

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF MONROE

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THOMAS SIMMONS and SIMM CORP.,

Plaintiff,

DECISION AND ORDER

v.

Index #2007/01204

WASHING EQUIPMENT TECHNOLOGIES and  
ARTHUR J. NORTH,

Defendant.

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Under CPLR §3025(a), a party may amend his or her pleading once as a matter of right, without leave of the court, within 20 days after its service, or at any time before the period for responding to it has expired. Here, rather than file an answer, defendants brought the motion to dismiss. A plaintiff may amend a complaint as a matter of right in the situation in which a defendant files a motion to dismiss, rather than filing an answer, which extends the defendants' time to answer the complaint, and thereby, also extends the plaintiffs' time to amend the complaint. Johnson v. Spence, 286 A.D.2d 481 (2d Dept. 2001); STS Mgt. Dev., v New York State Dept. of Taxation and Finance, 254 A.D.2d 409 (2d Dept. 1998). An amended pleading, when lawfully served, supercedes the original pleading. Aikens Construction of Rome, Inc. v. Simons, 284 A.D.2d 2d 946 (4th Dept. 2001). Consequently, the original pleading forms no part of the record, and the action proceeds as if the original pleading had never been served. Hawly v. Travelers Indemnity Co.,

90 A.D.2d 684 (4th Dept. 1982). Since defendants made no argument that the amended complaint was not accepted by defendants, it will be considered served for the purposes of this litigation, and the court considers the motion to dismiss the amended pleading only.

With respect to a cause of action for the breach of express warranty, the failure to set forth the terms of the alleged warranty with sufficient particularity to give fair notice thereof, will led to dismissal of the claim. Hicksville Dry Cleaners, Inc., v. Stanley Fastening Systems, L.P., \_\_\_\_ A.D.3d \_\_\_\_, 2007 WL 4135331 (1st Dept. February 8, 2007). An express warranty is defined as an a warranty contained in a contract of sale which is part of the purchase agreement, and the express warranty is as much a part of the contract as any other term. Danna Metro Heating Corp. v. Mobil Oil Corp., 203 A.D.2d 231 (2d Dept. 1994). Further, an express warranty can arise from the literature about a product. Imperia v. Marvin Windows of New York, Inc., 297 A.D.2d 621 (2d Dept. 2002). Moreover, an express warranty may be formed by an advertisement. Murrin v. Ford Motor Co., 303 A.D.2d 475 (2d Dept. 2003).

At first glance, the cause of action based upon breach of expressed warranty appears to be inadequate. That is because the cases indicate that one must have the contract to view when deciding what, if any, express warranties were allegedly breached

by defendant. Here, we never are shown the contract. Good practice would have meant that it would have been attached to the pleadings and there is no reason why it is not. However, despite that, plaintiff has a claim upon which relief may be granted. He is alleging that defendant held itself out as a company which were experts in the car wash business. As such, their "advertisement" that they could supply a product which would take care of the reclamation of the used water can be seen as an express warranty. They made the representation in their literature and as part of their attempt to sell their product. See Exhs. A and B of the Amended Complaint ("If there are no sewers, total reclaim must be used (W.E.T. can provide a solution for this problem.)"). UCC § 2-313. Thus, plaintiff is not relying on the warranties provided by the Rowafil manufacturer, cf., Luciano v. World-Wide Volkswagen Corp., 127 A.D.2d 1, 3-4 (3d Dept 1987), but is instead relying on W.E.T.'s separate promise to "provide a solution for this problem" of no sewers. Tillman & Deal Farm Supply, Inc. v Deal, 146 Ga. App. 232, 246 S.E.2d 138 (1978) (statement by a seller that the corn being sold was satisfactory for hog feed was held to constitute an affirmation of fact under UCC § 2-313(1)(a)); Auto-Teria, Inc. v. Ahern, 352 NE2d 774 (1976, Ind App) (statements to the effect that seller's coin-operated carwash's brush unit could be automatically operated by a customer's deposit of coins in the

meter, rather than by an attendant was affirmation of fact); Easton Farmers Elevator Co. v Chromalloy American Corp., 310 Minn. 568, 246 N.W.2d 705 (1976) (statements by the seller that its corn drier would dry over 1,500 bushels of corn an hour and that the drier would consume only 1 gallon of propane in drying 18 bushels of corn were held affirmations of fact); Pennsylvania Gas Co. v Secord Bros., Inc. 73 Misc.2d 1031, affd 44 A.D.2d 906 (4<sup>th</sup> Dept.)

Important here is that no disclaimers are relied on by defendants, and further that the language positing that defendants had a solution for the problem of no sewers was unqualified and not expressed in terms of opinion or otherwise hedged. In a similar case, the distinction was explained:

A related problem involves the degree to which the seller hedges in making an affirmation or promise. For example, in Hupp Corp. v. Metered Washer Service, [256 Or. 245, 472 P.2d 816, 8 UCC 42 (1970)], a buyer discovered that the clothes dryers he had purchased from the seller were defective. The seller then sold the buyer some parts and stated, "'[M]aybe' or 'we think that this might solve your problem.'" FN17 *Apparently because the language was so uncertain*, the Oregon Supreme Court held that this language was not an express warranty that the parts would correct the defects.

1 White & Summers, Uniform Commercial Code § 9-4, text at nn.16-17 (4th ed.) (emphasis supplied). The language in this case is unqualified and considerably more certain than in Hupp. Corp. although it may only be a very close case of express warranty. See Matlack, Inc. v. Hupp Corp., 57 F.R.D. 151, 157 (E.D.Pa.,

1972) ("against the background of the essentially novel character of the pneumatic unloading arrangement, it seems to us that the statement that the engine would 'fill the bill in all categories' makes out a pitifully weak case of express warranty"). Important also is the rule "that whether . . . advertising statements were warranties and a part of the bargain of sale to defendant or mere puffing was a question of fact." Opera v. Hyva, Inc., 86 A.D.2d 373, 379 (4<sup>th</sup> Dept. 1982). See also, Yuzwak v. Dygert, 144 A.D.2d 938, 939 (4th Dept. 1988) ("Whether representations made by a seller are warranties and, therefore, a part of the bargain, or merely expressions of the seller's opinion, or mere 'puffing,' is almost always a question of fact for a jury's resolution"). Accordingly, the statement of defendants that they had a solution to the problem of no sewers in a total reclamation system "are not so obviously 'puffing' that their significance should be determined as a matter of law." Id. 144 A.D.2d at 939-40. The motion to dismiss the express warranty claim is denied.

The cause of action grounded in implied warranty is also sustained. Here, it is clear that defendants held themselves out as experts in this market. They further indicated that they could provide a product which could solve the desalination and reclamation problem that did exist because the car wash was to be built off sewer. They are alleged to have known this fact when they contracted with plaintiff. Also, the facts show that the

building was built before the system was installed, so in that respect, the contract would have to have been entered into before the system was installed in the completed car wash. Plaintiff's biggest hurdle may be that he paid for the system by check in August 2004, which was after the plaintiff had complained about the Rowafil system that was installed, but acceptance with knowledge presents a factual question for the jury. There may still have been representations that the system could work for plaintiff and he was still required to pay for it. The check was made out to this defendant rather than the manufacturer, which supports plaintiff's submission that he dealt primarily with defendants.

A warrant of merchantability is implied in all sales of goods by a merchant, who is anyone who regularly deals in the kinds of goods involved in the transaction, or who, by occupation, holds himself out as having knowledge or skill relating to such goods. UCC §2-314(1); Saratoga Spa & Bath, Inc., v. Beeche Systems Corp., 230 A.D.2d 326 (3rd Dept. 1997); 4 A N.Y. Prac. Com. Litig.in New York State Courts §66:18. Further, where the seller, at the time of the contracting, has reason to know of a particular purpose for which the good is required and the a the buyer is relying on the seller's skill or judgment to select or furnish the goods, there is, unless excluded or modified by statute, an implied warranty that the good will be

fit for the purpose. UCC §2-315. In order to establish an implied warranty, the buyer must demonstrate that the seller was aware of the particular purpose for which the buyer intended to use the product, and that the buyer was justified in relying upon the seller's skill and judgment to select and furnish the particular good, and that the buyer did in fact rely upon that skill. Wojcik v. Empire Forklift, Inc., 14 A.D.3d 63 (3rd Dept. 2004); Saratoga Spa & Bath, Inc. v. Beeche Systems Corp, supra. Accordingly, the motion to dismiss the implied warranty claim is denied.

Inasmuch as the fraud cause of action is predicated on representations extraneous to the parties' contract and otherwise is sufficiently pled, I decline to dismiss it at this stage. Fresh Direct, LLC v. Blue Martini Software, Inc., 7 A.D.3d 487 (2d Dept. 2004). See also, Yuzwak v. Dygert, supra. In any event, because the parties' contract is not in the record, defendants fail to meet their burden on this 3211 motion to show that, necessarily, the fraud claim arises solely by virtue of defendants' breach of the express and implied warranties. Morgan v. A.O. Smith Corp., 221 A.D.2d 422 (2d Dept. 1995). In addition no disclaimers are alleged to be present.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: April 10, 2007  
Rochester, New York