Filed 9/21/17 Gimenez v. Ford Motor Company CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SUITBERTO GIMENEZ, Plaintiff and Appellant, v. FORD MOTOR COMPANY, Defendant and Respondent.	B275444 (Los Angeles County Super. Ct. No. BC574766)
TIM ROMERO et al., Plaintiffs and Appellants, v. FORD MOTOR COMPANY, Defendant and Respondent.	B275565 (Los Angeles County Super. Ct. No. BC587686)

APPEALS from judgments of the Superior Court of Los Angeles County, Elizabeth Allen White and Teresa A. Beaudet,

Judges. Judgment affirmed in full as to Romero; judgment as to Gimenez reversed in part and remanded with directions, and affirmed in part.

Strategic Legal Practices, Payam Shahian, Benjeman Beck and Christine J. Haw; Rosner, Barry & Babbbit, Hallen D. Rosner, Shay Dinata-Hanson and Kendra J. Woods, for Plaintiff and Appellant Suitberto Gimenez.

Strategic Legal Practices, Payam Shahian, Benjeman Beck and Jacob Cutler; Rosner, Barry & Babbbit, Hallen D. Rosner, Shay Dinata-Hanson and Kendra J. Woods, for Plaintiffs and Appellants Tim Romero and Diana Romero.

Shook Hardy & Bacon, M. Kevin Underhill and Amir M. Nassihi for Defendant and Respondent.

In these consolidated appeals, plaintiffs and appellants Suitberto Gimenez (Gimenez), and Tim Romero and Diana Romero (Romero) (collectively, plaintiffs) appeal judgments in favor of defendant and respondent Ford Motor Company (Ford) following the grant of defense motions for summary judgment.

Gimenez and Romero, California residents, purchased their vehicles in Nevada and Arizona, respectively. Because the vehicles were purchased outside California, the Song-Beverly Consumer Warranty Act (Song-Beverly) (Civ. Code, § 1790 et seq.), the statutory scheme known as California's lemon law (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 485), does not apply. (*Id.* at p. 483.) The trial court determined that because plaintiffs lacked a viable claim under Song-Beverly, they also lacked a viable claim under the federal lemon law, the Magnuson-Moss Warranty Act (Magnuson-Moss). (15 U.S.C. § 2301 et seq.)

The essential issue presented is whether, notwithstanding the inability of plaintiffs to invoke Song-Beverly, plaintiffs can assert claims under Magnuson-Moss. We conclude that irrespective of Song-Beverly, Gimenez has viable claims under Magnuson-Moss for breach of express warranty and breach of implied warranty, predicated on warranty provisions in the California Uniform Commercial Code. Therefore, as to Gimenez, the judgment is reversed in part and the matter is remanded for further proceedings, and affirmed in part. As to Romero, the judgment is affirmed in full because Romero previously had the opportunity to amend, but elected not to allege claims under the California Uniform Commercial Code.

FACTUAL AND PROCEDURAL BACKGROUND

I. Romero.

1. *Facts*.

On September 12, 2011, Romero purchased a 2011 Ford Edge from a Ford dealership in Arizona. In connection with the purchase, Romero received a written new vehicle limited warranty which provided 3 years/36,000 miles bumper to bumper coverage and 5 years/60,000 miles powertrain coverage.

On October 15, 2011, Romero took the vehicle to a Ford dealer with a concern that the MyFordTouch screen was blank. The dealer reprogrammed the SYNC module and the work was covered under the warranty. On February 11, 2012, Romero took the vehicle to the dealer with a concern that the touch screen was blank and there was no audio or response from the SYNC system. The dealer ordered a replacement module and the work was covered under the warranty. On February 17, 2012, Romero again returned to the dealer because the touch screen was blank. The dealer replaced the SYNC module pursuant to the warranty.

On July 13, 2013, Romero took the vehicle to the dealer due to a braking issue. The dealer replaced the brake booster, which was covered under the warranty. On August 20, 2013, Romero returned to the dealer because the "driver side front door ajar" warning light was on. The dealer replaced the door latch assembly under the warranty. On October 2, 2013, Romero took the vehicle to the dealer because it failed to start properly. The dealer replaced the battery under the warranty.

Due to the ongoing problems with the subject vehicle, on April 6, 2015, Romero requested that Ford take it back and issue a refund. Ford declined.

2. *Pleadings.*

On July 9, 2015, Romero filed this action against Ford. The operative first amended complaint alleged the following five causes of action: (1) breach of the implied warranty of merchantability (15 U.S.C. § 2310(d) & Civ. Code, § 1794); (2) breach of the implied warranty of fitness (15 U.S.C. § 2310(d) & Civ. Code, § 1794); (3) breach of express warranty (15 U.S.C. § 2310(d) & Civ. Code, § 1794); (4) failure to promptly repurchase product (15 U.S.C. § 2310(d) & Civ. Code, § 1793.2, subd. (d)); and (5) failure to commence repairs within a reasonable time and to complete them within 30 days (15 U.S.C. § 2310(d) & Civ. Code, § 1794). Each cause of action was brought pursuant to Magnuson-Moss (15 U.S.C. § 2301 et seq.) and Song-Beverly (Civ. Code, § 1790 et seq.).

3. *Motion for summary judgment.*

Ford moved for summary judgment, or in the alternative, summary adjudication. Ford contended that because Romero did not purchase the subject vehicle in California, relief could not be sought pursuant to Song-Beverly; further, because Romero's

federal claims for violations of Magnuson-Moss were predicated on Romero's state law Song-Beverly claims, the federal claims also must fail. Alternatively, Ford urged that if the Magnuson-Moss claims survived summary judgment, Romero's remedies were governed by the California Uniform Commercial Code, not by Song-Beverly.

4. *Romero's opposition*.

In opposition, Romero conceded that because the vehicle was purchased out of state, the causes of action alleged purely under Song-Beverly were not legally viable. Nonetheless, Romero contended that Magnuson-Moss establishes a federal claim for breach of written warranty, independent of Song-Beverly. Romero also argued that pursuant to Magnuson-Moss, California law, and specifically Song-Beverly, provides the measure of damages; and therefore, Romero was entitled to recover civil penalties under Song-Beverly for the claims being asserted under Magnuson-Moss.

5. *Hearing and trial court's ruling*.

The tentative ruling indicated that Romero could not use Song-Beverly as the underpinning of the Magnuson-Moss claims. At the hearing on the summary judgment motion, the trial court noted that although Romero denied he was asserting claims under Song-Beverly, every one of his causes of action cited Song-Beverly in addition to Magnuson-Moss. The trial court observed that if the pleading had specified violations of the California Uniform Commercial Code, rather than violations of Song-Beverly, the result would be entirely different.

Romero's counsel then requested that in light of the trial court's ruling, Romero be granted leave to file a second amended complaint to plead claims under Magnuson-Moss that would

incorporate provisions of the California Uniform Commercial Code.

The trial court denied leave to amend, reasoning that although the pleading was capable of being amended to state a cause of action, it would be improper to allow amendment in the midst of a summary judgment motion.

The trial court granted Ford's motion for summary judgment, ruling that (1) Romero's Song-Beverly claims failed as a matter of law because the vehicle was not purchased in California, and (2) because Romero's Song-Beverly claims as alleged in the complaint were infirm, the "Magnuson-Moss claims also fail to the extent that they rely on a violation of Song-Beverly. To conclude otherwise would effectively circumvent the substantive requirements of Song-Beverly including the limitation that Song-Beverly only applies to sales in California."

Romero filed a timely notice of appeal from the judgment.

II. Gimenez.

1. *Facts.*

On March 20, 2013, Gimenez purchased a 2012 Ford Transit from Friendly Ford in Las Vegas, Nevada. In connection with the purchase, Gimenez received a written new vehicle limited warranty which provided 3 years/36,000 miles bumper to bumper coverage and 5 years/60,000 miles powertrain coverage.

On April 18, 2013, Gimenez took the subject vehicle to a Ford dealer, Colley Ford, with a concern that the car hesitated when shifting and then made a loud noise before shifting into the next gear. Colley overhauled the transmission and the work was covered under the warranty. On March 17, 2014, Gimenez took the vehicle to Colley with a concern that the transmission would hesitate and then slam into gear. No repairs were made on that

visit with respect to this issue. On June 17, 2014, Gimenez took the vehicle to Colley with concerns that the wrench warning light was on, the car lacked power, and the car shifted hard. In response, Colley replaced the transmission and the work was covered under the warranty. Gimenez contended the repairs failed to resolve the transmission problems, and that the problems substantially impaired the use, value, or safety of the vehicle. On August 5, 2014, Gimenez called Ford and requested that it take back the car and refund his money. Ford refused.

2. *Pleadings*.

On March 6, 2015, Gimenez filed suit against Ford for violation of statutory obligations. The original complaint, which is the operative pleading, set forth six causes of action. The first five causes of action, which were based purely on state law, pled various violations of Song-Beverly and are not at issue on appeal.[1]

The sixth cause of action alleged a violation of Magnuson-Moss and pled in relevant part that in connection with the purchase of the vehicle, Gimenez received an express written warranty, and in addition, "an implied warranty of merchantability was created under California law. The vehicle's implied warranties were not disclaimed using a Buyer's Guide displayed on the vehicle; thus any purported disclaimers were ineffective pursuant to 15 U.S.C. § 2308(c). [¶] [Ford] violated the [Magnuson-Moss] Act when it breached the express warranty

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[1] Gimenez concedes he does not have a viable claim under Song-Beverly because the vehicle was not purchased in California.

and implied warranties by failing to repair the defects and nonconformities, or to replace the vehicle."

3. *Motion for summary judgment.*

Ford moved for summary judgment, contending that because Gimenez purchased the vehicle in Nevada, not California, he could not obtain any relief under Song-Beverly. As for the remaining cause of action, i.e., the sixth cause of action, because Gimenez could not prevail on his state law breach of warranty claims, his claim under Magnuson-Moss must fail as well.

4. *Gimenez's opposition.*

Gimenez did not dispute that his state law claims under Song-Beverly, the first through fifth causes of action, were not viable because the vehicle was purchased out of state. Gimenez argued, however, that Magnuson-Moss establishes a federal breach of warranty claim independent of California law, and therefore he was entitled to pursue his federal claim even if his state law Song-Beverly claims were not viable. Further, although the substantive right of action under Magnuson-Moss is independent of a claim arising under California law, state law and specifically Song-Beverly governs the damages that are available.

5. *Hearing and trial court's ruling.*

After hearing the matter, the trial court granted Ford's motion for summary judgment. The trial court ruled that the first five causes of action, alleging violations of Song-Beverly, were not viable because the vehicle was purchased in Nevada. Further, "it appears that because Plaintiff's Song-Beverly Act claim fails under the facts pled in this Complaint, Plaintiff's Magnuson-Moss Warranty Act claim also fails."

Gimenez filed a timely notice of appeal from the judgment.

Due to a unity of issues, and in the interest of judicial economy, we consolidated the Romero and Gimenez appeals for purposes of oral argument and opinion.

CONTENTIONS

Romero and Gimenez contend that Magnuson-Moss creates an independent federal cause of action that is not dependent upon the viability of a Song-Beverly claim.

DISCUSSION

1. *Scope of appellate review.*

The essential question before this court is whether plaintiffs' inability to state causes of action under Song-Beverly because they purchased the subject vehicles outside California also precludes them from stating causes of action under Magnuson-Moss.

Because the summary judgment motions were granted on the ground the complaints failed to state a cause of action, we treat the summary judgment motions as the functional equivalent of motions for judgment on the pleadings. (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 215; see generally, 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 209, pp. 647–649.)

2. *Song-Beverly and its territorial limitation.*

Song-Beverly, the California lemon law, "was enacted to address the difficulties faced by consumers in enforcing express warranties. Consumers frequently were frustrated by the inconvenience of having to return goods to the manufacturer for repairs and by repeated unsuccessful attempts to remedy the problem. [Citation.] [Song-Beverly] protects purchasers of consumer goods by requiring specified implied warranties,

placing strict limitations on how and when a manufacturer may disclaim those implied warranties, and providing mechanisms to ensure that manufacturers live up to the terms of any express warranty. (See §§ 1792–1792.5, 1793, 1793.2.)" (*Cummins*, *supra*, 36 Cal.4th at p. 484.)

However, Song-Beverly, which applies to warranties on new motor vehicles, applies only to vehicles purchased in California. (*Cummins*, *supra*, 36 Cal.4th at p. 483.) Therefore, plaintiffs, who purchased their vehicles out of state, are seeking relief under Magnuson-Moss (15 U.S.C. § 2301 et seq.), also known as the federal "lemon law." (*Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 911.)

3. *Magnuson-Moss and its reliance on state substantive law*.

Magnuson-Moss provides that "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with [(1)] any obligation under this chapter, or [(2)] under a written warranty, [(3]) implied warranty, or [(4)] service contract, may bring suit for damages and other legal and equitable relief" in any court of competent jurisdiction in any state. (15 U.S.C. § 2310(d).)

In the instant case, the plaintiffs alleged that Ford breached its obligations with respect to two of those categories, i.e., written warranties and implied warranties. Magnuson-Moss defines those terms as follows:

"(6) The term 'written warranty' means—[¶] (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect

free or will meet a specified level of performance over a specified period of time, or [¶] (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

"(7) The term 'implied warranty' *means an implied warranty arising under State law* (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product." (15 U.S.C. § 2301, italics added.)

With respect to implied warranties, the role of state law is clear. "Although the Magnuson-Moss Act creates a separate federal cause of action for breach of an implied warranty, courts must look to the relevant state law to determine the meaning and creation of any implied warranty. See 15 U.S.C. § 2301(7) . . . .)" (*Gusse v. Damon Corp.* (C.D.Cal. 2007) 470 F.Supp.2d 1110, 1116.)

In contrast, Magnuson-Moss's definition of "written warranty" does not expressly refer to state law. (15 U.S.C. § 2310(6).) Nonetheless, case law had held that state warranty law also applies to claims for breach of written warranty under Magnuson-Moss. In this regard, *Walsh v. Ford Motor Co.* (D.C. Cir. 1986) 807 F.2d 1000 (*Walsh*), stated: " The Act, [at 15 U.S.C. § 2301(6)], sets out a self-contained definition of 'written warranty'; in contrast to the subsection defining 'implied warranty' . . . , the written warranty definition does not refer to state law. An argument that Magnuson-Moss federalizes written

warranty law therefore has surface plausibility. [¶] One need not search far, however, to comprehend why the Act presents its own definition of written warranty. State law distinguishes 'express' warranties from 'implied' ones. 'Express warranty' is defined in state law; the term encompasses both written and oral undertakings. Congress ultimately decided that oral warranties need not be covered in the federal legislation unless and until they become 'more prevalent.' Because the state law term 'express warranty' did not suit the limited federal purpose, Congress supplied a definition—one confined to 'written warranty'—that did. [¶] But Congress indicated that, as in the case of implied warranties, state law would guide the determination whether a written warranty had been created. Magnuson-Moss, in section [2301(6)] defines 'written warranty' as 'any written affirmation of fact or written promise made in connection with the sale of a consumer product . . . .' The Conference Report to S. 356, the bill that became the Act, explains: [¶] The conferees intend that, if under State law a warrantor or other person is deemed to have made a written affirmation of fact, promise, or undertaking he would be treated for purposes of [the Act's consumer remedies section, section 110] as having made such affirmation of fact, promise, or undertaking. [¶] Here too, if Congress intended displacement of state law beyond the Act's explicit prescriptions, one would expect to find a clear statement to that effect. Particularly in an area traditionally in the state's domain, such as sales law, the likelihood is that the national legislature, when it intervenes, and does not say otherwise, opts for the little rather than the much. We have no reason to believe Congress departed from that general pattern in this particular instance." (*Id.* at pp. 1015–

1016, fns. omitted.) Thus, *Walsh* concluded that "state warranty law lies at the base of *all* warranty claims under Magnuson-Moss." (*Id.* at p. 1016, italics added; accord, *Plagens v. National RV Holdings* (D.Ariz. 2004) 328 F.Supp.2d 1068, 1072–1073; *Hill v. Hoover Co.* (N.D.Fla. 2012) 899 F.Supp.2d 1259, 1266.)

Although Magnuson-Moss "provides a federal cause of action for state warranty claims[,] *Monticello v. Winnebago Indus. Inc.* [(N.D.Ga. 2005) 369 F.Supp.2d 1350, 1356,] it does not expand the rights under those claims, and dismissal of the state law claims requires the same disposition with respect to an associated [Magnuson-Moss] claim. See *id.* See also *Clemens v. DaimlerChrysler Corp.* [(9th Cir. 2008) 534 F.3d 1017, 1022] ('disposition of the state law warranty claims determines the disposition of the Magnuson-Moss Act claims.'); *Daugherty v. Am. Honda Motor Co., Inc.* [(2006)] 144 Cal.App.4th 824, 833 . . . ('the trial court correctly concluded that failure to state a warranty claim under state law necessarily constituted a failure to state a claim under Magnuson-Moss.')." (*Stearns v. Select Comfort Retail Corp.* (N.D.Cal. 2009) 2009 WL 1635931 at *9; accord, *In re Sony PS3 Other OS Litigation* (9th Cir. 2014) 551 Fed.Appx. 916, 920; *Birdsong v. Apple, Inc.* (9th Cir. 2009) 590 F.3d 955, 958, fn. 2; *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation* (C.D.Cal. 2010) 754 F.Supp.2d 1145, 1188; *Sandoval v. PharmaCare US, Inc.* (S.D.Cal. 2015) 145 F.Supp.3d 986, 998.) Accordingly, plaintiffs' inability to state a warranty claim under Song-Beverly because the vehicles were purchased out of state (*Cummins*, *supra*, 36 Cal.4th at p. 483) precludes them from stating Magnuson-Moss warranty claims predicated on Song-Beverly.

The issue now becomes whether the failure of plaintiffs' Song-Beverly claims precludes plaintiffs from stating *any* cause of action under Magnuson-Moss for breach of warranty.

4. *Irrespective of Song-Beverly, the California Uniform Commercial Code provides litigants with a basis for asserting express and implied warranty claims under Magnuson-Moss.*

Leaving aside Song-Beverly, there is another body of state law, namely, the warranty provisions in the California Uniform Commercial Code, which can serve as an independent basis for litigants' claims under Magnuson-Moss for breach of express warranty, breach of the implied warranty of merchantability, and breach of the implied warranty of fitness. (See, e.g. *Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1332 [plaintiff was entitled to maintain a "count under Magnuson-Moss for breach of written warranty . . . based on the California Uniform Commercial Code, which provides a remedy for breach of express warranty"].)

Section 2313 of the California Uniform Commercial Code, pertaining to express warranties, states: "(1) Express warranties by the seller are created as follows: [¶] (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. [¶] (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. [¶] (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model. [¶] (2) It is not necessary to the creation of an express warranty that the seller use formal words such as

'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

Section 2314 of the California Uniform Commercial Code, pertaining to the implied warranty of merchantability, states: "(1) Unless excluded or modified (Section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . . . [¶] (2) Goods to be merchantable must be at least such as [¶] (a) Pass without objection in the trade under the contract description; and [¶] (b) In the case of fungible goods, are of fair average quality within the description; and [¶] (c) Are fit for the ordinary purposes for which such goods are used; and [¶] (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and [¶] (e) Are adequately contained, packaged, and labeled as the agreement may require; and [¶] (f) Conform to the promises or affirmations of fact made on the container or label if any. [¶] (3) Unless excluded or modified (Section 2316) other implied warranties may arise from course of dealing or usage of trade."

Further, section 2315 of the California Uniform Commercial Code, pertaining to the implied warranty of fitness, states: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

We express no opinion as to the merits of any potential claims that could be brought under these provisions. We merely hold that the above provisions of the California Uniform Commercial Code can supply a state law basis for a litigant's Magnuson-Moss claims, independent of Song-Beverly.

5. *The impact of the California Uniform Commercial Code's warranty provisions on Romero's and Gimenez's actions.*

We now address the particulars of Romero's and Gimenez's pleadings.

a. *Romero's appeal; no entitlement to leave to amend to plead new causes of action predicated on the California Uniform Commercial Code.*

Romero's original complaint, filed July 9, 2015, set forth five causes of action based on Song-Beverly, as well as a sixth cause of action for violation of Magnuson-Moss.

On February 9, 2016, at a hearing on a discovery motion, there was a colloquy as to the applicability of the California Uniform Commercial Code. The parties agreed that Romero would file a first amended complaint, deleting the first five causes of action, sounding in Song-Beverly, and retaining only the sixth cause of action.

Romero then filed a first amended complaint, consisting of five causes of action, which continued to be based on Song-Beverly, in addition to Magnuson-Moss.

For the reasons already discussed, the trial court properly found that no cause of action was stated because all of Romero's Magnuson-Moss claims were predicated on Song-Beverly. The remaining issue as to Romero is whether leave to amend is warranted to enable Romero to plead new Magnuson-Moss claims predicated on the California Uniform Commercial Code.

At the hearing on the summary judgment motion, the trial court stated: "But when we had this conversation about how the complaint was going to be fixed . . . , I thought you were going to incorporate something else besides Song-Beverly that got you to the Magnuson-Moss [claim]." The trial court explained, "[t]hat's why I went back to see if there was any reference to the Uniform Commercial Code in [the first amended complaint], anywhere. And there wasn't." The trial court then denied Romero leave to amend and granted summary judgment for Ford.

The trial court's written order stated: "In the case at hand, Plaintiff already asked the Court for leave to amend the complaint and Defendant agreed to the amendment to eliminate the Song-Beverly claim. . . . The [first amended complaint] is the resulting pleading now at issue. *Thus, Plaintiff elected not to include a claim based upon California's Commercial Code*." (Italics added.) In other words, the trial court made an express finding that despite having had the opportunity, Romero elected not to amend the pleading to allege a claim based upon the California Uniform Commercial Code. Romero does not challenge this finding by the trial court.

Because Romero chose not to amend the pleading to allege violations of the California Uniform Commercial Code, despite having had such opportunity, the trial court did not abuse its discretion in refusing Romero's request at the summary judgment hearing to amend the pleading in this manner. Having elected not to plead the California Uniform Commercial Code in the first amended complaint, Romero cannot now be heard to complain that the trial court should have granted him leave to amend to do so. (See *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 861 [by expressly declining an opportunity

to amend the pleading after trial court sustained a demurrer, plaintiff forfeited its claim of error based on trial court's denial of leave to amend].)

b. *Gimenez's appeal; Magnuson-Moss claim in sixth cause of action was well pled.*

Gimenez's appeal is limited to the trial court's ruling on the sixth cause of action.

That cause of action, alleging a violation of Magnuson-Moss, pled in relevant part: In connection with the purchase of the vehicle, Gimenez received an express written warranty. In addition, an implied warranty of merchantability was created under California law. Ford violated Magnuson-Moss when it breached the express warranty and implied warranties by failing to repair the defects and nonconformities, or to replace the vehicle.

In its moving papers below, Ford contended Gimenez's sixth cause of action, alleging a violation of Magnuson-Moss, must fail because Gimenez's Song-Beverly claims were not viable. The trial court agreed.

However, Gimenez's Magnuson-Moss claim, in the sixth cause of action, did not specify Song-Beverly as a predicate. The sixth cause of action simply alleged that Ford had breached the express written warranty in connection with the sale of the vehicle, as well as the implied warranty of merchantability under California law. Therefore, the sixth cause of action was not affected by Gimenez's reliance on Song-Beverly in his other causes of action.

We conclude Gimenez's sixth cause of action is not barred by Song-Beverly and therefore should be reinstated.[2]

6. *The issue of remedies for breach of warranty not reached.*

In moving for summary judgment/summary adjudication as to Romero, Ford also contended that in the event the court were to determine that Romero's Magnuson-Moss claims should survive summary judgment, the court should rule that the available remedies were governed by the California Uniform Commercial Code, not by Song-Beverly.[3] On appeal, plaintiffs contend Song-Beverly remedies are available for a successful Magnuson-Moss claim, even when a consumer cannot sue under Song-Beverly.

Because Romero's complaint failed to state a cause of action against Ford, it is unnecessary to address the scope of Romero's remedies.

As for Gimenez's appeal, we note that in moving for summary judgment/summary adjudication on Gimenez's complaint, Ford did not seek summary adjudication on any issue of damages.

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[2] We express no opinion as to the merits of Gimenez's sixth cause of action predicated on the California Uniform Commercial Code. We merely hold that Song-Beverly is not an impediment to Gimenez's stating a cause of action under Magnuson-Moss.

[3] Code of Civil Procedure section 437c provides at subdivision (f)(1) that a party "may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, *one or more claims for damages*, or one or more issues of duty." (Italics added.)

Therefore, the issue of remedies is not properly before this court and requires no discussion.[4]

7. *Preemption argument not reached*.

Plaintiffs also contend that if this court concludes that their Magnuson-Moss claims depend on the validity of their Song-Beverly claims, this court should rule that Magnuson-Moss preempts Song-Beverly.

Having concluded that litigants can predicate their Magnuson-Moss claims on the warranty provisions of the California Uniform Commercial Code, it is unnecessary to address the preemption argument.

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[4] Because plaintiffs' contention that Song-Beverly remedies should apply to their Magnuson-Moss claims is not properly before us, we do not address *Brilliant v. Tiffin Motor Homes, Inc.* (N.D.Cal. 2010) 2010 WL 2721531, and *Romo v. FFG Ins. Co.* (C.D.Cal. 2005) 397 F.Supp.2d 1237, two cases on which plaintiffs primarily rely to support their argument.

DISPOSITION

On the Gimenez appeal (No. B275444), the judgment is reversed with respect to the sixth cause of action only, with directions to reinstate that cause of action; in all other respects, the judgment is affirmed. Gimenez shall recover his costs on appeal.

On the Romero appeal (No. B275565), the judgment is affirmed, with Ford to recover its costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

BACHNER, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.