

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CLARENDON)

Carolina Tree Care,)

C. A. No. 2011-CP-14-3

Plaintiff,)

vs.)

ORDER

Supertrak, Inc. and Blanchard Machinery)
Company, Caterpillar Inc., Perkins)
Engines Co., Ltd.,)

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE)

11/27/13

Beulah H. Roberts

Defendants.)

CLERK OF COURT
CLARENDON COUNTY, SC

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

NOV 27 AM 8:59

This matter came before the court upon Defendants' motions to dismiss and Plaintiff's motion to amend the complaint. The motions were heard on August 20, 2013. With the consent of the Defendants, the court hereby grants Plaintiff's motion to amend the allegations of the complaint that pertain to its South Carolina Unfair Trade Practice (SCUTPA) cause of action. Having carefully reviewed the information submitted by the parties and having listened to oral arguments, for the reasons more fully explained below, the court hereby grants Defendants' motions to dismiss as to Plaintiff's negligent misrepresentation cause of action, and denies the motions as to Plaintiff's SCUTPA cause of action.

Pertinent Factual Allegations

This is a commercial dispute between entities arising from the sale of a heavy-duty mulching machine for commercial use. The machine, a Supertrak SK140TR, was manufactured by Supertrak, Inc. and purchased by Plaintiff as part of its forestry and tree care services business. Perkins manufactured the engine, which was marketed and sold as a Caterpillar engine. As more fully set forth in the Second Amended Complaint,

RECEIVED

DEC 16 2013

SC Court of Appeals

Plaintiff claims to have experienced “severe mechanical difficulties” with the machine after purchase, despite that it claims to have complied with maintenance procedures provided by the Defendants. Plaintiff further claims that it sought to have the machine repaired by all of the Defendants at differing times under the applicable warranties, if any, and otherwise, but despite Defendants’ efforts, the mechanical problems continued. Plaintiff claims the machine is now completely inoperable. The Plaintiff also claims that the Defendants misled the Plaintiff as to the cause of the mechanical problems and concealed important information as to the cause thereof.

Legal Findings

I) Plaintiff’s Negligent Misrepresentation Claim is Barred by the Economic Loss Rule.

For its Fifth Cause of Action, Plaintiff asserts a negligent misrepresentation claim against Defendants. Plaintiff alleges that Defendants misrepresented their ability to perform the repair work on the machine. Plaintiff’s allegation arises directly out of Defendants’ contractual obligations; thus, this is a claim that sounds in contract, and negligent misrepresentation is not applicable as a matter of law. Bishop Logging Co. v. John Deere Indus. Equip. Co., 317 S.C. 520, 530 (S.C. Ct. App. 1995) (“Contract law, specifically the Uniform Commercial Code, provides the exclusive rights and remedies under the economic loss doctrine to sophisticated parties in a commercial transaction when the product injures only itself and not other property belonging to the plaintiff.”)

In opposing dismissal of the negligent misrepresentation cause of action, the Plaintiff asserts two main points. First, the Plaintiff contends that the dismissal motion should be treated as one for summary judgment, because the motion relies upon matters outside the pleadings. In particular, the Plaintiff notes that the contract relied upon by

Caterpillar, Inc. and Perkins Engine Company, Ltd. is an express warranty, the existence of which is a matter of factual dispute. Likewise, the question of whether the Plaintiff had a contract with Blanchard Machinery Company is in dispute. Because (according to the Plaintiff) the Defendants' position depends upon these contested factual issues, the motion should be treated as one for summary judgment. Plaintiff claims that at the time of the hearing discovery was in its early stages, and that the motion should be denied on the authority cited in the Plaintiff's memorandum in opposition.

Second, the Plaintiff argues, primarily on the basis of *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995), that because the economic loss rule only operates to bar tort claims against parties with whom the Plaintiff has a contractual relationship, dismissal is not appropriate here because the only Defendant with whom the Plaintiff indisputably had a contract is Supertrak, Inc. The Plaintiff has consented to dismissal of the negligent misrepresentation claim against Supertrak, Inc., but argued in its brief and at the hearing that the motion should be denied as to the remaining Defendants until the question of the existence of a contract is resolved.

The Court is not persuaded by the Plaintiff's arguments, because it finds the facts of Bishop Logging to be materially indistinguishable from those in the instant case. In Bishop Logging, the plaintiff logging company purchased customized logging equipment from the defendant manufacturer. The equipment quickly began experiencing mechanical problems. The manufacturer made several attempts to repair the equipment pursuant to an express limited warranty, but was never able to get the equipment to operate to the satisfaction of the logging company. The logging company filed suit

alleging fraud, negligent misrepresentation, and breach of express warranty. Upon those facts, the Court of Appeals held negligent misrepresentation was not applicable as a matter of law due to the economic loss rule. Bishop Logging, 317 S.C. at 528-531, 455 S.E.2d at 188-189.

In the instant case, Plaintiff purchased equipment that it alleges is not operating properly. It alleges that Defendants have failed to repair the equipment pursuant to the warranties. Finally, just as in Bishop Logging, Plaintiff alleges Defendants made misrepresentations about their abilities to successfully repair the equipment. Since the facts of this case are materially indistinguishable from those in Bishop Logging, precedent demands the result must also be the same. Therefore, Plaintiff's negligent misrepresentation cause of action must be dismissed.

II) Unfair Trade Practice Act Claim Not Barred by Economic Loss Rule

Relying on the same factual allegations asserted in support of its negligent misrepresentation cause of action, Plaintiff alleges a violation of SCUTPA as its Sixth Cause of Action. Caterpillar and Perkins argue that a tort is defined as any civil wrong other than a breach of contract. See Sheppard v. Nienow, 254 S.C. 44, 173 S.E.2d 343 (1970). The term includes all civil wrongs, not just wrongs that were recognized at common law. See Green v. N.B.S., Inc., 180 Md. App. 639, 952 A.2d 364 (Md. Ct. App. 2008). One treatise concludes that an alleged violation of SCUTPA is a tort action. See F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts, 3rd. Ed., pp. 391-396. Therefore, Caterpillar and Perkins conclude that the economic loss rule should bar Plaintiff's SCUPTA claim for the same reasons it barred Plaintiff's negligent misrepresentation claim. Upon careful consideration of the arguments, including a review of cases in other jurisdictions, the court disagrees.

Though a violation of SCUTPA may well be a tort, the cause of action differs from Plaintiff's negligent misrepresentation claim in that it is a statutory cause of action. It is undisputed that the Legislature has the authority to enact laws creating causes of action. South Carolina Code § 39-5-160 provides that the "powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law." The court must presume that the Legislature was aware of the common law economic loss doctrine when it included this provision in the statute. It would create untenable separation of powers issues if courts used judicially created rules to strike down legislative enactments, especially when the statute provides that the remedies created under the statute are in addition to the remedies arising under the common law. See Comptech International, Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219 (Fla. 1999); Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So.2d 602, 609 (Fla. 2d DCA 1997) ("[C]ourts do not have the right to limit and, in essence, to abrogate... the expanded remedies granted to consumers under this legislatively created scheme by allowing the judicially favored economic loss rule to override a legislative policy pronouncement and to eliminate the enforcement of those remedies."); see also Ulbrich v. Groth, ___ A.3d. ___, 2013 Conn. LEXIS 377 (Conn. Nov. 12, 2013); contra Bussian v. DaimlerChrysler Corp., 411 F. Supp.2d 614 (M.D.N.C. 2005) (applying the economic loss rule to dismiss plaintiff's alleged claim under the North Carolina Unfair or Deceptive Trade Practices Act)(citing Coker v. DaimlerChrysler Corp., 2004 NCBC LEXIS 2 (2004)).

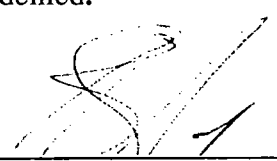
The court agrees with the logic of those courts that have held the economic loss rule does not bar statutorily created claims, such as SCUTPA. However, while Plaintiff's

SCUTPA claim has survived Defendants' motions to dismiss, it remains to be seen whether the claim will pass muster at the summary judgment stage.

For the reasons stated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's motion to amend the complaint is granted, Defendants' motions to dismiss Plaintiff's negligent misrepresentation cause of action are granted, and Defendants' motions to dismiss Plaintiff's SCUTPA cause of action are denied.

AND IT IS SO ORDERED.



George C. James, Jr., Judge
Third Judicial Circuit

November 25, 2013

