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United States District Court,
N.D. Georgia, Atlanta Division.

FITZTHORS ENGINEERING, INC., Plaintiff,
v.
KUKA ROBOTICS CORP., et al., Defendants.

CIVIL ACTION FILE NO. 1:21-CV-728-TWT
|
Signed January 25, 2023

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OPINION AND ORDER

THOMAS W. THRASH, JR., United States District Judge

***1** This is a fraud action. It is before the Court on the Defendants' Motion for Summary Judgment [Doc. 81]. For the reasons set forth below, the Defendants' Motion for Summary Judgment [Doc. 81] is GRANTED in part and DENIED in part.

I. Background[1]

This case arises from the sale of commercial machinery. The Plaintiff, FitzThors Engineering, Inc. ("FTE"), contracted with Shaw Industries Group, Inc. ("Shaw") to provide integration, engineering, and design services to support the automation of Shaw's manufacturing processes. (Defs.' Statement of Undisputed Material Facts ¶ 11, 20). As a part of their agreement, Shaw required that the Plaintiff deliver several autonomously guided vehicles (AGVs)—an AGV is a "portable, autonomous robot that follows along marked lines or wires on the floor, or uses radio waves, vision cameras, magnets, or lasers for navigation." (*Id.* ¶ 20; Compl. ¶ 8). The Defendant Kuka Robotics Corp. ("Kuka") sells industrial robots and solutions to support factory automation. (Defs.' Statement of Undisputed Material Facts ¶ 9; Compl. ¶ 6).

In January 2019, FTE's employee, John Cook, met with Kuka representatives Denise Ebenhoech and Defendant Brian Kocks[2] to discuss the potential sale of Kuka's AGVs to the Plaintiff. (Defs.' Statement of Undisputed Material Facts ¶ 33). During this meeting, the Plaintiff alleges that Kuka and Kocks falsely claimed that Kuka's AGV, the KMP 1500, could achieve a "positional accuracy" of ± 5mm. (Compl. ¶ 9). The Defendants dispute the allegations that Kocks made any such representation. (Defs.' Statement of Undisputed Material Facts ¶ 34). Following these discussions, the Defendants provided a quote for four KMP 1500s (the "Quote"), and in response to the Quote, the Plaintiff issued a purchase order for the AGVs (the "Contract"). (*Id.* ¶ 42). The parties dispute whether Kuka's standard Terms and Conditions were incorporated into the Contract. (*Id.* ¶ 47; Pl.'s Statement of Additional Undisputed Material Facts ¶ 26).

When the Plaintiff began its work on Shaw's automation process, it alleges that it experienced issues with the positional accuracy of the KMP 1500s—specifically, the AGVs could not reliably achieve a positional accuracy of ± 10mm. (Pl.'s Statement of Additional Undisputed Material Facts ¶ 12). The Defendants claim that the Plaintiff's issues with the KMP 1500s were attributable to the "application codes" that FTE employees wrote for the AGVs. (Defs.' Statement of Undisputed Material Facts ¶ 67). The Plaintiff claims that the KMP 1500s were unable to achieve the positional accuracy due to the Defendants' failure to disclose the need of a special camera system, which the AGVs did not have, to achieve ± 5mm accuracy. (Pl.'s Statement of Additional Undisputed Material Facts ¶ 17).

***2** After several months of additional work and troubleshooting, the Plaintiff alleges that it put the Shaw project on hold in March 2020 and awaited additional direction from Kuka regarding possible fixes for the issues. (Compl. ¶ 20). When a solution was not found, the Plaintiff alleges that in July 2020, Kuka told the Plaintiff that "it could not resolve the defects with the KMP 1500s" and "acknowledged that the KMP units were not going to meet the accuracy requirements based on the core technology that was marketed to, and purchased by," the Plaintiff. (*Id.* ¶ 21).

As a result of these issues and the resulting costs, the Plaintiff brings claims against Kuka, Benfield, and various Fictitious Defendants. (*Id.* ¶¶ 4, 30–73). Against Kuka, the Plaintiff brings claims of Breach of Implied Warranties (Count IV), Breach of Express Warranties (Count V), and Unjust Enrichment (Count VII). Against Kuka and Benfield, the Plaintiff brings claims of Fraudulent Misrepresentation (Count I) and Negligent and/or Wanton Misrepresentation and Suppression (Count VI). Against Kuka and the Fictitious Defendants, the Plaintiff brings a Negligent and/or Wanton Repairs claim (Count III). Finally, against all of the Defendants, the Plaintiff brings a claim of Fraudulent Suppression and/or Concealment (Count II). The Defendants now move for summary judgment as to all of the Plaintiff's claims.

II. Legal Standard

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c). The court should view the evidence and draw any inferences in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

III. Discussion

The Defendants move for summary judgment as to all of the Plaintiff's claims, though their arguments read more like those of a motion to dismiss than a motion for summary judgment. They argue that the absence of a "separate and distinct" legal duty and the economic loss doctrine, among other reasons, bar the fraud, negligence, and misrepresentation claims. (Br. in Supp. of Defs.' Mot. for Summ. J., at 1). The Defendants also contend that certain provisions of the Contract bar the Plaintiff's claims for breach of express and implied warranties and that the existence of the Contract bars the Plaintiff's unjust enrichment claim. (*Id.* at 1–2). Finally, the Defendants argue that the Contract bars claims for lost profits and punitive damages. (*Id.* at 2). In response, the Plaintiff argues that because some of its claims involve fraud, summary judgment is almost never appropriate, as is the case here. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 2). The Court addresses each of the Defendants' arguments and the Plaintiff's responses thereto in turn.

A. Choice of Law

The Defendants first argue that Michigan law governs the present dispute because the Plaintiff accepted the Defendants' Quote by issuing a purchase order for the AGVs without objecting to the Quote's Terms and Conditions, which included a provision stating that Michigan law governed the sale. (Br. in Supp. of Defs.' Mot. for Summ. J., at 3–4). The Plaintiff disputes this contention, arguing that Georgia law governs because the Contract's choice of law provision is invalid under Georgia precedent. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 4).

***3** Under Georgia law, the traditional rule of *lex loci contractus* governs choice of law issues. *Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc.*, 133 F.3d 1405, 1409 (11th Cir. 1998). That rule provides that "the validity, nature, construction, and interpretation of a contract are governed by the substantive law of the state where the contract was made." *Id.* (citation omitted). However, "where the contract is made in one state and is to be performed in another state, the substantive law of the state where the contract is performed will apply." *Lloyd v. Prudential Sec., Inc.*, 211 Ga. App. 247, 248 (1993). Here, the parties do not appear to dispute that the contract was either made (or to be performed) in Georgia. Thus, Georgia law governs this choice of law issue.

In Georgia, " 'parties by contract may stipulate that the laws of another jurisdiction will govern the transaction,' unless the law is contrary to Georgia public policy, or the chosen jurisdiction has no substantial relationship to the parties or the transaction." *Rayle Tech*, 133 F.3d at 1409 (citations omitted). Indeed, a choice of law clause is "presumptively valid where the underlying transaction is fundamentally international in character." *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1295 (11th Cir. 1998) (quotation marks and citation omitted). That presumption of validity, however, may be overcome "by a clear showing that the clauses are 'unreasonable under the circumstances.' " *Id.* (citation omitted).

> Choice clauses will be found "unreasonable under the circumstances," and thus unenforceable only when: (1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of such provisions would contravene a strong public policy.

Id. at 1296 (citations omitted). The Plaintiff argues that the Contract's choice of law clause is unreasonable under the first, second, and third factors. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 4–6).

Regarding the first factor, the Eleventh Circuit considers "whether the clause was reasonably communicated to the consumer" in assessing formation induced by fraud or overreaching. *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009). Such reasonable communicativeness turns on the "clause's physical characteristics and whether [the party contesting the clause] had the ability to become meaningfully informed of the clause and to reject its terms." *Id.* In *Krenkel*, the Eleventh Circuit determined that the clause at issue was valid because it "was not hidden or ambiguous" but rather was on a one-page form, was set apart in a separate paragraph, and contained the disclaimer, "READ BEFORE SIGNING." *Id.* at 1281–82.

The Plaintiff argues that the present case is distinguishable from *Krenkel* because the language at issue here was "buried in a 4-page, two-column, small font, non-capitalized or bolded, paragraph within a document that was not provided to [the Plaintiff] in advance." (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 5). In reply, the Defendants contend that a party cannot claim unreasonable communicativeness when nothing prevented the party from clicking on a hyperlink that contained the terms and conditions of the contract, including a governing choice of law provision. (Reply Br. in Supp. of Defs.' Mot. for Summ. J., at 3 (citing *Feggestad v. Kerzner Int'l Bahamas Ltd.*, 843 F.3d 915, 918–19 (11th Cir. 2016), and *Muniz v. Fenix Int'l Ltd.*, 2021 WL 3417581, at *3 (N.D. Ga. June 28, 2021))). The Court agrees with the Defendants. The Plaintiff points to "nothing that prevented [it] from clicking on the link to read the terms and conditions that would apply to" its Contract with the Defendants, and therefore, the Plaintiff received reasonable communication of the choice of law provision. *Feggestad*, 843 F.3d at 919.

***4** Regarding the second and third prongs, the Plaintiff argues that the unfairness factors apply because the independent tort and economic loss doctrines under Michigan law would bar some of its claims. But the Plaintiff cites no Georgia legal authority suggesting that a potentially adverse result under the application of the chosen law inherently constitutes unfairness. And the Plaintiff does not expand upon how application of Michigan law would deprive it of its day in court or of a remedy, nor does the Plaintiff cite any authority under similar facts establishing what it asks this Court to hold at present.[3] Accordingly, the Court concludes that the choice of law provision is valid and thus that Michigan law governs the present dispute.

B. Tort Claims

The Defendants contend that the Plaintiff's tort claims should be dismissed (1) because no "separate and distinct duty" independent of the parties' contractual relationship exists to support such claims, and (2) because the economic loss doctrine bars the claims. (Br. in Supp. of Defs.' Mot. for Summ. J., at 4, 7). The Plaintiff argues, in response, that the Complaint's allegations arose independent of the Contract and that the fraudulent inducement exception to the economic loss doctrine applies. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 7, 11). Because the separate duty doctrine and the economic loss doctrine bear strong resemblance under Michigan law, the Court addresses them here in turn.

1. Separate Duty Doctrine

The Defendants contend that because "an action in tort will not arise for a breach of contract unless the action in tort would arise independent of the existence of the contract," the Plaintiff's tort claims in this case should be barred. (Br. in Supp. of Defs.' Mot. for Summ. J., at 4 (quoting *Theuerkauf v. United Vaccines Div. of Harlan Sprague Dawley, Inc.*, 821 F. Supp. 1238, 1241 (W.D. Mich. 1993))). The Defendants rely primarily on *Merchants Publishing Co. v. Maruka Machinery Corp. of America*, 800 F. Supp. 1490 (W.D. Mich. 1992), in support of their position that the Plaintiff's allegations could not have arisen without the Contract. (Br. in Supp. of Defs.' Mot. for Summ. J., at 5).

In *Merchants Publishing Co.*, the U.S. District Court for the Western District of Michigan granted the defendants' motion to dismiss the plaintiff's fraudulent and negligent misrepresentation claims pertaining to the sale of a "faulty printing press" from the defendants. *Merchants Publ'g Co.*, 800 F. Supp. at 1491, 1493. The Western District reasoned that the plaintiff's operative allegations were contractual in nature, "would not arise without the existence of the putative contracts between the parties," and "therefore [could] not be maintained as tort-based claims." *Id.* at 1493. Here, the Defendants contend that like the claims in *Merchants Pub.*, the Plaintiff's fraud, negligence, and misrepresentation claims would not have arisen without the existence of the Contract and therefore should be dismissed. (Br. in Supp. of Defs.' Mot. for Summ. J., at 5). In response, the Plaintiff argues that the Defendants' fraudulent inducement in selling the AGVs makes the Contract voidable by the Plaintiff and thus that its tort claims should survive summary judgment because no contractual obligations existed such that its tort claims needed to arise from separate legal duties. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 7–8 (citing *Diamond Computer Sys., Inc. v. SBC Commc'ns, Inc.*, 424 F. Supp. 2d 970, 981 (E.D. Mich. 2006), and *Samuel D. Begola Servs., Inc. v. Wild Bros.*, 210 Mich. App. 636 (1995))).

***5** In its response brief, the Plaintiff does not point to any separate and distinct legal duty contained in its Complaint that would directly refute the Defendants' contention on this point. (*See id.* at 6–11). In addition, the Plaintiff seeks to maintain breach of express and implied warranty claims in its Complaint, which undermines its argument here that the Contract was voidable. Accordingly, the Plaintiff cannot avoid summary judgment on its tort claims under this theory. The Plaintiff's reliance on *Diamond Computer* and *Samuel D. Begola*, however, overlaps with its reliance on the fraudulent inducement exception to the economic loss doctrine, considered below.

2. Economic Loss Doctrine

The Defendants then argue that the economic loss doctrine bars the Plaintiff's claims for fraud, negligence, and misrepresentation. (Br. in Supp. of Defs.' Mot. for Summ. J., at 7). In response, the Plaintiff contends that the fraudulent inducement exception to the economic loss doctrine, though construed narrowly in Michigan, allows the Plaintiff's claims. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 11–14).

Under Michigan law, the economic loss doctrine "prohibits a party to a contract from bringing tort claims that are factually indistinguishable from breach of contract claims."[4] *Llewellyn-Jones v. Metro Prop. Grp., LLC*, 22 F. Supp. 3d 760, 778 (E.D. Mich. 2014). Michigan courts, however, recognize fraud in the inducement as an exception to the economic loss doctrine. *Id.* The exception "addresses a situation where the claim is that one party was tricked into contracting. It is based on pre-contractual conduct which is, under the law, a recognized tort." *Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.*, 209 Mich. App. 365, 371 (1995).

> Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely—which normally would constitute grounds for invoking the economic loss doctrine—but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior. In contrast, where the only misrepresentation by the dishonest party concerns the quality or character of the goods sold, the other party is still free to negotiate warranty and other terms to account for possible defects in the goods.

> The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction ... between fraud extraneous to the contract and fraud interwoven with the breach of contract. With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.

Id. at 372–73 (citation omitted).

The Defendants rely on *Theuerkauf*, 821 F. Supp. 1238, in support of their position on the economic loss rule. (Br. in Supp. of Defs.' Mot. for Summ. J., at 7–9). In that case, the plaintiff purchased vaccines from the defendant to immunize his breed stock mink, and the plaintiff brought suit after the vaccines allegedly harmed the mink. *Theuerkauf*, 821 F. Supp. at 1241. The U.S. District Court for the Western District of Michigan dismissed the plaintiff's negligence and fraud claims under the economic loss doctrine because the dispute was "in essence a contractual dispute in which the damage arose out of the commercial sale of goods." *Id.*

The Plaintiff contends, in response, that the fraudulent inducement rule, as set forth in *Huron Tool*, captures the essence of the fraud it alleges here—that it was "induced into purchasing the robots through both verbal misrepresentations made by the Defendants as well as Kuka's marketing material, prior to making the purchase." (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 13). The Plaintiff also argues that the instant matter is similar to *Llewellyn-Jones*. (*Id.* at 13–14). In that case, the plaintiffs alleged that the defendants fraudulently induced them into investing in rental properties "with false promises that the homes were refurbished, approved under a federal housing program standard, already tenanted, and would yield a specific rate of return each year." *Llewellyn-Jones*, 22 F. Supp. 3d at 770. The defendants contended that the plaintiffs' tort claims did not fall within the fraudulent inducement exception to the economic loss rule because the alleged fraud was not extraneous to the contract. *Id.* at 779. But the U.S. District Court for the Eastern District of Michigan concluded, at the motion to dismiss stage, that the plaintiffs adequately pleaded fraudulent inducement, considering the breadth of the defendants' fraudulent conduct prior to the sale of the rental properties. *Id.* That conduct included forging lease documents, lying about the conditions of the rental properties, supplying false information regarding rental payments, and falsely representing that the properties had current tenants who paid a certain amount of monthly rent. *Id.* Like the conduct at issue in *Llewellyn-Jones*, the Plaintiff argues that the present case is not one where a specific product was non-conforming but rather one where the product delivered was altogether different than the Defendants represented it to be. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 14).[5]

***6** At the outset, the Court acknowledges that the fraudulent inducement exception to the economic loss doctrine, as pronounced in *Huron Tool*, contains language that appears to favor both the Plaintiff and the Defendants' contrary positions at present. *Compare Huron Tool*, 209 Mich. App. at 371 (favoring the Plaintiff in providing that the exception "addresses a situation where the claim is that one party was tricked into contracting ... based on pre-contractual conduct"), *with id.* at 373 (favoring the Defendants in providing "where the only misrepresentation by the dishonest party concerns the quality or character of the goods sold, the other party is still free to negotiate warranty and other terms to account for possible defects in the goods"). The Court also notes that the Michigan Court of Appeals' conclusion in *Huron Tool* appears to favor the Defendants' position. *See id.* at 375. But other Michigan courts have more clearly explained the fraudulent inducement exception to the economic loss doctrine. *See, e.g., H & H Wholesale Servs., Inc. v. Kamstra Int'l, B.V.*, 373 F. Supp. 3d 826, 843 (E.D. Mich. 2019).

> As explained, the economic-loss doctrine is built on the assumption that a commercial seller and buyer have fairly allocated the risk of a faulty product during contract negotiations. And so when the bargained-for event comes to pass (a faulty product) courts have no warrant to assign the loss under the guise of tort law. Further, for those contracts governed by the UCC, permitting a tort claim not only upsets the parties' bargain but also undermines the legislature's selection of remedies. *But the assumption that two businesses fairly allocated the risk of a faulty product during bargaining is not a good one when, for example, the seller makes a misrepresentation that compromises the buyer's ability to bargain on a level playing field. So in that scenario, the economic-loss doctrine does not bar the buyer from bringing a tort claim.*

Id. (emphasis added) (citations omitted); *see also La Pesca Grande Charters, Inc. v. Moran*, 704 So. 2d 710, 713 (Fla. Dist. Ct. App. 1998) (explaining the difference between fraud in the inducement and fraud in the performance).

Having reviewed the governing case law on the fraudulent inducement exception, the question at present is whether the Plaintiff has created a genuine dispute of material fact as to the issue of fraud in the inducement, such that summary judgment should be denied. The Defendants argue that the Court should dismiss the Plaintiff's tort claims in Count I (fraudulent misrepresentation), Count II (fraudulent suppression and/or concealment), Count III (negligent and/or wanton repair), and Count VI (negligent and/or wanton misrepresentation). (Br. in Supp. of Defs.' Mot. for Summ. J., at 9). Because the economic loss doctrine under Michigan law generally precludes tort recovery in the contractual context, the Court agrees that the Plaintiff fails to state a claim as to Counts III and VI and thus is entitled to judgment as a matter of law on those Counts. Accordingly, an award of summary judgment in favor of the Defendants on Counts III and VI is appropriate. But the first two Counts merit a closer look under the fraudulent inducement exception.

Neither Count I nor Count II are specifically fashioned as fraudulent inducement claims in the Complaint, but the Court nonetheless concludes that Counts I and II state plausible claims for such relief. Both Counts turn on allegations that the Plaintiff's ability "to negotiate fair terms and make an informed decision [was] undermined by the [Defendants'] fraudulent behavior." *Huron Tool*, 209 Mich. App. at 373; (Compl. ¶¶ 31, 41). Accordingly, the final question is whether the Plaintiff has created a genuine dispute of material fact, such that summary judgment should be denied.

The Court concludes that the Plaintiff has indeed presented affirmative evidence showing that a genuine issue of fact exists as to the alleged fraudulent misrepresentations that induced it to buy the AGVs from the Defendants. Specifically, the Plaintiff relies on the deposition of its employee John Cook, who substantiated that Kuka's representative, Denise Ebenhoech, indicated that the KMP 1500 AGVs could achieve a positional accuracy of ± 5mm and that they would therefore be sufficient for the Plaintiff's work for Shaw, which required a positional accuracy of ± 10mm. (Cook Dep. at 70:8–10, 70:20–23). The Plaintiff also presented affirmative evidence showing that the Defendants knew the KMP 1500 AGVs could not achieve the required positional accuracy without purchasing an additional vision technology system. (Ebenhoech Dep. at 119:11–120:11). With such evidence, the Court concludes that the Plaintiff has carried its burden of showing that a genuine dispute of material fact remains as to the issue of fraudulent inducement. The Defendants' reliance on the deposition testimony of Kuka employee, Alan Threefoot, does not directly refute the Plaintiff's position on this point. (Reply Br. in Supp. of Defs.' Mot. for Summ. J., at 8–9). Even if the KMP 1500s were technically capable of achieving ± 10mm without a camera system, such capability does not mean they necessarily would achieve such accuracy consistently without the use of the camera system, as the Plaintiff needed for the Shaw project. The crux of the Plaintiff's position, as the Court understands it, is that the Defendants represented to the Plaintiff that the KMP 1500s could necessarily achieve the required positional accuracy without ever needing to purchase (or even mentioning) an additional vision technology system. Construed in the light most favorable to the Plaintiff, a reasonable jury could find that such a representation, if true, amounted to fraud in the inducement. Accordingly, the Defendants' motion for summary judgment as to Counts I and II of the Complaint should be denied.[6,7]

C. Express and Implied Warranties

***7** The Defendants argue that the Plaintiff's express and implied warranty claims should be dismissed because the Contract's Terms and Conditions conspicuously disclaimed all warranties, including the implied warranties of merchantability and fitness for a particular purpose. (Br. in Supp. of Defs.' Mot. for Summ. J., at 14–15). In response, the Plaintiff argues that the Defendants never provided it with any disclaimer and that the Terms and Conditions themselves had already expired. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 19–22).

For largely the same reasons as discussed above pertaining to the Contract's choice of law provision, the Plaintiff's arguments here also fail. The Defendants effectively disclaimed any express and implied warranties in Section 6 of the Contract's Terms and Conditions. (Doc. 81-3, at 231); *Vanalstine v. Land O'Lakes Purina Feeds, LLC*, 326 Mich. App. 641, 650–52 (2018). The Plaintiff argues that the expiration of a 2016 contract between the parties invalidates its assent to the Contract's Terms and Conditions as provided in the Quote from the Defendants, but the Plaintiff cites no authority in support of its position on this point. Accordingly, the Court concludes that no genuine dispute of material fact exists as to the issues of express and implied warranties, and therefore, the Defendants are entitled to summary judgment on Counts IV and V of the Complaint.

D. Damages

The Defendants next argue that the Plaintiff's claims for damages should be dismissed because the Contract bars claims for punitive and incidental damages, among others. (Br. in Supp. of Defs.' Mot. for Summ. J., at 19–24). The Plaintiff argues, in response, that the Contract is voidable because of the Defendants' allegedly fraudulent statements and that limitation of liability clauses are disallowed for intentional torts such as fraud. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 22–25).

Under Michigan law, "[i]t is well established ... that, although a party may contract against liability for harm caused by his ordinary negligence, a party may not insulate himself against liability for gross negligence or willful and wanton misconduct." *Lamp v. Reynolds*, 249 Mich. App. 591, 594 (2002). Here, the Contract's Terms and Conditions expressly preclude claims for punitive, incidental, special, exemplary, consequential, and other similar types of damages. (Doc. 81-3, at 232–33). But because the Court concluded above that the Plaintiff's fraud claims in Count I and II survive summary judgment, the Defendants are not entitled to any limitation of liability under the Contract for those intentional tort claims. Thus, the Defendants are entitled to summary judgment on their damages' argument, except as applied to Counts I and II.

E. Unjust Enrichment

Finally, the Defendants argue that the Plaintiff's unjust enrichment claim should be dismissed because the Contract governs the present case. (Br. in Supp. of Defs.' Mot. for Summ. J., at 24 (citing *Zwiker v. Lake Superior State Univ.*, 2022 WL 414183, at *13 (Mich. Ct. App. Feb. 10, 2022) ("Courts may not imply a contract under an unjust-enrichment theory if there is an express agreement covering the same subject matter."))). Because the Contract, including the Terms and Conditions linked in the Quote, govern the present dispute, the Plaintiff cannot prevail on its unjust enrichment theory. The Court agrees with the Defendants that the Plaintiff fails to state a claim for unjust enrichment and thus that the Defendants are entitled to judgment as a matter of law on that claim. Accordingly, the Defendants' Motion for Summary Judgment is granted as to Count VII.

IV. Conclusion

***8** For the foregoing reasons, the Defendants' Motion for Summary Judgment [Doc. 81] is GRANTED in part and DENIED in part. It is GRANTED as to Counts III through VII and DENIED as to Counts I and II.

SO ORDERED, this 25th day of January, 2023.

All Citations

Not Reported in Fed. Supp., 2023 WL 2372406

Footnotes

1 The operative facts on the Motion for Summary Judgment are taken from the parties' Statements of Undisputed Material Facts and the responses thereto. The Court will deem the parties' factual assertions, where supported by evidentiary citations, admitted unless the respondent makes a proper objection under Local Rule 56.1(B).

2 The Court notes that Madison Benfield as Administrator of the Estate of Brian Kocks has been substituted as the proper Defendant in the present case for the deceased Defendant Brian Kocks. (Doc. 59).

3 The Plaintiff's reliance on *Moon* and *Briscoe* is also unavailing. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 6, 12 (citing *Moon v. CSA-Credit Sols. of Am., Inc.*, 304 Ga. App. 555, 557 (2010), and *Frank Briscoe Co. v. Georgia Sprinkler Co.*, 713 F.2d 1500, 1503 (11th Cir. 1983))). Regarding the Plaintiff's argument on public policy, the Court agrees with the Defendants that *Moon*'s lack of reference to the economic loss rule refutes the Plaintiff's position on the issue. (Reply Br. in Supp. of Defs.' Mot. for Summ. J., at 11 n.9). Regarding the Plaintiff's argument on the presumption of

identity rule, the Court agrees with the Defendants that the Michigan UCC governs the present sale of goods transaction. (*Id.* at 4 – 5 (citing Mich. Comp. Laws § 440.1301(1)).

4 Michigan courts have acknowledged the overlap between the separate duty doctrine and the economic loss doctrine. *See, e.g., Theuerkauf*, 821 F. Supp. at 1241 (conflating the two doctrines).

5 The Court finds the Plaintiff's asserted distinction between the AGVs' *capabilities* and their *abilities* to be a stretch, at best. (*See id.*).

6 Because the economic loss doctrine governs all of the Defendants' arguments regarding the Plaintiff's tort claims, the Court declines to address the Defendants' arguments in Sections V, VI, and VII. (Br. in Supp. of Defs.' Mot. for Summ. J., at 9–14). The Court acknowledges that in Section VI, the Defendants argue that the Plaintiff cannot maintain a claim against Kocks (Benfield) in his individual capacity because the Plaintiff failed to allege independent acts for which Kocks (Benfield) should be held personally liable. (*Id.* at 12). But the Defendants cite no legal authority in support of their proposition. And construing the evidence in the light most favorable to the Plaintiff, the Court concludes that a reasonable jury could find that Kocks' alleged concealment constituted fraud in the inducement.

7 In this section, the Defendants also take issue with the Plaintiff's allegation regarding an agency relationship between Defendant Kocks and Defendant Kuka (and Defendant Kuka and the Fictitious Defendants A-Z) "in which all parties had a duty to disclose all material facts regarding the AGVs to the Plaintiff." (Compl. ¶ 42; Br. in Supp. of Defs.' Mot. for Summ. J., at 6). The Defendants contend that the absence of an agency relationship between the Plaintiff and the Defendants warrants dismissal of Count II for fraudulent concealment. (Br. in Supp. of Defs.' Mot. for Summ. J., at 7). The Plaintiff responds that the Defendants' argument misconstrues the fraudulent suppression allegations, noting that the allegation hinges on a purported agency relationship between Defendant Kocks and Defendant Kuka, not any agency relationship between the Plaintiff and the Defendants. (Pl.'s Resp. Br. in Opp'n to Defs.' Mot. for Summ. J., at 9). The Plaintiff does not, as the Defendants contend, pivot to a new and unpled theory with this argument; rather, the Plaintiff merely restates the unambiguous meaning behind Paragraph 42 of its Complaint. (Reply Br. in Supp. of Defs.' Mot. for Summ. J., at 7). The Defendants' argument here is indeed "nonsensical"; they are not entitled to summary judgment on Count II on this ground.

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