

COMMONWEALTH OF MASSACHUSETTS

Appeals Court

ESSEX, SS.

APPEALS COURT SINGLE JUSTICE NO. _____
SUPERIOR COURT DOCKET NO. 1977CV00658

ANN DELUCA,
Plaintiff-Petitioner

v.

BALLARD DESIGNS, INC.,
FLEETWOOD INDUSTRIES, INC. D/B/A FLEETWOOD FIXTURES, and
NELSON WORLDWIDE, LLC,
Defendants-Respondents.

**PETITION SEEKING RELIEF PURSUANT TO G.L. c. 231, § 118, ¶ 1
FOR PLAINTIFF-PETITIONER ANN DELUCA**

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July 22, 2020

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REQUEST FOR REVIEW

Now comes the Plaintiff-Petitioner, Ann DeLuca ("DeLuca"), and requests review of so much of Plaintiff Ann DeLuca's second Motion to Amend Complaint as the Superior Court (Lang, James F., J.) denied in part on May 8, 2020.

R.A./I:9:173.¹

ISSUES OF LAW

The issues of law raised in this Petition are:

1. "[A] finding that a defendant in a products liability case is negligent is tantamount to a finding that the defendant breached its warranty of merchantability." *Goulet v. Whittin Mach. Works, Inc.*, 399 Mass. 547, 549 (1987). "Generally, a breach of warranty constitutes a violation of G.L. c. 93A, § 2." *Maillet v. ATF-Davidson Co., Inc.*, 407 Mass. 185, 193 (1990). Where the Superior Court allowed DeLuca's second Motion to Amend Complaint in part to add an additional count for negligence, and where DeLuca now has negligence counts pending against all three defendants, did the Superior Court abuse its discretion in denying, on the basis of futility, DeLuca's second Motion to Amend Complaint in part to add counts

¹ Citations to the Record Appendix are formatted "R.A./[Volume]:[Page(s)]."

for breach of the implied warranty of merchantability and G.L. c. 93A?

2. The Bankruptcy Court granted DeLuca relief from an automatic stay in order to permit DeLuca "to establish the liability, if any, of the Debtors, and to seek recovery on account of her claims solely from any applicable insurance policies." R.A./I:118. Where an insurance carrier for the Debtor-in-Bankruptcy has denied coverage for new claims in DeLuca's Second Amended Complaint, but where that insurance carrier will continue to defend the Debtor-in-Bankruptcy under a reservation of rights, did the Superior Court abuse its discretion in denying, on the basis of futility, DeLuca's second Motion to Amend Complaint in part to add claims against the Debtor-in-Bankruptcy?

ABBREVIATED STATEMENT OF THE CASE

On May 1, 2019, Plaintiff-Petitioner Ann DeLuca ("DeLuca") filed a Complaint alleging negligence against Ballard Designs, Inc. ("Ballard").² R.A./I:7:10-11.

On September 30, 2019, the Superior Court (Fahey, J.) allowed DeLuca's

² Chronology reflects dates on pleadings and certificates of service.

first Motion to Amend Complaint, and DeLuca filed her First Amended Complaint, alleging negligence against Ballard and Fleetwood Industries, Inc. ("Fleetwood").

R.A./I:7:34-40.

On January 6, 2020, Fleetwood filed a Suggestion of Bankruptcy.

R.A./I:8:66-68.

On February 25, 2020, the United States Bankruptcy Court for the District of Delaware modified the automatic stay in Fleetwood's bankruptcy "solely to the extent necessary to permit [DeLuca] to establish the liability, if any, of [Fleetwood], and to seek recovery on account of her claims solely from any applicable insurance policies[.]" R.A./I:118-125.

On March 2, 2020, the Superior Court (K. McCarthy-Neyman, J.) allowed the joint Motion to Extend Tracking Order, extending discovery through November 2020. R.A./I:8:74-75.

On April 15, 2020, Travelers, a liability and umbrella carrier of Fleetwood, denied coverage for pending claims for breach of warranty and violation of G.L. c. 93A but re-affirmed that it would continue to defend the claims under a reservation of rights. R.A./I:127-130.

On April 23, 2020, DeLuca filed her second Motion to Amend Complaint and associated pleadings, including the oppositions of Fleetwood and Nelson Worldwide, Inc. ("Nelson") and replies. R.A./I:8-9:76-172. On May 8, 2020, the

Superior Court (Lang, James F., J.) allowed the second Motion to Amend Complaint as to a negligence claim against Nelson and denied the second Motion to Amend Complaint as to additional breach of warranty and G.L. c. 93A claims against Fleetwood and Nelson. R.A./I:9:173. The Superior Court "sees the[denied] claims as futile with no plausible course of action having been set forth in the proposed amended complaint." R.A./I:9:173.

STATEMENT REGARDING RECONSIDERATION

Pursuant to Mass. Super. Ct. R. 9A, on July 16, 2020, DeLuca served Plaintiff's Motion for Reconsideration and Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Reconsideration upon counsel for Ballard, Fleetwood, and Nelson. As of the filing of this Petition, DeLuca awaits responsive pleadings from opposing counsel.

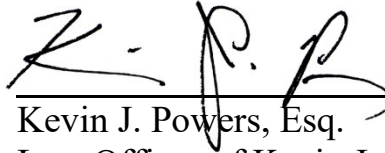
SPECIFIC RELIEF REQUESTED

Plaintiff Ann DeLuca respectfully requests that this Honorable Court:

1. Reverse the Superior Court denial in part of DeLuca's second Motion to Amend Complaint;
2. Allow DeLuca's second Motion to Amend Complaint to the extent of the proposed counts for breach of the implied warranty of merchantability and G.L. c. 93A; and

3. Grant such other relief as this Honorable Court deems just and proper.

Respectfully submitted,



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Date: July 22, 2020

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CERTIFICATE OF COMPLIANCE

I, Kevin J. Powers, hereby certify that the Petition herein complies with the rules of court that pertain to the filing of a Single Justice Petition Pursuant to G.L. c. 118, § 231, para. 1, including, but not limited to, and to the extent applicable:

Mass. App. Ct. R. 20.0(a) (Contents of petition for relief; form);

Mass. R. App. P. 16(a)(13) (addendum);

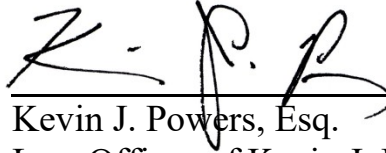
Mass. R. App. P. 16(e) (references to the record);

Mass. R. App. P. 18 (appendix to the briefs);

Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. App. P. 21 (redaction).

I further certify, pursuant to Mass. App. Ct. R. 20.0(d), that the Petition herein complies with the applicable length limitation in Mass. App. Ct. R. 20.0(a) because it is printed in a proportional spaced font, Times New Roman, at size 14 point, and contains 714 non-excluded words, as calculated using Microsoft Word 2007.

A handwritten signature in black ink, appearing to read "K. J. Powers", is written over a solid horizontal line.

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of July, 2020, I served the foregoing pleading upon the trial court and the other parties in this matter by electronic delivery via the efileMA system to their attorneys of record or, if such attorneys are not registered with efileMA or if such parties are *pro se* and not registered with efileMA, via First-Class Mail, via personal service, or via email pursuant to Supreme Judicial Court Order Concerning Email Service In Cases Under Rule 5(b) Of Mass. Rules Of Civil Procedure (On Attorneys of Record Only, Unless Self-Represented Party Consents) (Mar. 30, 2020). The trial court, attorneys, or parties served are:

Trial Court:

Clerk's Office
Essex County Superior Court
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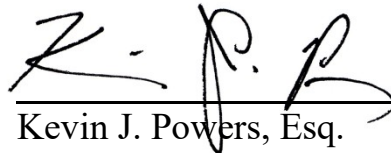
*For Defendant-Respondent Fleetwood Industries, Inc. d/b/a Fleetwood
Fixtures:*

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A handwritten signature in black ink, appearing to read "K. J. Powers", is written over a horizontal line.

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**ADDENDUM TO
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FOR PLAINTIFF-PETITIONER ANN DELUCA**

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RELEVANT UNDERLYING ORDERS

Endorsement on Plaintiff's [Second] Motion to Amend Complaint, May 8, 2020
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CLERK'S NOTICE	DOCKET NUMBER 1977CV00658	Trial Court of Massachusetts The Superior Court 
CASE NAME: Deluca, Ann vs. Ballard Designs, Inc. et al		Thomas H. Driscoll, Jr., Clerk of Courts
TO: F. Robert Allison, Esq. Attorney at Law 447 Boston St Suite 9 Topsfield, MA 01983		COURT NAME & ADDRESS Essex County Superior Court - Newburyport 145 High Street Newburyport, MA 01950
<p style="text-align: center;">You are hereby notified that on 05/08/2020 the following entry was made on the above referenced docket:</p> <p>Endorsement on Motion to amend the Complaint (#14.0): Other action taken After review of the submissions, allowed in part and denied in part. The motion to amend is denied as to the proposed additional breach of warranty and c. 93A claims against Fleetwood Industries and Nelson Worldwide. The court sees their claims as futile with no plausible course of action having been set forth in the proposed amended complaint. The motion is allowed as to the proposed negligence claim against Nelson Worldwide. Dated 5/8/2020</p> <p>Judge: Lang, Hon. James F</p>		
DATE ISSUED 05/08/2020	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. James F Lang	SESSION PHONE# (978)462-4474