IN THE SUPERIOR COURT OF THE SATED OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT D. HEGWOOD, JR.,	)	
	)	
Plaintiff,	)	
	)	
	)	C. A. No. N13C-11-192
v.	)	
	)	
ROMMELL MOTORSPORTS DELAWARE, INC. F/K/A MIKE'S, FAMOUS HARLEY DAVIDSON, D/B/A ROMMEL HARLEY-DAVIDSON,	)	
	)	
Defendant.	)	

Submitted: June 25, 2014
Decided: September 26, 2014

On Defendant's Motion for Judgment on the Pleadings
DENIED

ORDER

This 25th day of September, 2014, upon consideration of the Defendant's Motion for Judgment on the Pleadings, the Plaintiff's Response in Opposition and oral argument held on June 25, 2014, it appears to the Court that:

(1) On November 14, 2013, Plaintiff filed a Complaint with the Court alleging three counts: 1.) Defendant acted negligently before and after the sale of

the motorcycle to the Plaintiff with respect to the condition of the brakes;[1] 2.) Defendant breached the implied warranty of use because the brakes did not function properly;[2] and 3.) Defendant breached the warranty of merchantability because the brakes did not function properly.[3]

(2) On February 19, 2014, Defendant filed an Answer in which Defendant denied all of the allegations set forth in the Complaint, asserted various affirmative defenses and attached to its pleading Exhibit A which included several documents characterized by Defendant as "sale documents."[4]

(3) The "sale documents" contained several documents including the following: a one-page document executed by Plaintiff on November 20, 2011 that contained the "Mike's Famous" logo followed by the words "AS IS" in large, bolded text and a paragraph that states that

> This vehicle is sold "as-is" and the selling dealer hereby expressly disclaims all warranties, either express, or implied, including any implied warranties of merchantability and fitness for a particular purpose. Any liability of the selling dealer with respect to defects or malfunctions of this vehicle including, without limitation, those which pertain to performance or safety, (whether by way of "strict liability," based upon the selling dealer's negligence, or otherwise), is expressly excluded and customer hereby assumes any such risks;[5]

and a one-page purchase order form executed by Plaintiff and a representative of

[1] Compl., D.I. 1, ¶ 6-11.
[2] *Id*. at ¶ 13.
[3] *Id*. at ¶ 15.
[4] Def. Answ., D.I. 8, ¶ 4.
[5] *Id.* at Ex. A.

Defendant on November 20, 2011 that states that "[t]he front and back of this Order comprise the entire agreement affecting this purchase and no other agreement or understanding of any nature concerning the same has been made or entered into, or will be recognized."[6]

(4) On February 25, 2014, Defendant moved for Judgment on the Pleadings to dismiss all three counts on the grounds that the "sale documents" establish that "the defendant seller included plain and conspicuous language which disclaimed all express and implied warranties and included the expression 'as is'"[7] pursuant to 6 *Del. C.* § 2-316(3).[8] Therefore, Defendant argues, Judgment on the Pleadings is appropriate.[9]

(5) On March 26, 2014, Plaintiff responded in opposition to the Motion for Judgment on the Pleadings citing *Lecates v. Hertrich Pontiac Buick, Co.*[10] in

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[6] *Id.*
[7] Def. Mot., D.I. 10, ¶ 7.
[8] 6 *Del. C.* § 2-316(3) provides:

> (3) Notwithstanding subsection (2)
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he or she desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him or her; and
>
> (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

[9] Def. Mot., D.I. 10, ¶ 10.
[10] 515 A.2d 163 (Del. Super. 1986).

which the Court denied a motion for summary judgment.[11] In *Lecates*, the Court found that a material factual dispute existed regarding whether a disclaimer of warranties, which was executed on the same date as the sales invoice, had been executed as part of the sales contract or after the sales contract.[12] Plaintiff argues that the same factual dispute arises here in the context of a Motion for Judgment on the Pleadings and, therefore, the Court should allow the Plaintiff to conduct discovery.[13] Plaintiff additionally argues that "[e]ven if the Court agrees the disclaimer is enough to protect Defendant from the breach of warranty claims at this point, it does not protect Defendant from the negligence that occurred after Plaintiff returned the bike."[14]

(6) Pursuant to Super. Ct. Civ. R. 12(c), "[a]fter the pleadings are closed but within such time so as not to delay the trial, any party may move for judgment on the pleadings."[15] Upon considering such a motion, the Court must accept all well-pled facts as true and must construe all reasonable inferences in favor of the non-moving party.[16] The motion may only be granted where the Court is satisfied that "no material issue of fact exists and the movant is entitled to judgment as a

[11] *Id*. at 170.
[12] *Id*.
[13] Pl. Resp., D.I. 12, ¶ 3.
[14] *Id.* at ¶ 4.
[15] Super. Ct. Civ. R. 12(c).
[16] *Silver Lake Office Plaza, LLC v. Lanard & Axilbund, Inc.*, 2014 WL 595378, at *6 (Del. Super. Jan. 17, 2014).

matter of law."[17]

(7) The Court agrees with Plaintiff and finds that material issues of fact remain with respect to all three counts in the Complaint. Therefore, Defendant is not entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS **ORDERED** that the Defendant's Motion for Judgment on the Pleadings is hereby **DENIED.**

/s/ Ferris W. Wharton, Judge

[17] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).