NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 1684-CV-02022

Notice Sent (JRB) 10/7/19
JD/ L.D.G. D.R.F. R.J.B. A.L.W.
H+L/ M.J.C. M.T.L. T.M.G.
GRSM/ J.S.G. T.E.L. S.O.

Ofer Nemirovsky

v.

Daikin North America LLC, et al.

Memorandum of Decision and Order on Plaintiff's G.L. c. 93A Claim (P#105)

Background

This action arises from malfunctions in a "VRV-III" heating and cooling system that the plaintiff, Ofer Nemirovsky ("Nemirovsky"), purchased and installed in his home in downtown Boston in 2008. In 2016, after experiencing system failures for some three to four years, Nemirovsky filed suit against four commercial entities, alleging breach of express warranty, breach of the implied warranty of merchantability, intentional misrepresentation, negligent misrepresentation, and violation of the Massachusetts Consumer Protection Act, G.L. c. 93A ("Chapter 93A").

The express warranty claim was dismissed on summary judgment prior to trial. The remaining claims were tried before a jury over 2½ weeks in late July and early August, 2019. During trial, the Court informed the parties that it would submit the plaintiff's Chapter 93A claim to the jury for a non-binding, advisory verdict, and reserve to itself the final determination of the claim.[1]

[1] Initially, the plaintiff requested that the Court submit the question to the jury for an advisory verdict while the defendants requested a binding submission. During a conference the parties switched positions. As the parties never agreed on a binding submission, the Court opted to proceed with a submission for advisory purposes only.

At the close of evidence, the Court directed a verdict in the defendants' favor on the implied warranty claim that arose from the original sale of the VRV system in 2008.[2] The implied warranty claim that arose from replacement parts sold to the plaintiff in 2014 and beyond proceeded to the jury, as did the misrepresentation and Chapter 93A claims.

On August 12, 2019, the jury returned a verdict on special questions. The jury found that defendant Daikin North America ("Daikin NA") had breached the implied warranty of merchantability with respect to the replacement parts supplied to plaintiff, and made intentional misrepresentations to plaintiff after he reported failures in the VRV system, and awarded him $3,387,473.73 in damages. The jury further found that Daikin NA's actions were unfair or deceptive acts or practices, that plaintiff suffered damages in the amount of $3,387,473.73 due to these acts, that these actions were willful or knowing, and that plaintiff was entitled to double damages of $6,774,947.46 under Chapter 93A. The jury also found that Daikin Applied breached the implied warranty of merchantability with respect to the replacement parts, and awarded $8,934 in damages on that claim (there was no Chapter 93A claim against Daikin Applied). The jury found for the defendants on all remaining claims.

Now before the Court is plaintiff's Motion to Adopt and Enforce the Jury's Advisory Verdict, and Daikin NA's response thereto.[3] Daikin NA argues that the jury's findings were unsupported in several regards. The Court considers each of these contentions in turn.[4]

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[2] The Court ruled that a contract-based claim for the sale was barred by the Statute of Limitations, and a tort-based claim was not supported by evidence of physical injury. See Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co., 404 Mass. 103 (1989).

[3] There was also a Chapter 93A claim against defendant DACA Trust. The jury found in favor of DACA Trust on that claim. The plaintiff does not argue that the Court should not adopt that finding of the jury and the Court hereby adopts it.

[4] The Court acknowledges that some of Daikin NA's arguments may be more properly suited to a Motion for Judgment Notwithstanding the Verdict.

Discussion

1. Breach of Implied Warranty of Merchantability

It was undisputed that the VRV system in plaintiff's home failed because copper coils within the system's fan coil units prematurely corroded. The dispute lay in what caused the coils to corrode. Daikin NA presented expert evidence that the corrosion was caused by "off-gassing" of chemicals from materials in the plaintiff's home, and therefore was not due to any defect in the VRV system. The plaintiff's expert, Dr. Thomas Eager ("Eager"), opined that the coils corroded due to accelerated "galvanic corrosion." Specifically, Eager testified that electrons released from the corrosion of zinc coating on the coils (which is supposed to occur) travel through water to a drain pan at the bottom of the unit where, in a properly functioning system, they would exit the unit. However, because the drain pan in the VRV unit is made of nonconductive Styrofoam, rather than conductive metal, the electrons could not exit the unit, and instead circulated back up through the unit and corroded the copper. **T.931-971**

To the extent Daikin NA argues that Eager's testimony should be disregarded because it is unscientific, the Court rejects this contention as it comes too late, the defendants having not sought to preclude Eager's testimony under *Daubert-Lanigan* before trial. In any event, Daikin NA raised its asserted deficiencies in Eager's theory during cross-examination. In particular, Daikin noted that there are no publications identifying stray current corrosion in HVAC systems, to which Eager responded by noting that the theory of stray current corrosion has "been around for about a hundred years" and occurs in numerous contexts. The jury found Eager's theory credible and the Court does not see grounds for disturbing that finding.

Daikin NA also argues that, as it only supplied coils to Nemirovsky, and Eager identified the drain pan as the cause of the malfunction in the system, NA cannot be held liable because "[w]hen a component of an integrated product is not itself defective, the maker of the component is not liable for injury that results from a defect in the integrated product." Cipollone v. Yale Indus. Prods., Inc., 202 F.3d 376, 379 (1st Cir. 2000); see also Mitchell v. Sky Climber, Inc., 396 Mass. 629, 631 (1986); Freitas v. Emhart Corp., 715 F.Supp. 1149, 1152 (D.Mass. 1989).

The Court disagrees that the coils in this case are similar to the products at issue in Cipollone, Mitchell, and Freitas, because, unlike the products at issue in those cases, the coils supplied by NA do not function separately from the system in which there was a defect (i.e. the fan coil unit).

Specifically, in Cipollone, the product at issue was a dock lift manufactured by the defendant, which the customer integrated into a material-handling system that the customer designed. The plaintiff alleged that the system was dangerous due to the proximity between a handrail on the lift and a handrail installed by the customer on a separate catwalk. The Court held that the lift was a product that "function[s] on [its] own" which did not itself have a defect, but was merely integrated with other products to create a larger system that was defective. The Court held that the lift manufacturer could not be held liable for a defect in the larger system.

Similarly, in Freitas and Mitchell, the courts held that defendants were not liable where they had supplied standalone products that were assembled with other products, by other designers or manufacturers, to create systems that were subsequently deemed defective.

Here, in contrast, the coils distributed by Daikin NA are not a product that "function on their own but still may be utilized in a variety of ways by assemblers of other products." Cipollone, 202 F.3d at 379. Rather, the coils are produced specifically for the Daikin-brand

VRV system and distributed exclusively for use in that system. The coils are not interchangeable with other coils; indeed, Daikin NA produced evidence that when coils in a Daikin-brand VRV system fail, only Daikin-brand coils can be used to replace them. **T.1369-70**

The coils are thus not merely component products that were integrated with other products into a larger system that was defective. They are not independent of the VRV system, but a part of it, and that system had a defect which rendered the coils unfit for their ordinary purpose. Coils supplied by Daikin NA did not work in the very environment (the only environment) in which they were intended to be used.[5] As such, the Court adopts the jury's finding that Daikin NA breached the implied warranty of merchantability. See Haglund v. Philip Morris, Inc., 446 Mass. 741, 746-47 2006() (considerations of whether warranty obligation is breached "demand close attention to the actual environment in which the product is used"). And, as a breach of the implied warranty of merchantability is a *per se* unfair and deceptive act, see 940 CMR §3.08(2), Maillet v. ATF-Davidson Co., 407 Mass. 185, 193 (1990), the Court adopts the jury's finding that Daikin NA violated G.L. c. 93A by this breach.

2. Intentional Misrepresentation

There was evidence at trial that Daikin NA made misrepresentations to Nemirovsky, which induced him to engage in transactions in which he would not otherwise have engaged.

Most significantly, there was evidence that, when Nemirovsky complained of repeated failures in his VRV system, Daikin NA told him that the problem was due to "off-gassing" of chemicals from materials in his home, even though Daikin never tested the air in Nemirovsky's home and had no other information regarding any environmental issues in the home. **T. 422-**

[5] There was evidence that at least four replacement coils, if not more, failed. **Exs. 73, 76**

423; Ex. 40. Moreover, Daikin knew at that time that its testing lab, Matrix, had initially reported that it was unable to test sample coils from Nemirovsky's home for corrosive chemicals (although it later did so), **Ex. 33,** and that its employee, Michael Hastings, had conducted a survey of Nemirovsky's home and reported that he found "no environmental issues that could have led to the coil failures." **Ex. 88** Further, an email between employees of Daikin NA and Daikin Applied indicates that, at the same time Daikin NA told Nemirovsky the issue was due to conditions in his home, these employees believed that "[t]he leaking coils do not appear to be related to adverse filed conditions." **Ex. 89** Daikin did not inform Nemirovsky of any of these facts when it told him that the failures were due to environmental factors in his home. Finally, the letter Daikin NA sent to Nemirovsky informing him that the problem was due to conditions in his home was virtually identical to a letter it sent to another customer who was complaining about his malfunctioning VRV system at around the same time. **Exs. 40, 41** The Court finds that this evidence alone is sufficient to support the jury's finding that intentional misrepresentations were made.

Moreover, while Daikin placed the blame for numerous irregularities related to Matrix labs' reporting of tests done on Nemirovsky's coils on "clerical errors,"[6] the jury could reasonably have found instead that, as plaintiff argued, the reporting was fabricated, as part of an effort to cover up a defect in its system, or at least a refusal to investigate whether there was a defect in the system. At the very least, the jury was justified in finding that Daikin wrongfully concealed the initial reports from Nemirovsky.

[6] These included creation of identical reports for Nemirovsky and another local customer complaining of a malfunctioning system; a request by Daikin NA that Matrix revise Nemirovsky's report; and the creation of four versions of Nemirovsky's report.

Further, there was evidence that Daikin NA employees falsely told Nemirovsky that his system was experiencing unique failures when in fact there were similar failures in other VRV systems in Massachusetts. **T.431-432, 501; Ex. 42-43**.

Finally, the evidence showed that Nemirovsky relied on these representations to enter into transactions he would not have entered into if he knew the VRV system was defective, including, *inter alia*, the purchase of replacement parts for the VRV system and the hiring of his own experts (at Daikin NA's recommendation) to investigate the environmental issue that Daikin NA blamed for the problem. Nemirovsky testified that had he known of the defect in the VRV system, he would not have taken these actions because he "probably wouldn't have wanted the Daikin system anymore to begin with." **T.431**

Thus, the Court adopts the jury's finding that there were intentional misrepresentations by Daikin NA and that Nemirovsky engaged in transactions that he otherwise would not have due to same. And, as "a failure to disclose any fact, the disclosure of which may have influenced a person not to enter into a transaction, is a violation of c. 93A," Grossman v. Waltham Chemical Co., 14 Mass. App. Ct. 932, 933 (1982), the Court adopts the jury's finding that Daikin NA violated G.L. c. 93A by these misrepresentations.

3. Damages

The evidence supports the jury's award of $3,387,473.73 in damages for the Chapter 93A violations. The bulk of the award is plainly the roughly $2.8 million cost to replace the system, a cost that was supported by testimony from plaintiff's damages expert regarding the need to, among other things, tear out walls and ceilings in the home, as well as documentation of the anticipated expenditures. **Exs. 46-47** While Daikin is correct that this portion of the award cannot be based on the misrepresentation claim – because Nemirovsky would still have to

replace the system even absent the misrepresentations – it may be based on the implied warranty claim because, had the replacement parts worked as they were supposed to, Nemirovsky would not have needed to replace the system. Moreover, Daikin NA could reasonably have expected that replacement costs for the defective product would be high, given that the VRV systems are typically installed in high-end homes and are marketed as a system that can be "concealed" within a home's walls.

Daikin NA further argues that replacing the system is unreasonable, because, according to Daikin, now that ball valves have been installed, future breakdowns in the system can be remedied by simply replacing coils in the individual unit, which is inexpensive and takes only a day or two. The jury found that Nemirovsky is entitled to the benefit of what he bargained for – a fully functioning system. This finding is not unreasonable.

Evidence also supported the remaining $587,000 awarded by the jury. Plaintiff produced evidence of several hundred thousand dollars in costs he incurred to investigate the failure of the system and make repairs to it. The remaining damages were presumably based on inconvenience and discomfort he experienced due to the system failures, which the Court allowed the jury to consider.[7] Plaintiff provided evidence, in the form of testimony and correspondence with Daikin NA, of the discomfort he and his family experienced due to the malfunctioning of the heating/cooling system, and the aggravation he experienced in unsuccessfully attempting to get Daikin to resolve the problem.

[7] The Court precluded plaintiff from seeking damages that will allegedly be incurred due to having to move out of his house while a replacement system is installed, and damages for alleged diminution in the value of his home, as these damages were purely speculative.

The jury's finding that the 93A violations were willful and knowing is also supported. With respect to the warranty claim, Daikin NA knew that numerous customers had experienced failures in their systems at the time Nemirovsky was reporting failures in his system, but no evidence was presented that Daikin has taken any steps to try to address the problem. To the contrary, Daikin continues to take the position that these failures are a product of environmental factors, though no evidence was presented that such environmental issues have been established in any of the homes in which the failures have occurred. Further, the misrepresentations were knowingly made for the reasons explained above.

Accordingly, the Court adopts the jury's finding that Daikin NA committed unfair acts or practices, that these acts or practices caused Nemirovsky damages in the amount of $3,387,473.73, and that this award should be doubled because the acts and practices were willful or knowing.

However, the Court does not agree with plaintiff that he is entitled to collect the jury's award of $3,387,473.73 on the underlying breach/misrepresentation claims *and* the doubled award on the Chapter 93A claim, for a total of some $10,162,000. The injuries caused by Daikin's unfair acts or practices are the same injuries caused by Daikin's breach and misrepresentation; there was no evidence that plaintiff suffered separate injuries, and the awards on the tort claims and the Chapter 93A claim are identical. To allow plaintiff to recover both amounts would impermissibly result in duplicative awards for the same injuries. See, e.g., Calimlim v. Foreign Car Center, Inc., 392 Mass. 228, 235 (1984) (where injury is incurred because of conduct that is tortious and also a violation of Chapter 93A, "recovery of cumulative damages under multiple counts may not be allowed").

Order

Accordingly, for the foregoing reasons, the Court adopts the jury's findings on plaintiff's Chapter 93A claims, and finds that plaintiff is entitled to damages of $6,774,947.46. Plaintiff shall serve a petition for fees and costs upon defense counsel within 21 days of this Order; defense counsel shall serve a response to the petition upon plaintiff's counsel within 21 days thereafter, whereupon plaintiff shall file the petition as a package with the Court. If either party wishes a hearing on the petition, it shall be noted in the papers.

Date: October 4, 2019

Jackie Cowin

Jackie Cowin
Associate Justice, Superior Court