EMILY GREINES, Plaintiff and Appellant, v. FORD MOTOR COMPANY, INC. et al., Defendants and Respondents.

B148400

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

2003 Cal. App. Unpub. LEXIS 90

January 7, 2003, Filed

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, Carol Boas Goodson and Robert A. Dukes, Judges. Super. Ct. No. BC210565.

DISPOSITION: Reversed.

COUNSEL: Caldwell, Leslie, Newcombe & Pettit, David Pettit, Andrew Esbenshade; Law Offices of Gretchen M. Nelson, Gretchen M. Nelson; Greines, Martin, Stein & Richland, Feris M. Greenberger and Cynthia E. Tobisman for Plaintiff and Appellant.

Yukevich & Sonnett, Anthony E. Sonnett and D. Jason Davis for Defendants and Respondents.

JUDGES: KITCHING, J. We concur: KLEIN, P.J., CROSKEY, J.

OPINION BY: KITCHING

OPINION:

Emily Greines appeals a judgment in favor of Ford Motor Company (Ford) and Buerge Motor Car Company (Buerge). She challenges the sustaining of a demurrer to several counts alleged in her complaint and a summary judgment on the remaining counts. She contends (1) the complaint adequately alleges counts **[*2]** for intentional and negligent misrepresentation arising from representations concerning an electronic anti-theft device; (2) the complaint adequately alleges counts based on breach of an express warranty; and (3) there are triable issues of fact concerning the counts for false advertising, deceptive business practices, and negligence. We need not address her other contentions concerning the denial of her motions to reopen discovery and for reconsideration and the exclusion of her expert's declaration.

The central questions presented are whether the statement "Unless your specially coded driver's key is used, the vehicle won't start" was an actionable representation of fact and warranty, and whether Greines presented evidence sufficient to show that the representation was false. We conclude that the answer to both questions is yes and therefore reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

Greines leased a new 1998 Ford Explorer from Buerge in November 1997. The vehicle was equipped with an electronic anti-theft device known as "SecuriLock." Before she leased the vehicle, a sales agent told her that SecuriLock would prevent the vehicle from **[*3]** starting or driving without use of a specially coded key. She also reviewed a sales brochure that stated:

"SecuriLock protects against theft electronically. Unless your specially coded driver's key is used, the vehicle won't start."

The owner's manual also stated:

"The SecuriLock TM anti-theft system provides an advanced level of vehicle theft protection. Your vehicle's engine can only be started with the two special SecuriLock TM electronically coded keys provided with your vehicle. . . . If the SecuriLock TM key identification code does not match the code stored in the system or if a SecuriLock TM key is not detected (vehicle theft situation), the vehicle's engine will not operate."

Greines parked the vehicle on the street in front of her apartment one evening in May 1998 and removed the key. The vehicle was gone the next morning. Three weeks later, the police found the car parked on another street approximately five blocks away. Part of the ignition system had been removed. The police towed the vehicle to an impound lot and then carried it on a flatbed truck to a repair shop. The repair shop records indicate that the ignition lock cylinder, parts of the steering column, a **[*4]** transceiver, and a battery trim cover were replaced, and the front bumper was realigned.

2. *Procedural Background*

Greines sued Ford and Buerge in May 1999 alleging several counts based on misrepresentation, breach of warranty, and false advertising. The trial court sustained a demurrer to each count with leave to amend, based on failure to state a cause of action.

Greines's first amended complaint alleges counts for intentional and negligent misrepresentation, false advertising in violation of *Business and Professions Code section 17200,* deceptive business practices in violation of the Consumers Legal Remedies Act (*Civ. Code, § 1750* et seq.), breach of express warranty in violation of the federal Magnuson-Moss Warranty Act *(15 U.S.C. § 2301* et seq.) and state law, and negligence.

Ford demurred to the amended complaint arguing among other things that the sales brochure statement was merely "puffing" and was not a guaranty against theft, that Greines failed to allow Ford an opportunity to repair the alleged defect, and that she failed to set out verbatim the terms of the express warranty. The trial court sustained without leave to amend the demurrer **[*5]** to the counts for negligent and intentional misrepresentation and the counts for breach of warranty.

Ford and Buerge moved for summary judgment in August 2000 on the ground that Greines cannot prove that their representations concerning SecuriLock were false because she cannot prove that a thief started and drove the vehicle. They argued that Greines's discovery responses showed that there was no evidence that their representations were false. They also presented a declaration by the Ford engineer who designed SecuriLock stating that SecuriLock prevents an engine from starting without a specially coded key and that the SecuriLock in Greines's vehicle was fully functional when he examined it in November 1999. The expert declared further that when he reproduced the condition in which the vehicle was found immediately after the theft, including a damaged SecuriLock transceiver, the engine still did not start without the specially coded key. The expert therefore concluded that SecuriLock had functioned properly and prevented the thief from starting the engine.

Greines presented evidence of the circumstances of the theft and argued that the evidence supports a reasonable inference that **[*6]** the thief started the engine and drove the vehicle. She also presented a declaration by a forensic examiner and automobile theft expert stating his opinion that the thief had circumvented SecuriLock, started the engine, and drove the vehicle; several internal Ford emails discussing SecuriLock's potential failures and the theft of an employee's vehicle that was equipped with SecuriLock; and other evidence purportedly showing that SecuriLock is ineffective.

The trial court concluded that the defendants satisfied their burden as moving parties and that Greines failed to present evidence to show that her vehicle or any other vehicle equipped with SecuriLock had been stolen by starting the engine and driving the vehicle without use of a specially coded key. The court also sustained the defendants' objection to the declaration by Greines's expert, stating that although he is qualified to testify as an expert on automobile theft he is not qualified to testify as an expert on the SecuriLock system. The court therefore granted the summary judgment motion. The court later denied Greines's motion for reconsideration and entered judgment for the defendants.

CONTENTIONS

Greines contends **[*7]** (1) the complaint adequately alleges counts for intentional and negligent misrepresentation, so it was error to sustain the demurrer to those counts; (2) the complaint adequately alleges counts for breach of an express warranty under the Magnuson-Moss Warranty Act and California *Uniform Commercial Code section 2313*, so it was error to sustain the demurrer to those counts; and (3) there are triable issues of fact as to whether the representations were false, so the defendants are not entitled to summary judgment on the false advertising, deceptive business practices, and negligence counts.

Ford and Buerge contend (1) they represented that SecuriLock would protect against theft, not that it would prevent theft, and their representations were only sales puffery; (2) the complaint does not allege with sufficient specificity the facts necessary to establish the elements of intentional and negligent misrepresentation; (3) their representations do not constitute an affirmation of fact or warranty; (4) Greines does not allege that she allowed the defendants a reasonable number of attempts to repair her vehicle and does not allege an affirmation of fact or promise, as required to state a **[*8]** cause of action under the Magnuson-Moss Warranty Act; (5) she does not allege that the representations became a basis of the bargain; and (6) the defendants satisfied their initial burden on summary judgment by presenting discovery responses showing that Greines has no evidence that a thief has ever managed to start the engine of and drive a vehicle equipped with SecuriLock and by presenting an expert declaration that it could not be done without the specially coded key, and Greines failed to present evidence to the contrary and therefore failed to create a triable issue that the representations were false.

DISCUSSION

1. *Demurrer*

a. *Standard of Review*

On appeal from a judgment after a demurrer is sustained without leave to amend, we assume the truth of the facts alleged in the complaint, facts that can be inferred from those expressly pleaded, and facts of which judicial notice can be taken. We determine de novo whether the complaint states facts sufficient to state a cause of action and does not disclose a complete defense. (*Blank v. Kirwan (1985) 39 Cal.3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58; Shaolian v. Safeco Ins. Co. (1999) 71 Cal.App.4th 268, 271.)* **[*9]**

b. *Intentional and Negligent Misrepresentation*

The essential elements of a cause of action for intentional misrepresentation are (1) a misrepresentation of fact, (2) knowledge of falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) resulting damage. (*Lazar v. Superior Court (1996) 12 Cal.4th 631, 638, 909 P.2d 981.)* The essential elements of a cause of action for negligent misrepresentation are the same except that the second element is that the defendant had no reasonable ground to believe that the representation was true. (*Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, 407, 834 P.2d 745; Christiansen v. Roddy (1986) 186 Cal. App. 3d 780, 785-786, 231 Cal. Rptr. 72.)*

A statement of opinion ordinarily is not an actionable representation of fact. (*Neu-Visions Sports, Inc. v. Soren/McAdams/Bartells (2000) 86 Cal.App.4th 303, 308.)* In some circumstances when a party possesses or purports to possess superior knowledge, however, the other party reasonably can rely on a statement expressed in the form of an opinion as a representation of fact. (*Bily v. Arthur Young & Co., supra, 3 Cal.4th at p. 408;* **[*10]** *Gagne v. Bertran (1954) 43 Cal.2d 481, 489, 275 P.2d 15.)* Moreover, a statement that constitutes " 'a deliberate affirmation of the matters stated' " can be regarded as a representation of fact even if the statement is in the form of an opinion. (*Bily*, at p. 408.)

Some representations concerning the quality of wares express the seller's subjective and obviously biased opinion and cannot reasonably be relied upon as statements of fact. Other sales representations are expressed as statements of fact upon which a purchaser reasonably can rely. (*Hauter v. Zogarts (1975) 14 Cal.3d 104, 111-113, 120 Cal. Rptr. 681, 534 P.2d 377.)*

Whether a statement is an actionable representation of fact or a nonactionable statement of opinion is a question of fact for the trier of fact, unless reasonable minds cannot differ. (*Willson v. Municipal Bond Co. (1936) 7 Cal.2d 144, 151, 59 P.2d 974; Furla v. Jon Douglas Co. (1998) 65 Cal.App.4th 1069, 1081.)*

A trier of fact reasonably could conclude that the written representation that without the specially coded key "the vehicle won't start" and the alleged oral representation to the **[*11]** same effect are representations of fact. The alleged representations are not expressed in terms of a subjective opinion and are not mere sales puffery.

The defendants have not shown error in the allegations as to the remaining elements. Although each element of a fraud cause of action must be pleaded with particularity so as to apprise the defendant of the specific grounds for the charge and enable the court to determine whether there is any basis for the cause of action, less specificity is required where the defendant would likely have greater knowledge of the facts than the plaintiff. (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 216-217, 197 Cal. Rptr. 783, 673 P.2d 660.)* The complaint alleges each element with sufficient specificity for a fraud cause of action.

c. *Breach of Warranty*

"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." (Cal. U. *Com. Code, § 2313*, subd. (1)(a).)

"It is not necessary to the creation of an express warranty **[*12]** 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 seller's opinion or commendation of the goods does not create a warranty." (Cal. U. *Com. Code, § 2313*, subd. (2).)

California *Uniform Commercial Code section 2313* relaxes the former requirement that the purchaser prove reliance on an affirmation of fact to establish a breach of warranty. (*Hauter v. Zogarts, supra, 14 Cal.3d at pp. 115-116;* U. Com. Code coms. 3 & 8, 23A West's Ann. Com. Code (1964 ed.) foll. § 2313, pp. 249, 250.) A seller's affirmation of fact that relates to the goods is presumed to

be part of the basis of the bargain unless the seller proves otherwise. (*Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 23-24, 220 Cal. Rptr. 392.)* A plaintiff therefore need not separately allege that an affirmation of fact was part of the basis of the bargain.

The written representation that without the specially coded key "the vehicle won't start" and the alleged oral representation to the same effect are affirmations of fact relating **[*13]** to the quality of the anti-theft system. The alleged representations are not expressed in terms of a subjective opinion or commendation of goods, and are actionable warranties. (*Hauter v. Zogarts, supra, 14 Cal.3d at pp. 111-113, 115, fn. 10; Keith v. Buchanan, supra, 173 Cal. App. 3d at pp. 21-22.)*

The Magnuson-Moss Warranty Act prescribes rules for written warranties for consumer products in interstate commerce. The act does not preempt state law but supplements and incorporates state law. (*Walsh v. Ford Motor Co. (D.C. Cir. 1986) 257 U.S. App. D.C. 85, 807 F.2d 1000, 1012-1016;* see *Kanter v. Warner-Lambert Co. (2002) 99 Cal.App.4th 780, 798.)* A "written warranty" includes an affirmation of fact or promise made in connection with a sale that the product's nature or workmanship is defect free. *(15 U.S.C. § 2301*(6)(A).) The representations that without the specially coded key "the vehicle won't start" affirm that SecuriLock is defect free and are affirmations of fact within the meaning of the act.

A provision cited by the defendants states that if the warrantor fails to remedy a defect **[*14]** after a reasonable number of attempts, the consumer is entitled to a refund or replacement of the defective product. *(15 U.S.C. § 2304*(d).) Contrary to the defendants' argument, the statute does not state that a consumer must allow a reasonable number of repair attempts before suing for breach of warranty. Moreover, Greines does not seek a refund or replacement, but seeks to recover damages caused by the alleged product failure.

3. *Summary Judgment*

a. *Standard of Review*

A party is entitled to summary judgment if under the undisputed facts or facts as to which there is no reasonable dispute the party is entitled to judgment as a matter of law. (*Code Civ. Proc., § 437c,* subd. (c); *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.)* A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (*Code Civ. Proc., § 437c,* subd. (o)(2); *Aguilar,* at pp. 849, 854-855.) Once the defendant meets its burden, the burden shifts to the plaintiff to set forth "specific facts" showing that a triable issue of material fact **[*15]** exists. (*Code Civ. Proc., § 437c,* subd. (o)(2); *Aguilar,* at p. 849.) The court must view the evidence and reasonable inferences from the evidence in the light most favorable to the opposing party. (*Aguilar,* at p. 843.)

We review the trial court's ruling de novo and apply the same legal standard that governs the trial court. (*Johnson v. City of Loma Linda (2000) 24 Cal.4th 61, 67-68.)* We affirm the ruling if it is correct on any ground, regardless of the trial court's stated reasons. (*Truck Ins. Exchange v. County of Los Angeles (2002) 95 Cal.App.4th 13, 20.)*

b. *False Representation*

Ford and Buerge contend they are entitled to summary judgment on the false advertising, deceptive business practices, and negligence counts because there is no evidence that SecuriLock has ever failed to work as designed, and because the engineer who designed SecuriLock declared that SecuriLock prevents the engine from starting without use of a specially coded key and that SecuriLock functioned properly in Greines's vehicle. Ford and Buerge do not attempt to disprove the facts alleged in the complaint concerning the circumstances of the theft. Rather, **[*16]** they contend those facts and the facts stated in Greines's discovery responses do not support a reasonable inference that the thief started the engine and drove the vehicle, as opposed to pushing or towing it. They also con-

tend Ford's internal emails and a patent application discussing SecuriLock's potential shortcomings are not evidence that SecuriLock is flawed.

An inference is reasonable if a rational trier of fact without relying on speculation or conjecture could conclude based on the evidence that the inference is true. (*California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 44-45, 221 Cal. Rptr. 171;* see *Evid. Code, § 600,* subd. (b).) The question whether an inference is reasonably deducible from the evidence is a legal question that we review de novo. (*Willis v. Gordon (1978) 20 Cal.3d 629, 633, 143 Cal. Rptr. 723, 574 P.2d 794.)* If an inference is reasonably deducible from the evidence, the question whether to draw the inference is a question of fact for the trier of fact. (*Ibid*.)

Greines parked the Ford Explorer on the street in front of her apartment in the evening and removed the key. The vehicle was not there **[*17]** the following morning. Three weeks later, the police found the vehicle on another street approximately five blocks away. Greines observed that part of the ignition system had been removed. The area where the vehicle was stolen and recovered is a densely populated residential neighborhood with narrow streets, and the most direct route from where Greines parked the vehicle to where it was recovered involved two turns at intersections.

The repair shop records state that the ignition lock cylinder, parts of the steering column, a transceiver, and a battery trim cover were replaced, and the front bumper was realigned. These repairs suggest that someone attempted to start the vehicle, although they do not necessarily show that the attempt was successful. The fact remains that the vehicle was moved approximately five blocks. Either a thief started the engine and drove the vehicle that far, or a thief acting alone or with accomplices pushed or towed the vehicle, or carried it on a flatbed truck.

An Explorer is a large sport utility vehicle. To move such a large and heavy vehicle ordinarily would require preparation and planning, and would require either several strong assistants able to **[*18]** push manually or a vehicle capable of towing or carrying an Explorer. A thief who is thwarted in an attempt to hotwire an Explorer is unlikely to be prepared to transport the vehicle by some other means, and a thief who is prepared to transport the vehicle by some other means is unlikely to attempt to hotwire it. This is true particularly when the vehicle is parked in a densely populated residential neighborhood where a thief probably would not be so brazen as to spend the time necessary to attempt both hotwiring and an alternative method of theft. The dense population and narrow streets also make it unlikely that a thief would attempt the cumbersome task of pushing the vehicle manually, towing it, or carrying it on a flatbed truck. Those methods all present obvious disadvantages to a thief who wishes to avoid detection and desires a quiet and speedy getaway.

We conclude that the evidence supports a reasonable inference that a thief started the engine and drove the vehicle. This reasonable inference creates a triable issue of fact. In light of our conclusion, we need not decide whether other evidence creates a triable issue of fact or whether it was error to sustain the defendants' **[*19]** objection to the declaration by Greines's expert, and we need not consider Greines's remaining contentions.

DISPOSITION

The judgment is reversed, and the orders sustaining the demurrer without leave to amend and granting summary judgment are vacated. Greines is entitled to recover her costs on appeal.

KITCHING, J.

We concur:

KLEIN, P.J.

CROSKEY, J.