

Rae J. Mauk, et al. v Ford Motor Co. 17CVP-0083

Re: Defendant's Demurrer

Date: July 11, 2017

Rae J. Mauk and Glenn R. Mauk (Plaintiffs) bring this lemon law action against Ford Motor Company (Defendant) for alleged defects with the PowerShift transmission in a 2013 Ford Focus purchased by Plaintiffs.

This complaint, demurrer and opposition to demurrer are virtually identical to those presented in *Vasquez v Ford Motor Co.* 16CV0075 that involved the same PowerShift transmission in a Ford Focus. The attorneys involved in the *Vasquez* action are the same attorneys involved in this action.

The complaint includes causes of action for violation of the Song Beverly Act, intentional misrepresentation, negligent misrepresentation and concealment. Defendant demurs to the third, fourth and fifth causes of action that sound in fraud and misrepresentation. Defendant asserts that Plaintiffs fail to allege sufficient facts to state valid tort/fraud based causes of action. Defendant also argues those causes of action are barred by the economic loss rule.

With regard to the fourth cause of action for intentional misrepresentation and fifth cause of action for negligent misrepresentation, Defendant contends those claims must be alleged with sufficient specificity. Defendant argues any alleged misrepresentations related to the transmission being an "automatic" transmission are in fact true. Also, Defendant asserts alleged misrepresentations in its marketing material lack specificity and simply amount to "puffery."

Contrary to Defendant's assertions, the complaint alleges sufficient specific facts to establish the basis of Plaintiffs' misrepresentation claims. The complaint includes specific allegations related to the unique nature of the PowerShift transmission and whether it is actually an "automatic" transmission as represented by Defendant. Plaintiff also alleges substantial factual detail regarding the known defects with the transmission, Defendant's exclusive knowledge of the problems and misrepresentations related to the operation and effectiveness of the transmission. Evidently, Defendant marketed the transmission as having the best of both worlds combining the fuel economy of a manual transmission with the ease of operation of an automatic transmission. As such, there are sufficient facts to allege the specific misrepresentations and whether or not it constitutes "puffery" is a question of fact. (*Paduano v. Am. Honda Motor Co.* (2009) 169 Cal.App.4th 1453, 1470)

As to the third cause of action for concealment Defendant demurs on the grounds it had no duty to disclose to Plaintiff as there was no fiduciary relationship between Plaintiffs and Defendant. However, under California law there are four circumstances in which nondisclosure may constitute actionable fraud and one of those circumstances is when the

defendant had exclusive knowledge of material facts not known to the plaintiff. (*Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 651) Here, Plaintiffs allege Defendant had exclusive knowledge of the defects with transmission and failed to disclose them to Plaintiffs. As such, Plaintiffs allege a valid cause of action for concealment.

Defendant also demurs to the fraud based causes of action on the grounds they are barred the economic loss rule. Defendant argues claims based upon breach of contract can only support tort remedies when the alleged breach involves a duty independent of the contract. (*Erllich v. Menezes* (1999) 21 Cal.4th 543, 551) “The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise.” (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988) In this instance, Plaintiffs allege fraudulent activity independent from their breach of warranty claims. Plaintiffs allege fraud in the inducement of the purchase contract which in itself is sufficient to defeat the economic loss rule. (*Robinson, supra* at 359; *Erllich v. Menezes, supra* 21 Cal.4th 543, 552)

The demurrer is overruled. Defendant shall file its answer within 30 days from the date of the order.