IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

BRANDON BECKERMEYER, on behalf of himself and other similarly situated,	:	August Term, 2002
Plaintiff,	:	No.: 00469
v.	:	COMMERCE PROGRAM
AT&T WIRELESS and PANASONIC TELECOMMUNICATIONS SYSTEMS COMPANY, DIVISION OF MATSUSHI ELECTRONIC CORPORATION OF AMERICA	:	CLASS ACTION
Defendants.	:	Control No. 022091

MEMORANDUM OPINION

C. DARNELL JONES, J.

Before the Court are the preliminary objections of AT&T Wireless ("AT&T") and Panasonic Telecommunications Systems Company, a division of Matsushita Electronic Corporation of America ("Panasonic")(collectively the "Defendants"). For the reasons more fully set forth below, the Defendants Preliminary Objections are **sustained** and Counts I, II and III are **dismissed**; however, the Plaintiff ("Brandon Beckermeyer"), may file an amended complaint in accordance with this Opinion and Order.

I. BACKGROUND

On August 21, 2001, Plaintiff purchased a Panasonic Duramax cell phone (the "Phone") designed by the Panasonic. Third Amended Complaint (the "Complaint") at ¶14. Plaintiff made his purchase through the internet from Nationwide Wireless ("Nationwide") who was allegedly

acting as an agent of AT&T at the time of the sale. Id. Prior to purchasing the Phone, Plaintiff alleges he told Nationwide that he did not intend to purchase wireless service from AT&T.[1] Id. at ¶15. Apparently, Plaintiff intended to purchase a cell phone that could be programmed to work with any wireless provider of his choosing. However, based upon the allegations in the complaint, this was specifically never communicated to Nationwide. Instead, Plaintiff simply stated that he did not intend to purchase AT&T service. Plaintiff alleges Nationwide never informed him that the Phone would only work with AT&T.

The Phone was shipped to the Plaintiff and it arrived "in an AT&T box, had an AT&T sticker and, when turned on read "AT&T Wireless". Id. at ¶16. Upon receipt of the Phone, Plaintiff attempted to use it with Cingular Wireless Service. Plaintiff's attempts failed. After contacting AT&T and Panasonic, Plaintiff was allegedly told that the Phone would not work with any wireless service provider other than AT&T. Id. at ¶17. Plaintiff also alleges that AT&T and Panasonic refused to accept a return of the Phone.[2] Id. Plaintiff then purchased wireless service from AT&T but became dissatisfied with the service after a few months. Id. at ¶21. As a result of the cancellation of the AT&T service, Plaintiff alleges he suffered a loss associated with early termination of the service contract. Plaintiff believes that he now owns a worthless paperweight.

[1] Plaintiff fails to allege the manner this communication took place, i.e. whether it was oral or by writing and also fails to allege the context of the communication, i.e. whether it was stated in the process of selecting a phone or as a part of the actual purchase. Specifics as to the sales process are not presented in the Complaint.

[2] Plaintiff does not allege or discuss whether he attempted to return the Phone to Nationwide, the actual seller.

Plaintiff's entire complaint is based upon his allegation that the Phone is "defective". The defect is the inability of the Phone to work with wireless providers other than AT&T. Plaintiff alleges that Panasonic and AT&T achieved this result by placing a locking device on the Phone prior to the sale that prevents it from being used with other wireless providers, thereby causing a defect.

Plaintiff filed a class action complaint against AT&T and Panasonic alleging they sold a defective product and, therefore, breached certain express and implied warranties. Plaintiff also alleges that he is representative of a class of individuals that purchased defective AT&T phones. AT&T and Panasonic filed preliminary objections to the Complaint which are now before the Court.

II. PRELINARY OBJECTIONS

A preliminary objection in the nature of a demurrer tests the legal sufficiency of the complaint. Constantino v. University of Pittsburgh, 2001 Pa.Super. 4, 766 A.2d 1265, 1268 (2001). The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Viglione v. Pennsylvania Dept. of Corrs., 781 A.2d 248, 250 n. 3 (Pa.Commw.2001). When considering preliminary objections, all material facts set forth in the complaint, as well as all inferences reasonably deducible therefrom are accepted as true, while conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion need not be regarded as such. Wagner v. Waitlevertch, 2001 Pa.Super. 100, 774 A.2d 1247, 1250 (2001).

Preliminary objections may only be granted in cases where it is clear and free from doubt that the facts alleged are legally insufficient to establish a right to relief. Stair v. Turtzo, Spry,

Sbrocchi, Faul & LaBarre, 564 Pa. 305, 309, 768 A.2d 299, 301 (2001). For that reason, a demurrer should not be sustained simply because of the novelty of a claim. Denton v. Silver Stream Nursing and Rehabilitation Center, 739 A.2d 571, 575 (Pa.Super.1999). Furthermore, if there is any doubt as to whether a demurrer should be granted, it should be resolved in favor of overruling the preliminary objections.) Lennon ex rel. v. Wyeth-Ayerst Laboratories Inc., 2001 WL 755944, *1 (Pa.Super. June 14, 2001). Albertson v. Wyeth Inc., 2003 WL 21544488, *5 (Pa.Com.Pl. 2003)

III. DISCUSSION

In his Complaint, the Plaintiff asserts three counts of liability against AT&T and Panasonic. The counts are (1) violation of the Magnuson Moss Warranty Act; (2) breach of warranties and (3) violation of the Unfair Trade and Consumer Protection Act ("UTP"). AT&T and Panasonic filed preliminary objections to the Plaintiff's complaint seeking a dismissal of all counts. AT&T asserts that (1) the Plaintiff's claims are preempted by federal telecommunication law and (2) the Plaintiff has failed to allege a defect. Panasonic filed its own preliminary objections and also joined in AT&T's preliminary objections. The Court does not need to address the Defendants' preemption argument because it finds that the Plaintiff has failed to allege a defect.

A. Magnuson Moss Warranty Act Claim.

The Court finds that the Plaintiff has failed to sufficiently plead a claim for violation of the Magnuson Warranty Act, 15 U.S.C. § 2310, *et seq*. Under this count, Plaintiff alleges the Defendants breached the implied warranty of merchantability and their own express limited

written warranty.[3] As discussed more fully below, the Court finds that the Plaintiff has not alleged a defect. As such, the Defendants did not violate any express warranty, implied warranty of merchantability or implied warranty of fitness for a particular purpose. Because the Magnuson Moss Warranty Act claim, as plead, relies solely on the finding of a breach of warranty, the claim fails.

B. Plaintiff Fails to Allege a Defect in the Phone and, Therefore, There Is No Breach of Warranties under Pennsylvania's Uniform Commercial Code

The Court finds that the Plaintiff does not allege facts upon which the Defendants could be held liable for breach of warranties. Initially, the Court notes that Count II of the Plaintiff's complaint fails to cite the specific warranty statutes that the Plaintiff alleges were violated. Instead, the Plaintiff puts the cart before the horse and cites to 13 Pa.S.C.A § 2-714, which only addresses damages for breach of warranty. Nonetheless, the complaint contains, at various places, allegations that the Defendants suffered damages as a result of breaches of express and implied warranties. Therefore, the Court will address the claims under the Pennsylvania warranty statutes found in Pennsylvania's Uniform Commercial Code, specifically, Title 13 Pa.C.S.A. §§ 2313 through 2314.

1. There Is No Breach Of An Express Warranty.

The Court finds that there is no breach of an express warranty by the Defendant. Title 13 Pa.S.C.A. §2313 provides for the following:

> (a) General rule.--Express warranties by the seller are created as

[3] Plaintiff raised for the first time additional claims under the Magnuson Moss Act in his brief in opposition to the Defendants' preliminary objections. Plaintiff alleges in his brief that the Defendants breached certain anti-tying provisions of the act and that the written warranties also violated the technical form requirements of the act. The Plaintiff's Complaint, and the two complaints prior, did not plead these theories of liability. Instead, the complaints dealt solely with a straight breach of express/implied warranty claims by virtue of an alleged defect. Therefore, the Court will not consider any of these new theories of liability since such theories are not pled in the complaint; however, Plaintiff is free to amend.

follows:

> (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (b) Formal words or specific intent unnecessary.-- It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the opinion of the seller or commendation of the goods does not create a warranty.

13 Pa.C.S.A. §2313 (West 2003).

The question at this stage is whether or not the Defendants made an express warranty, and if so, what was the warranty. Plaintiff alleges that each defendant issued a written warranty with the phone. The relevant parts of the written warranties that the Plaintiff claims were breached by the Defendants are set forth below.

The Panasonic limited warranty provided:

> Panasonic Telecommunications . . . will repair this product. . . in the event of a defect in manufacture or workmanship . . . .”

The AT&T limited warranty provided:

> This product is covered by a limited 1-year warranty . . . It is warranted to be free from defects in the workmanship and materials under normal use for a 1-yearperiod from the date of purchase.

Plaintiff asserts that these express warranties were breached by the Defendants because the Phone would not work with wireless providers other than AT&T.

The Court fails to see where the Defendants ever expressly warranted that the Phone would work with wireless providers other than AT&T. Plaintiff does not allege (1) AT&T, Panasonic or Nationwide, ever represented in any shape or form that the Phone would work as he wished and/or (2) the written warranties stated in any part that the Phone would work with wireless providers other than AT&T.

The language in the warranty that the Phone is free from defects cannot be examined in a vacuum as the Plaintiff wishes. Any product could be considered defective in materials and workmanship when the only criteria to judge it by are the unbounded expectations of a purchaser. In order to have an express warranty in this case, there would have had to been some representation that the Phone would work as the Plaintiff wished. Plaintiff fails to allege the Defendants ever represented to the Plaintiff, through advertisements, sales literature, oral assertions or in the warranty itself that the Phone would work with wireless providers other than AT&T. In this case, the Plaintiff made an assumption about the Phone that turns out was incorrect. Therefore, there can be no breach of an express warranty when there was never any representation made that the Phone would work with other wireless providers.

2. <u>There Is No Breach Of The Implied Warranty of Merchantability</u>

The Court finds that there is no breach of an implied warranty of merchantability. Title 13 Pa.C.S.A. § 2314 provides for the following:

> (a) Sale by merchant.--Unless excluded or modified (section 2316), 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. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a

> sale.
>
> (b) Merchantability standards for goods.--Goods to be merchantable must be at least such as:
>
> > (1) pass without objection in the trade under the contract description;
> >
> > (2) in the case of fungible goods, are of fair average quality within the description;
> >
> > (3) are fit for the ordinary purposes for which such goods are used;
> >
> > (4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
> >
> > (5) are adequately contained, packaged, and labeled as the agreement may require; and
> >
> > (6) conform to the promises or affirmations of fact made on the container or label if any.
>
> (c) Course of dealing or usage of trade.--Unless excluded or modified (section 2316) other implied warranties may arise from course of dealing or usage of trade.

13 Pa.C.S.A. § 2314 (West 2003).

The sole basis of the Plaintiff's claim is that he expected the Phone to work with other wireless providers. Plaintiff admits that (1) the Phone was designed to be used with only AT&T and (2) the Phone did work with AT&T, but he was dissatisfied with AT&T's service, not the Phone itself. Plaintiff simply bought the wrong product to suit his needs. Plaintiff tries to cover this fact by asserting that the Phone, purchased from an AT&T dealer, with an AT&T label, and displayed AT&T Wireless on its screen, should be able to be used with any wireless provider because it is a TDMA cell phone. Plaintiff asserts that all TDMA cell phones, when sold, should work with any wireless provider. Plaintiff's argument is simplistic at best.

Plaintiff essentially equates a defect with an alleged failure of AT&T and Panasonic to adequately advertise and/or inform consumers that the Phone would not work with wireless providers other than AT&T. Whether the Phone should have been advertised or otherwise sold in a fashion that may have more pointedly put a consumer on notice of the phone's limitations is a different issue than whether the phone is "defective". Plaintiff's Complaint really has nothing to do with the performance or abilities of the Phone when used as the Phone was intended. It admittedly worked fine with AT&T service. Rather, the Complaint is about the Plaintiff's perceived failure to be told that the Phone would not work with providers other than AT&T. Therefore, the Court finds that the Plaintiff has failed to allege facts that would support a claim of breach of the implied warranty of merchantability.

3. <u>There Is No Breach Of the Warranty Of Fitness For A Particular Purpose</u>

The Court also finds there is no basis for a claim of breach of warranty of fitness for a particular purpose. Neither of the Defendants ever received instructions or directions from the Plaintiff on a requirement that the Phone be able to be used with other wireless carriers. Moreover, the complaint is devoid of any allegation that the Plaintiff ever communicated to the seller that he wanted a phone that worked with wireless providers other than AT&T. Title 13 Pa.C.S.A. § 2314 provides:

> Where the seller at the time of contracting has reason to know:
>
> (1) any particular purpose for which the goods are required; and
>
> (2) that the buyer is relying on the skill or judgment of the seller to select or furnish suitable goods;
>
> there is unless excluded or modified under section 2316 (relating to exclusion or modification of warranties) an implied warranty that the goods shall be fit for such purpose.

13 Pa.C.S.A. § 2314 (West 2003). There are absolutely no allegations to support a contention that the Defendants knew of the Plaintiff's specific needs. Because the complaint lacks any allegations that would state a claim for breach of warranty of fitness for a particular purpose, the claim is dismissed.

C. There Is No Violation Of The Pennsylvania UTP

There are no violations of Pennsylvania's Unfair Trade and Consumer Protection Act. One of the statute's definitions of unfair or deceptive acts and practices is "failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made. 73 P.S. § 201-2(xiv)(West 2003). Plaintiff's UTP claim is solely based upon the allegation that the Defendants did not comply with their written warranties. As discussed above, the Court finds that there is no written guarantee or warranty that the Phone could be used as the Plaintiff's wished. Therefore, there can be no violation of the UTP based upon an alleged failure to comply with the terms of a written guarantee or warranty. Accordingly, the claim is dismissed.

IV. CONCLUSION

For the reasons more fully set forth above, the Court sustains the Preliminary Objections of the Defendants. Counts I, II and III of the Plaintiff's Third Amended Class Action Complaint are dismissed; however, the Plaintiff is granted 20 days to amend the complaint to assert Magnuson Moss Act anti-tying and/or warranty form violations.

BY THE COURT:

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C. DARNELL JONES, J.

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BRANDON BECKERMEYER, on behalf of himself and other similarly situated,	:	August Term, 2002
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AT&T WIRELESS and PANASONIC TELECOMMUNICATIONS SYSTEMS COMPANY, DIVISION OF MATSUSHI ELECTRONIC CORPORATION OF AMERICA	:	CLASS ACTION
Defendants.	:	Control No. 022091

ORDER AND MEMORANDUM

AND NOW, this _____ day of December 2003, upon consideration of the Preliminary Objections of AT&T Wireless ("AT&T") and Panasonic Telecommunications Systems Company, a division of Matsushita Electronic Corporation of America ("Panasonic")(collectively the "Defendants") to the Third Amended Complaint of Brandon Beckermeyer (the "Plaintiff"), all responses thereto and all matters of record, it is hereby

ORDERED and **DECREED** that the Defendant's Preliminary Objections are **SUSTAINED**, it is further

ORDERED and **DECREED** that Counts I, II and III of the Plaintiff's Third Amended Complaint are **DISMISSED**, it is further

ORDERED and **DECREED** that the Plaintiff shall have 20 days from the date of entry of this Order to file an amended complaint asserting claims under the Magnuson Moss Warranty Act relating to anti-tying and warranty form violations. If Plaintiff does not file an amended

complaint within the aforementioned 20 days, this action shall be dismissed.

BY THE COURT:

_____

C. DARNELL JONES, J.