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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

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TEDDY MOORE, et al.

INDEX NO. 029845/00

- against -

BY: KITZES, J.

MICROSOFT CORPORATION
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DATED: JUNE 5, 2001

Defendant Microsoft Corporation has moved for an order dismissing the complaint against it pursuant to CPLR 3211(a)(1) and (7).

On or about November 22, 2000, plaintiff Teddy Moore, an attorney, purchased Windows Me, which is manufactured by the defendant, to upgrade his computer's operating system. The defendant requires consumers to consent to an End-User License Agreement ("EULA") as a condition of using Windows Me. The EULA reads in relevant part: "This End-User License Agreement ('EULA') is a legal agreement between you (either an individual or a single entity) and Microsoft Corporation for the Microsoft Software identified above.* * *You agree to be bound by the terms of the EULA by installing, copying, downloading, accessing or otherwise using the software product." The EULA contains a disclaimer of warranties: "The limited warranty that appears above is the only express warranty made to you* * *. * * *Microsoft and its suppliers* * *hereby disclaim all other warranties and conditions, either express, implied, or statutory, including, but not

limited to, any (if any) implied warranties or conditions of merchantability, of fitness for a particular purpose* * *." The EULA further provides: "EXCLUSION OF INCIDENTAL, CONSEQUENTIAL, AND CERTAIN OTHER DAMAGES. To the maximum extent permitted by applicable law, in no event shall Microsoft or its suppliers be liable for any special, incidental, indirect, or consequential damages whatsoever (including* * *for negligence, and for any other pecuniary or other loss whatsoever) arising out of or in any way related to the use of or inability to use the SOFTWARE PRODUCT." "LIMITATION ON REMEDIES: NO CONSEQUENTIAL OR OTHER DAMAGES. Your exclusive remedy for any breach of this Limited Warranty is as set forth below. Except for any refund elected by Microsoft, YOU ARE NOT ENTITLED TO ANY DAMAGES, INCLUDING BUT NOT LIMITED TO CONSEQUENTIAL DAMAGES, if the SOFTWARE PRODUCT does not meet Microsoft's Limited Warranty, and, to the maximum extent allowed by applicable law, even if any remedy fails of its essential purpose." The EULA also elsewhere expressly excludes liability for incidental and consequential damages. The plaintiff alleges that the software would not function properly and that the installation of Windows Me damaged his computer. The plaintiff, purporting to bring a class action, seeks \$125,998.28 in consequential damages for himself and \$200,000,000 in damages on behalf of a proposed class. Microsoft offered him a refund.

That branch of the motion which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the first cause of action, which is for negligence, is granted. The

defendant argues that the first cause of action is barred by the "economic loss" doctrine. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated* * *." (Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 389.) "As a general rule, where a product fails to perform as promised due to negligence in either the manufacturing or installation process, a plaintiff is precluded from recovering tort damages for its economic loss* * *. The economic loss rule is based on the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort, unless a legal duty independent of the contract itself has been violated* * *." (Suffolk Laundry Servs. v Redux Corp., 238 AD2d 577, 578; see, Bristol-Myers Squibb, Indus. Div. v Delta Star, Inc., 206 AD2d 177.) In order to recover in tort, a plaintiff must allege sufficient facts to show that the defendant breached a duty of reasonable care distinct from or in addition to its contractual duty to manufacture the product in a reasonable manner. (See, Bristol-Myers Squibb, Indus. Div. v Delta Star, Inc., supra.) However, the economic loss rule may not be applicable where a product has malfunctioned and caused personal injury or damage to other property. (See, Syracuse Cablesystems v Niagara Mohawk Power Corp., 173 AD2d 138.) "Courts in this jurisdiction have generally adhered to the principle, commonly referred to as the 'economic loss rule,' that pure economic losses (without property damage or personal injury) are not recoverable in a negligence action, and that a claimant suffering purely financial losses is restricted to an

action in contract for the benefit of its bargain* * *." (532 Madison Avenue Gourmet Foods, Inc., 271 AD2d 49, 52 [emphasis added].) In the case at bar, the plaintiff has alleged that the software malfunctioned and caused damage to other property, that is, damage to the computer hardware. While the defendant contends that damage to other components integrated into a single unit are not regarded as damage to other property for purposes of the economic loss doctrine (see, Transport Corp. of America, Inc. v International Business Machines Corp., 30 F 3d 953), the court will not attempt to resolve the issue of whether there was damage to plaintiff's other property on a mere CPLR 3211(a)(7) motion. There is a clearer ground for dismissing the first cause of action. The EULA expressly excluded liability for negligence and expressly excluded liability for consequential and incidental damages. "[A]n exculpatory provision ordinarily will be enforced when its language 'expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence'* * *.'" (Uribe v Merchants Bank of N.Y., 91 NY2d 336, 341, quoting Lago v Krollage, 78 NY2d 95, 100; see, Bufano v National Inline Roller Hockey Ass'n., 272 AD2d 359; Perelman v Snowbird Ski Shop, 215 AD2d 809.)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(1)and (7) dismissing the second case of action, which is for unjust enrichment, is granted. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising

out of the same subject matter* * *." (Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., *supra*, 388.)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the third cause of action is granted. The third cause of action is for breach of the implied warranties of merchantability and fitness for a particular purpose. However, parties to a contract may exclude or modify implied warranties so long as the warranty disclaimer is conspicuous and specific (*see*, UCC 2-316[2]), and, in the case at bar, the EULA contains an effective disclaimer of those warranties. (*See*, UCC 1-201[10]; 2-316[2]; Nautilus Painting, Inc. v Cianbro Corp., 275 AD2d 975; Travelers Ins. Cos. v Conrad, Inc., 233 AD2d 890; Sky Acres Aviation Servs., Inc. v Styles Aviation, Inc., 210 AD2d 393.)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the fourth cause of action is granted. The fourth cause of action is for breach of express and implied warranties of fitness for a particular purpose. The complaint fails to adequately allege that Microsoft made an express warranty to the plaintiff, and, insofar as the implied warranty of fitness is concerned, the EULA contains an effective disclaimer. (*See*, UCC 1-201[10]; 2-316[2]; Nautilus Painting, Inc. v Cianbro Corp., *supra*; Travelers Ins. Cos. v Conrad, Inc., *supra*; Sky Acres Aviation Servs., Inc. v Styles Aviation, Inc., *supra*.) Moreover, the EULA precludes the plaintiff from recovering consequential damages for breach of warranty. (*See*, UCC 2-719[3]; Suffolk Laundry Servs. v Redux Corp., *supra*.)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the fifth cause of action, which is for strict liability, is granted. The EULA bars the recovery of consequential and incidental damages. (See, Uribe v Merchants Bank of N.Y., supra.)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the sixth cause of action, which is for violation of the General Business Law, is granted. The complaint fails to adequately allege that the defendant engaged in deceptive trade practices. (See, Stutman v Chemical Bank, 95 NY2d 24.)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the seventh cause of action, which is for "infliction of pain and suffering on the public" is granted. (See, Uribe v Merchants Bank of N.Y., supra.)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the eighth cause of action, which is for an accounting, is granted. (See, Kaminsky v Kahn, 23 AD2d 231.)

Short form order signed herewith.

J.S.C.