffs have failed to provide the Court with any authority that would allow a plaintiff to bring a claim in a Michigan court based on another state's laws where the parties contractually agreed that Michigan law would apply. Consequently, the Court is convinced that Plaintiffs have failed to properly support their position that they are authorized to bring a claim under the Texas Deceptive Practices Act in this court absence a choice of law provision so authorizing such an act. As a result, the Court is convinced that Plaintiffs' claim under the Texas Deceptive Practices Act must be dismissed.

IV. Conclusion

For the reasons discussed above, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) is GRANTED, IN PART and DENIED, IN PART. Specifically:

- (1) Defendants' motion for summary disposition of the portions of Count I- Breach of Contract based on Defendants' alleged (a) failure to provide "white

glove" delivery, (b) failure to ship all the equipment in one shipment (c) failure to provide a plastic cadaver, (d) failure to provide on-site or paid-for training, (d) refusal to rescind the Purchase Agreement or issue a full refund, and (e) breach of the implied warranty of fitness for a particular purpose is GRANTED;

(2) Defendants' motion for summary disposition of the portions of Count I- Breach of Contract based on Defendants' alleged (a) failure to provide applications training, (b) provide timely and effective service, (c) breach of the implied warranty of good faith and fair dealing, and (d) breach of the implied warranty of merchantability is DENIED;

(3) Defendants' motion for summary disposition of Counts II-IV is DENIED;

(4) Defendants' motion for summary disposition of Count V- Fraud is GRANTED as to the portions of Plaintiffs' claim based on Defendants' failure to satisfy contractual promises specifically provided in the Purchase Agreement. Defendants' motion for summary disposition of Count V- Fraud is DENIED to the extent Plaintiffs' claim is based on promises made before the Purchase Agreement was executed; and

(5) Defendants' motion for summary disposition of Count VI- Violation of the Texas Deceptive Practices Act is GRANTED.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: MAY 25 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge