NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CARYN BORGER, MD, on behalf of herself and all others similarly situated, Plaintiff, v. TREX COMPANY, INC., Defendants.	**Hon. Dennis M. Cavanaugh** **OPINION** Civil Action No. 12-CV-2584 (DMC)(JAD)

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon Defendant Trex Company, Inc.'s Motion to Dismiss Counts III, IV, V, and VI of Plaintiff Caryn Borger, MD.'s Complaint and Plaintiff's "Tolling" Claim (May 18, 2012 ECF No. 4). Pursuant to FED. R. CIV. P 78, no oral argument was heard. Based on the following and for the reasons expressed herein, Defendant's Motion to Dismiss is **denied in part, granted in part without prejudice.**

I. BACKGROUND

In April 2010, Plaintiff Caryn Borger, MD ("Plaintiff"or "Borger") purchased outdoor decking manufactured by Defendant Trex Company, Inc ("Defendant" or "Trex") for her home. (Compl. ¶ 2, ECF. No. 1-1, May 1, 2012). The decking at issue is not a natural wood product, but a manufactured composite decking made from recycled plastic and wood fibers. (Id.) Within three months, Plaintiff alleges that the decking started exhibiting mold, flakes, mildew and

discoloration. (Id. ¶ 17). That summer, Plaintiff contacted a Trex service representative, who allegedly denied that the defects were covered by Trex's warranty and thus denied her warranty claim. (Id.)

Trex markets and advertises its decking products directly to consumers. Trex represents that the plastic in its materials "shields the wood from moisture and insect damage, preventing rotting and splintering;" the "maintenance problems that come with wood decks don't come with Trex;" the decking material "will not rot or deteriorate due to harsh weather or insects;" "Trex resists damage from moisture and sunlight, making it the natural choice for pools, hot tubs and spas;" and its decking and railing products "require only periodic cleaning for years to come - no need for sanding, staining or painting, ever." (Id. ¶ 22).

In its "Limited Residential Warranty," Trex warrants the product for twenty-five (25) years from the date of the original purchase. The warranty provides that "Trex products shall be free from material defects in workmanship and materials, and shall not check, split, splinter, rot or suffer structural damage from termites or fungal decay." (Id. ¶ 33).

Plaintiff alleges that Trex knows about the discoloration, mold, mildew and/or other fungal growth on its decking products but has actively concealed this information from consumers. (Id. ¶ 39). Plaintiff also alleges that "Trex fails to provide suitable material with which to build and maintain a deck or other outdoor structure, and fails to meet its advertised, marketed and warranted qualities."

Plaintiff, on behalf of herself and others similarly situated, filed a putative class action Complaint against Defendant based on allegations that she purchased allegedly defective decking products manufactured by Trex. (See Compl.). She alleges that the decking products are

defective because they allegedly "exhibit[] mold and/or dark spotting often emanating from within the Trex material at high rates, all well beyond what should be occurring with a product meant for the outdoors, and well beyond what consumers expected based on Trex's representations." (Id. ¶ 2). Based on these allegations, Plaintiff asserts the following claims: (1) breach of express warranty; (2) breach of the implied warranty of merchantability; (3) breach of the covenant of good faith and fair dealing; (4) violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et seq., ("CFA"); (5) fraudulent concealment/nondisclosure; and (6) fraudulent misrepresentation. (Id. ¶¶ 15-24). Plaintiff also asserts that "any applicable statutory or contractual limitation period has been tolled by Trex's concealment of material facts" and that "Trex is estopped from relying on any statutory or contractual limitation because of its concealment of the defect." (Id. ¶¶ 57, 58).

II. STANDARD OF REVIEW

In deciding a motion under FED. R. CIV. P. 12(b)(6), the District Court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff]." Phillips v. Cnty. of Allegheny, 515 F.3d 224, 228 (3d Cir. 2008). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). However, the plaintiff's "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions and a formulaic recitation of the elements of a cause of action will not do." Id. On a motion to dismiss, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). Plaintiff's complaint is subject to the heightened pleading standard set forth in Ashcroft v. Iqbal:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . Determining whether a complaint states a plausible claim for relief will. . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not "show[n]" - "that the pleader is entitled to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-679 (2009) (quoting Twombly, 550 U.S. at 557, 750).

III. DISCUSSION

A. Plaintiff's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

"[E]very contract imposes on each party the duty of good faith and fair dealing in its performance and its enforcement." Pickett v. Lloyd's & Peerless Ins. Agency, Inc., 621 A.2d 445, 450 (N.J.1993). The implied covenant therefore ensures that "neither party to a contract shall injure the right of the other to receive the fruits of the agreement." Onderdonk v. The Presbyterian Homes of N.J., 425 A.2d 1057, 1062 (N.J.1981). A claim for breach of the implied covenant of good faith and fair dealing is wholly dependent on the existence of a contract between the parties: "'[I]n the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing.'" Wade v. Kessler Institute, 778 A.2d 580, 584 (N.J. Super. Ct. App. Div. 2001) (quoting Noye v. Hoffman-LaRoche, Inc., 570 A.2d 12, 14 (N.J. Super. Ct. App. Div.), certif. denied, 584 A.2d 218 (N.J. 1990)).

Defendant argues this count must be dismissed as Plaintiff has not alleged a contract with Trex; with no contract, there is no claim for the breach of good faith and fair dealing. Plaintiff

argues that Trex's written warranty is an express, enforceable contract. Plaintiff alleges in the Complaint that "Trex warrants the Product for twenty-five (25) years from the date of original purchase. The warranty provides that "Trex products shall be free from material defects in workmanship and materials, and shall not check, split, splinter, rot or suffer structural damage from termites or fungal decay."(Compl. ¶ 33).

A Plaintiff may allege a contractual relationship with defendant in the form of a written warranty. Payne v. Fujifilm U.S.A., Inc., No. 07-385, U.S. Dist. LEXIS 94765 at *31 (D.N.J. Dec. 28, 2007). Plaintiff properly alleges a warranty contract between the parties and properly states a cause of action for the breach of the covenant of good faith and fair dealing.

> New Jersey case law has recognized the potential for such an independent cause of action based upon the covenant of good faith and fair dealing in three situations: (1) to allow the inclusion of additional terms and conditions not expressly set forth in the contract, but consistent with the parties' contractual expectations; (2) to allow redress for a contracting party's bad-faith performance of an agreement, when it is a pretext for the exercise of a contractual right to terminate, even where the defendant has not breached any express term; and (3) to rectify a party's unfair exercise of discretion regarding its contract performance.

Barrows v. Chase Manhattan Mortgage Corp., 465 F.Supp.2d 347, 365 (D.N.J.2006). Plaintiff has alleged breach of the implied covenant of good faith and fair dealing, pursuant to category two, listed above. Throughout the Complaint, Plaintiff alleges that Defendant acted in bad faith. Plaintiff claims that Defendant had knowledge of the defect in its decking products, but "has actively concealed this information from consumers." (Compl. ¶ 39). Specifically, Plaintiff alleges that "at the time Trex extended its express warranties, Trex knew that it was experiencing manufacturing issues and that its product was defective, it continued to place the defective Product on the market and to make representations to consumers that the product was anything

but defective." (Id. ¶ 75). Thus Plaintiff has sufficiently alleged a breach of the implied warranty of good faith and fair dealing.

B. Plaintiff's Fraud-Based Claims (Counts IV, V, and VI)

Defendant argues that Plaintiff's fraud based claims should be dismissed because they are barred by the economic loss doctrine and Plaintiff failed to plead the claim with particularity as required by FED. R. CIV. P. 9(b).

1. Economic Loss Doctrine

Defendant first argues that Plaintiff's claims for violation of the CFA (Count IV), fraudulent concealment/nondisclosure (Count V) and fraudulent misrepresentation (Count VI) must be dismissed because they are barred by the economic loss rule. As recognized under New Jersey law, the economic loss rule bars recovery under tort theories for damages that consist of "economic loss" only. See Alloway v. Gen. Marine Indus., LP, 695 A.2d 264, 267 (N.J.1997). The rule applies to fraud-based claims, including alleged violations of the Consumer Fraud Act, in the same manner as any other tort claim. State Capital Title & Abstract Co. v. Pappas Bus. Servs., LLC, 08-cv-3619, 2009 WL 114160, *3-4 (D.N.J. Jan. 15, 2009)(dismissing fraud claim based on economic loss rule); Hunt Constr. Group Inc. v. Hun School of Princeton, No. 08-3550, 2009 WL 1312591, *6 (D.N.J. May 11, 2009) (dismissing Consumer Fraud Act claim based on economic loss rule).

This Court agrees with the Defendant that Plaintiffs fraud claims are barred by the economic loss doctrine. Federal district courts interpreting New Jersey common law routinely hold that "fraud claims not extrinsic to underlying contract claims are not maintainable as separate causes of action." Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co., 226

F.Supp.2d 557, 564 D.N.J.2002) (citing Gleason v. Norwest Mortgage, Inc., 243 F.3d 130, 144 (3d Cir.2001)). For example, one district court explained that "an act that is in breach of a specific contractual undertaking would not be extrinsic, but an act that breaches some other duty would be." Id. (citing Emerson Radio Corp. v. Orion Sales, Inc., No. 95-6455, 2000 WL 49361, at *7 (D.N.J.2000)); see also Hunt Constr. Group, Inc. v. School of Princeton, 08-3550, 2009 WL 1312591, *6 (D.N.J. May 11, 2009) (dismissing Consumer Fraud Act claim based on economic loss rule). Thus as the claims are not "extrinsic" to the underlying contract claims, the fraud claims are dismissed pursuant to the economic loss doctrine.

2. Heightened Pleading Standard of FRCP 9(b)

Plaintiff's fraud-based claims are subject to the heightened pleading standards mandated by FED. R. CIV. P. 9(b). Dewey v. Volkswagen, 558 F. Supp. 2d 505, 524 (D.N.J. 2008)("[New Jersey Consumer Fraud Act] claims 'sounding in fraud' are subject to the particularity requirements of Federal Rule of Civil Procedure 9(b)."). Under Rule 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." As such, a plaintiff must set forth in the complaint the circumstances of the alleged fraud "with sufficient particularity to place the defendant on notice of the 'precise misconduct with which [it is] charged.'" Frederico v. Home Depot, 507 F.2d 188, 200 (3d Cir. 2007) (quoting Lum v. Bank of America, 361 F.3d 217, 223-24 (3d Cir. 2004)). To meet this standard, the plaintiff must plead the date, time, and place of the alleged fraud. Id. The plaintiff must also allege "'who made the purported misrepresentations and what specific misrepresentations were made.'" Gutierrez v. TD Bank, No. 11-cv-5533, 2012 U.S. Dist. LEXIS 10724, *22 (D.N.J. Jan. 27, 2012) (quoting Frederico, 507 F.3d at 200). This Court agrees with Defendant that Plaintiff's

fraud claims, both under the CFA and common law, fail to be pled with the requisite specificity. With regards to the CFA claim, Plaintiff has failed to sufficiently plead "a causal nexus between. . . defendant's allegedly unlawful behavior and the plaintiff's ascertainable loss." Dewey, 558 F. Supp. 2d at 524. Similarly, as the CFA claims are substantively identical to the allegations in the common law fraud claims, they are also insufficient to satisfy Rule 9(b)'s heightened pleading requirements.

D. Plaintiff's Claim of Equitable Tolling Based on Trex's Allegedly Fraudulent Concealment Is Not Pled with Particularity

In her Complaint, Plaintiff alleges that "any applicable statutory or contractual limitation period" should be tolled because Trex knew of the alleged defect in the decking products prior to the time of sale and it concealed this "material information" from Plaintiff and the putative class. (Compl. ¶¶ 57). To toll a statute of limitations based on fraudulent concealment, a plaintiff must show "'(1) an affirmative act of concealment; (2) which misleads or relaxes the plaintiff's inquiry, who (3) exercised due diligence in investigating his cause of action.'" In re Magnesium Oxide Antitrust Litig., Civ. No. 10-5943(DRD), 2012 U.S. Dist. LEXIS 48427, *16 (D.N.J. Apr. 5, 2012) (quoting In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1178-79 (3d Cir. 1993)). The fraudulent act that forms the basis of the claim for damages "will not satisfy the factual showing required to invoke the equitable tolling doctrine." Poskin v. TD Banknorth, N.A., 687 F. Supp. 2d 530, 550 (3d Cir. 2009). Rather, a plaintiff "must point to some additional affirmative fraudulent act that perpetuates concealment; inaction or silence by the [defendant] is not sufficient to show fraudulent concealment to toll equitably the limitations period." Id. Moreover, the allegations of fraudulent concealment must be pled with particularity pursuant to

FED. R. CIV. P. 9(b). In re Magnesium Oxide Antitrust Litig., 2012 U.S. Dist. LEXIS 48427 at *16. Thus, as it is currently pled in the Complaint, Plaintiff's tolling claim is dismissed as it has not been pled with particularly pursuant to Rule 9(b).

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **denied in part, granted in part without prejudice** and Plaintiff is granted leave to amend the Complaint. An accompanying Order follows this Opinion.

Dennis M. Cavanaugh, U.S.D.J.

Date: January 3, 2013
Orig.: Clerk's Office
cc: All Counsel of Record
The Honorable Joseph A. Dickson, U.S.M.J.
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