IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DIANE H. MURRAY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 09C-10-103 PLA
	)	
AMERICAN SUZUKI MOTOR CORPORATION,	)	
	)	
	)	
Defendant.	)	

ON DEFENDANT'S MOTION TO DISMISS
DENIED IN PART and GRANTED IN PART

Submitted: December 28, 2009
Decided: January 25, 2010

Kate G. Shumaker, Esquire, KIMMEL & SILVERMAN, P.C., Wilmington, Delaware, Attorney for Plaintiff.

Tracy A. Burleigh, Esquire, MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

I. Introduction

Plaintiff Diane Murray ("Murray") allegedly experienced persistent problems with her car that led her to file suit against its manufacturer, Defendant American Suzuki Motor Corporation ("Suzuki"). Murray claims that Suzuki has been unable to effectively repair the vehicle and has refused to replace it or compensate her. Her suit alleges violations of the Delaware Automobile Warranty Act (also known as the "Lemon Law"), the federal Magnuson-Moss Warranty Improvement Act, and the Delaware Consumer Fraud Act.

In the instant Motion to Dismiss the Complaint, Suzuki argues that Murray's inability to meet the Lemon Law's presumptions regarding whether a reasonable number of repair attempts occurred merits dismissal of her claims under that statute. Furthermore, Suzuki contends that Murray's breach-of-warranty claims brought pursuant to the Magnuson-Moss Act and the Consumer Fraud Act are untimely, because they were filed more than four years after Suzuki delivered the vehicle to the dealership.

For the reasons discussed more fully herein, the Court finds that even assuming Murray should not receive the benefit of the Lemon Law's presumptions, this does not imply that she is unable to prove her claim. As to Suzuki's second argument, the Court agrees that Murray's breach-of-warranty claims accrued on the date delivery was tendered by Suzuki to the dealership from which she

purchased her car. Accordingly, the Court finds that her warranty claims are time-barred. Therefore, Defendant's Motion to Dismiss will be **DENIED IN PART and GRANTED IN PART**.

II. Factual and Procedural Background

Murray purchased a new 2005 Suzuki Verona ("the Verona") from Castle Suzuki dealership in New Castle on March 22, 2006. The contract price was $17,994.00. The manufacturer, Defendant Suzuki, issued a 3-year/36,000-mile express limited warranty and a 7-year/100,000-mile powertrain warranty. Pursuant to this coverage, Suzuki agreed to repair or replace any defective parts or workmanship during the warranty periods.

According to Murray, she began experiencing problems with the Verona in February 2007, when the "Check Engine" light turned on after approximately 8,600 miles of use. Suzuki made repair attempts on February 7, 2007. One week later, on February 14, 2007, the Verona underwent further repairs to address the "Check Engine" light and the failure of the car's heater. From that point on, Murray alleges that the Verona was plagued by myriad problems, including repeated illumination of the engine warning and tire pressure lights; odometer failure; speedometer "scrambling" and inoperability; large leaks from the engine; gasket failure; vehicle hesitance; jerking or rough riding; and vehicle misfiring and

stalling.[1] Between July 2, 2007 (12,165 miles) and September 30, 2009 (35,198 miles), she brought the vehicle in for attempted repairs on twelve different occasions to address these issues.[2] Murray claims that Suzuki refused further repairs, even though the car continues to exhibit stalling, jerking, and failure to shift. Because of these ongoing problems, Murray states that she no longer uses the Verona.[3]

On October 9, 2009, Murray filed suit against Suzuki in this Court, alleging that the vehicle's use, value, and safety have been substantially impaired by its defects and nonconformities. Murray claims that Suzuki has violated the Delaware Automobile Warranty Act (Count I),[4] the Magnuson-Moss Warranty Improvement Act (Count II),[5] and the Delaware Consumer Fraud Act (Count III).[6]

Suzuki filed the instant Motion to Dismiss on November 25, 2009. The motion advances two arguments for dismissal. First, Suzuki contends that Murray's own Complaint demonstrates that her case does not meet the

[1] Pl.'s Compl, ¶¶ 12-21.

[2] As set forth in Murray's Complaint and attached exhibits, these further repair attempts occurred on the following dates: July 2, 2007; July 10, 2008; August 14, 2008; August 28, 2008; March 11, 2009; April 1, 2009; April 3, 2009; July 9, 2009; and September 30, 2009. Pl.'s Compl., ¶¶ 12-21 & Exs. B-M.

[3] Pl.'s Resp. to Def.'s Mot. to Dismiss, 1-2.

[4] 6 *Del. C.* §§ 5001-5009.

[5] 15 U.S.C. §§ 2301-2312.

[6] 6 *Del. C.* §§ 2511-2527.

presumptions provided for in § 5004 of the Lemon Law. This section establishes a rebuttable presumption that a reasonable number of repair attempts were undertaken if, within the shorter of one year of delivery to the consumer or the warranty term, a nonconformity was subject to four or more repair attempts or the plaintiff's vehicle was out of service for more than thirty days. Suzuki notes that within the year following delivery of the vehicle to Murray, only two repair attempts related to the alleged nonconformities occurred, and these attempts did not keep the vehicle out of service for more than nine days.[7] Suzuki portrays Murray's failure to meet the presumptions as a fatal defect in her Count I Lemon Law claim, as well to the portion of her Count III claim under the Delaware Consumer Fraud Act that derives from alleged violations of the Lemon Law.

Suzuki's second contention is that Murray's Magnuson-Moss claim is untimely under the four-year statute of limitations provided in 6 *Del. C.* § 2-725. Suzuki argues that any cause of action for breach of warranty accrued on the date it tendered delivery of the car to the dealership, and not on the date Murray accepted delivery. Suzuki notes that the exhibits to Plaintiff's Complaint confirm that the Castle Suzuki dealership received delivery of the vehicle and had conducted an initial pre-delivery inspection by November 30, 2004.[8] Because this suit was filed

[7] Def.'s Mot. to Dismiss, ¶¶ 5-6.

[8] Pl.'s Compl., Ex. B.

in October 2009 and the "time of discovery" rule will not toll the limitations period in a breach of warranty action, Suzuki contends that the Court must dismiss Count II and the portion of Murray's Delaware Consumer Fraud Act claim alleging failure to comply with warranties.

In response, Murray denies that she must establish that the Lemon Law's presumptions regarding a reasonable number of repair attempts in order to prevail on a Lemon Law claim. She also contends that her cause of action under the Magnuson-Moss Act did not accrue until delivery was tendered to her on March 22, 2006. Because Murray "had no knowledge of when the Vehicle was delivered to the dealer," she argues that calculating the limitations period from that date would deprive her of the benefit of her bargain, and in particular of the warranty protections that she believed were part of her purchase.[9] Because she filed suit less than four years after she received delivery, she submits that her claim was timely filed.

III. Standard of Review

Upon a motion to dismiss, the Court subjects a statement of claim to a broad test of sufficiency.[10] Dismissal is appropriate only if it is reasonably certain "that

[9] Pl.'s Resp. to Def.'s Mot. to Dismiss, ¶ 9.

[10] *C&J Paving, Inc. v. Hickory Commons, LLC*, 2006 WL 3898268 (Del. Super. Jan. 3, 2007).

the plaintiff could not prove any set of facts that would entitle him to relief."[11] A plaintiff's claim will not be dismissed unless it clearly lacks factual or legal merit.[12] When considering a motion to dismiss, the Court will accept all well-pleaded allegations as true.[13] In addition, every reasonable factual inference will be drawn in favor of the plaintiff.[14]

IV. Analysis

A. The Presumptions of § 5004 Do Not Provide a Defense to Lemon Law Claims

A consumer is entitled to remedies under § 5003 of Delaware's Lemon Law when "the manufacturer, its agent or its authorized dealer does not conform the automobile to any applicable express warranty by replacing or correcting any nonconformity *after a reasonable number of repair attempts*."[15] In her attempt to establish that a reasonable number of repair attempts have occurred, the consumer may avail herself of the presumptions set forth in § 5004(a), which provides as follows:

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[11] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

[12] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

[13] *Spence v. Funk*, 396 A.2d at 968; *Wyoming Concrete Indus. Inc., v. Hickory Commons, LLC II*, 2007 WL 53805, at *1 (Del. Super. Jan. 8, 2007) (citing *Ramunno*, 705 A.2d at 1036).

[14] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

[15] 6 *Del. C.* § 5003(a) (emphasis added).

> It shall be presumed that a reasonable number of attempts have been undertaken to conform a new automobile to the manufacturer's express warranty if, within the warranty term or during the period of 1 year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date:
>
> (1) Substantially the same nonconformity has been subject to repair or correction 4 or more times by the manufacturer, its agents or its dealers and the nonconformity continues to exist; or
>
> (2) The automobile is out of service by reason of repair or correction of a nonconformity by the manufacturer, its agent or its dealers for a cumulative total of more than 30 calendar days since the original delivery of the motor vehicle to the consumer. . . .[16]

Although § 5004 is intended to aid consumer-plaintiffs, Suzuki attempts to subvert it to create a manufacturer's defense, arguing that because the facts of this case do not "meet the presumption," Murray's Complaint must be dismissed.

A straightforward reading of the relevant statutory sections—or even just their titles—shows the flaw in Suzuki's logic. To put it simply, "presumptions" (as § 5004 is labeled) are not elements. Nothing in the Lemon Law *requires* that a consumer be able to satisfy either subsection of § 5004(a) to proceed with a claim; rather, the consumer must be able to meet her burden under § 5003 of establishing that the defendant has been afforded a "reasonable number of repair attempts," which is ultimately a question of fact for trial. The presumptions of § 5004 may assist the consumer in proving her case where they apply, but they are not the only

[16] 6 *Del. C.* § 5004(a).

means by which the consumer can show that a reasonable number of repair attempts were undertaken.

Murray may have prompted Suzuki's rather strained argument by suggesting in her Complaint that she will pursue the presumptions,[17] even though the factual allegations in that Complaint do not appear to satisfy the requirements of § 5004. However, even assuming this is the case, Murray's overambitious pleading does not end her claim. The language of the Complaint places Suzuki on notice of the nature of Murray's Lemon Law claim and the basis for it. If further development of the facts confirms that Murray cannot satisfy § 5004, she remains free to present relevant evidence suggesting that Suzuki was provided a reasonable number of repair attempts so that this factual issue, along with the other elements of her Lemon Law claim, may be decided by a jury.

B. Murray's Magnuson-Moss Act Claim is Time-Barred by 6 *Del. C.* § 2-725

Turning to Suzuki's second argument, the Court holds that under well-established Delaware law, Murray's breach-of-warranty claims accrued upon Suzuki's delivery of the Verona to the Castle Suzuki dealership and are therefore untimely filed.

[17] Pl.'s Compl., ¶¶ 32-33.

Because the Magnuson-Moss Act contains no statute of limitations, courts must look to their state's statute of limitations for similar claims.[18] Delaware courts have turned to the limitations period set forth in § 2-725 of Delaware's version of the Uniform Commercial Code.[19] Thus, claims brought under the Magnuson-Moss Act must be brought "within 4 years after the cause of action has accrued."[20] Section 2-725(1) governs the time of accrual:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.[21]

As will be discussed below, the manufacturer's warranties at issue in this case do not extend to future performance.

The parties dispute whether, in the context of a claim brought against a vehicle manufacturer, "tender of delivery" refers to the manufacturer's delivery to a dealership or other middleman, or to the delivery of the vehicle to the end consumer. Because Murray filed suit more than four years after Suzuki delivered

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[18] *See, e.g.*, *Dalton v. Ford Motor Co.*, 2002 WL 338081, at *5 (Feb. 28, 2002).

[19] *Id.*

[20] 6 *Del. C.* § 2-725(1).

[21] 6 *Del. C.* § 2-725(2).

the Verona to the dealership, but less than four years after the dealership delivered the car to her, a different result will obtain depending upon which interpretation is applied.

Unfortunately for Murray, when called upon to interpret the relevant "delivery" under § 2-725, this Court has repeatedly held that "the warranty limitations period accrues on the date the defendant charged with the breach tenders delivery."[22] In *Wilson v. Class*, this Court articulated its rationale for rejecting the tender to the consumer as the operative "delivery" date, noting that such a theory "would mean that a manufacturer and some middlemen would face an unknown statute of limitations that would be based on the 'shelf life' of the wholesaler or retailer. This is not an advisable nor [an] acceptable result."[23]

The time of delivery to the consumer may be relevant if the date that a defendant-manufacturer tendered delivery is unknown.[24] In the absence of this information, the limitations period can be calculated from the date of delivery to the consumer, on the basis that the consumer could not have accepted delivery of a vehicle earlier than the date the manufacturer delivered it to the dealer.[25] As

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[22] *Wilson v. Class*, 605 A.2d 907, 910 (Del. Super. 1992); *see also Jakotowicz v. Hyundai Motor Am.*, 2005 Del. Super. LEXIS 283 (Del. Super. Aug. 17, 2005).

[23] 605 A.2d at 910 (citation omitted).

[24] *Id.* at 909-10.

[25] *Id.* at 909 (discussing *Amoroso v. Joy Mfg. Co.*, 531 A.2d 619 (Del. Super. 1987)); *see also Jakotowicz.*, 2005 Del. Super. LEXIS 283, at *15.

plaintiff has pointed out in her references to *Stenta v. General Motors Corp.*[26] and *Pender v. DaimlerChrysler Corp.*, [27] past decisions have risked confusion by referring to the dealer's tender to the consumer as the "date of delivery" without further explanation or any indication of whether the date of the manufacturer's delivery was known. Both *Stenta* and *Pender*, however, involved claims that were time-barred regardless of which date was used, and they should be read as emphasizing that dismissal was appropriate even if the date of the manufacturer's delivery was unavailable. The rationale of *Wilson* requires that a claim accrue from the date on which the manufacturer tendered delivery to the dealer, and that the consumer's delivery date may be used as a stand-in "date of delivery" only in the absence of more specific information.[28]

Using tender by the manufacturer as the operative "date of delivery" has the apparently perverse result of subjecting Magnuson-Moss claims to a statute of limitations that can operate harshly against the consumers that the law was intended to protect. In a case such as this, the consequence of this approach is that the time during which the consumer can enforce a Magnuson-Moss claim may be extremely brief simply because her new vehicle sat in a dealership's inventory for

[26] 2009 WL 1509299, at *9 (Del. Super. May 29, 2009).

[27] 2004 WL 2191030, at *4 (Del. Super. July 30, 2004).

[28] *See Jakotowicz*, 2005 Del. Super. LEXIS 283, at *14.

a lengthy period before she purchased it. More generally, applying § 2-725 to Magnuson-Moss claims leaves consumers who have received express repair-or-replace warranties extending longer than four years without a mechanism for legal enforcement after the expiration of the four-year limitations period.

Some jurisdictions ameliorate these arguable pitfalls through a variety of alternative approaches, such as construing express repair-or-replace warranties as relating to future performance[29] or holding that claims for repair warranty breaches begin to accrue when the manufacturer breaches its contractual obligation to repair.[30] Delaware courts, however, have consistently held that a Magnuson-Moss claim accrues on the "date of delivery," despite their occasional lapses in defining that term by the consumer's delivery date without sufficient explanation. Our cases have also been consistent in construing § 2-725(2)'s "future performance" exception narrowly to reject arguments that manufacturers' repair-or-replace warranties fall within its purview.[31] This Court is not in a position to depart from its longstanding precedents, particularly when there is, as *Wilson* details, a

[29] *See, e.g.*, *Nationwide Ins. Co. v. Gen. Motors Corp.*, 625 A.2d 1172, 1177-78 (Pa. 1993).

[30] *See, e.g.*, *Brown v. Gen. Motors Corp.*, 14 So.3d 104, 113 (Ala. 2009).

[31] *Jakotowicz*, 2005 Del. Super. LEXIS 283, at *11-12; *Pender*, 2004 WL 2191030, at *4-5 ("The warranties here are repair or replacement warranties. Even though Plaintiff purchased an extended, service contract, the 'future performance' exception is inapplicable . . . . Defendant agreed to cover the cost of parts and labor needed to repair any defective, covered component. The warranties do not include performance assurances by Defendant or guarantees that repairs will be unnecessary."); *Dalton*, 2002 WL 338081, at *4 (citing *Sellon v. Gen. Motors Corp.*, 571 F. Supp. 1094, 1098 (D. Del. 1993)).

countervailing interest in providing manufacturers with predictable limitation periods that is served by the current rule.

In this case, the manufacturer is the sole defendant. It tendered delivery no later than late November 2004, when the dealership first recorded that the Verona was in its inventory.[32] Murray's Magnuson-Moss claim, filed almost five years later in October 2009, is untimely.

V. Conclusion

For the above reasons, Defendant's Motion to Dismiss is **DENIED IN PART** as to Count I of the Complaint, and **GRANTED IN PART** as to Count II and the breach-of-warranty portion of Plaintiff's Delaware Consumer Fraud Act claim under Count III.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Kate G. Shumaker, Esq.
Tracy A. Burleigh, Esq.

[32] *See* Pl.'s Compl., Ex. B.