

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 19-CIV-62630-RAR**

**MISSING CARD 3, LLC,**

Plaintiff,

v.

**HORIZON YACHTS, INC., et al.,**

Defendants.

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**ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANTS' MOTION TO DISMISS**

**THIS CAUSE** comes before the Court on Defendants' Motion to Dismiss the Amended Complaint for Failure to State a Claim ("Motion") [ECF No. 44] under Federal Rule of Civil Procedure 12(b)(6). As to Defendant Horizon Yachts, Inc., the Motion seeks the dismissal with prejudice of Counts III, V, VII, and IX, and as to Defendant Horizon Yacht Co., Ltd., the dismissal with prejudice of Counts II, VI, and X. The Court conducted a telephonic hearing to discuss the Motion on September 2, 2020 ("Hearing"). *See* Paperless Minute Entry [ECF No. 60]. The Court having heard argument from all parties and carefully reviewed Plaintiff's Amended Complaint [ECF No. 19] ("Amended Complaint"), the Motion, Plaintiff's Response in Opposition to the Motion [ECF No. 47] ("Response"), and Defendant's Reply [ECF No. 50] ("Reply"), and being otherwise fully advised, it is hereby

**ORDERED AND ADJUDGED** that Plaintiff's Motion is **GRANTED IN PART AND DENIED IN PART** as follows:

1. Counts III, V, VII, and IX are dismissed *with prejudice*. These claims involve breach of express and implied warranties against Horizon Yachts, Inc. Viewing the allegations in

the light most favorable to Plaintiff, as required when considering a motion to dismiss under Rule 12(b)(6), *see Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2013), these claims must be dismissed because Horizon Yachts, Inc. issued no warranties, express or implied, and conspicuously disclaimed any such warranties. As discussed at the Hearing, although Plaintiff entered into the Vessel Purchase Agreement<sup>1</sup> with Horizon Yachts, Inc., the Limited Warranty in the transaction was provided by co-defendant Horizon Yacht Co., Ltd., the manufacturer of the vessel in question.

2. For similar reasons, Count II is dismissed *with prejudice*. Count II alleges a breach of the Vessel Purchase Agreement against Horizon Yacht Co., Ltd., but Horizon Yacht Co., Ltd. is not a party to the Vessel Purchase Agreement. Because Count I, which is not the subject of the Motion, alleges a breach of the Vessel Purchase Agreement against the proper party, Horizon Yacht Co., Inc., amendment of this claim would be futile.

3. Count VI for Breach of Implied Warranty of Fitness for a Particular Performance is dismissed *without prejudice* because Plaintiff has not sufficiently alleged that the vessel was purchased for a particular purpose. “A warranty of fitness for a particular purpose arises when the buyer relies on the seller’s skill or judgment to select the goods and the seller at the time of contracting has reason to know the buyer’s purpose and that the buyer is relying on the seller’s skill and judgment.” *Barnext Offshore, Ltd. v. Ferretti Grp. USA, Inc.*, No. 10–cv-23869, 2012 WL 1570057, at \*12 (S.D. Fla. May 2, 2012) (quoting *First New Eng. Fin. Corp. v. Woffard*, 421

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<sup>1</sup> Although a motion to dismiss is to be considered based only on the allegations in the Complaint, “[i]t is well established that, where a cause of action stems from a contract that is attached to the complaint as an exhibit, the contract is considered part of the record for a Rule 12(b)(6) motion to dismiss. If the contract demonstrates unambiguously that the plaintiff’s relief is not merited, the claims should be dismissed.” *Siedle v. Nat’l Ass’n of Secs. Dealers, Inc.*, 248 F. Supp. 2d 1140, 1143 (M.D. Fla. 2002) (citation omitted); *see also Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (the court can consider a document referenced in the complaint when deciding a motion to dismiss). The Vessel Purchase Agreement is referenced repeatedly in the Amended Complaint and is attached thereto as Exhibit A.

So.2d 590, 596 (Fla. 5th DCA 1982)). The Eleventh Circuit has described a particular purpose as differing “from an ordinary purpose in that it envisages a specific use by the buyer which is *peculiar* to the nature of his business.” *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1100 (11th Cir. 1983) (emphasis added). Plaintiff has alleged only that the vessel “was [] purchased for the particular purpose of a luxury motor yacht,” Amended Compl. at ¶ 158, which is insufficient to allege the vessel was purchased for a *particular*—rather than an ordinary—purpose. *See Royal Typewriter Co.*, 719 F.2d at 1100 (“Since the [products] were used for ordinary purposes, a warranty of fitness for a particular purpose did not arise.”). Similarly, Plaintiff alleges only that it “was relying upon HORIZON [Yacht Co. Ltd]’s skill, representations and judgment to select, furnish and provide a vessel which was fit to be used for a particular purpose,” Amended Compl. at ¶ 158, but has not alleged “*how* it relied on the seller’s skill and judgment in choosing a particular yacht for its particular purposes.” *See Barnext Offshore, Ltd.*, 2012 WL 1570057, at \*13 (emphasis added). Therefore, Plaintiff’s allegations in this regard are “threadbare recitals of a cause of action’s elements, supported by mere conclusory statements,” which “do not suffice” to overcome a motion to dismiss for failure to state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As discussed at the Hearing, Plaintiff is granted leave to replead this claim with specific allegations regarding the particular purpose for which the vessel was purchased and how it relied on Defendant’s skill and judgment in making the purchase.

4. Count X for Breach of Implied Warranty of Workmanlike Performance is dismissed *without prejudice*. Admiralty law recognizes an implied warranty of workmanlike service which arises from *contractual relationships*. *See Taylor v. Carey’s Diesel, Inc.*, No. 07-cv-80106, 2007 WL 9701773, at \*2 (S.D. Fla. May 24, 2007). “The warranty of workmanlike performance is a duty to perform the work properly and safely, and with a degree of diligence, attention and skill

adequate to complete the task.” *Id.* (citations and quotations omitted). Defendants correctly point out that “[m]aritime law will not imply the warranty of workmanlike performance upon a contract for the sale or construction of a vessel,” Motion at 9 (citing *Avondale Shipyards, Inc. v. Vessel Thomas E. Cuffee*, 434 F. Supp. 920, 926 (E.D. La. 1977)), and Plaintiff has alleged no other contractual relationship for repairs between itself and Horizon Yacht Co., Ltd. outside the Vessel Purchase Agreement,<sup>2</sup> see *AIG Prop. Casualty Co. v. Bradford Marine Inc.*, No. 17-cv-62578, 2018 WL 2198453, at \*4 (S.D. Fla. May 14, 2018) (dismissing without prejudice a claim for implied warranty of workmanlike performance because plaintiff failed to allege the existence of a repair contract). By the same token, Plaintiff has failed to aver when the allegedly faulty performance occurred, what repairs Defendant contracted to perform (i.e., “the work”), and how Defendant “failed to perform [that] work properly and safely.” *Taylor*, 2007 WL 9701773, at \*2. Plaintiff has thus failed to allege “sufficient factual matter, accepted as true, to ‘state a claim to relief [for implied warranty of workmanlike performance] that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). As discussed at the Hearing, Plaintiff is granted leave to replead this claim with specific allegations regarding the agreement between the parties and how the repairs allegedly breached an implied warranty to that agreement.

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<sup>2</sup> Plaintiff insists that the repairs were not performed pursuant to the Vessel Purchase Agreement but instead were “agreed to and rendered . . . after the completion of the sales and purchase transaction had long been concluded.” Response at ¶¶112-113. But the Amended Complaint does not allege the existence of any contract, express or implied, outside the Vessel Purchase Agreement, and “[w]hile the Court must accept as true all factual allegations contained in the Complaint, the same does not hold for new facts that a plaintiff belatedly raises in response to a motion to dismiss. That amounts to an impermissible attempt to amend the Complaint without leave of Court.” *Zurich Am. Ins. Co. v. Amerisure Ins. Co.*, No. 9:16-cv-81393, 2017 WL 366232, at \*7 (S.D. Fla. Jan. 20, 2017) (citing *Burgess v. Religious Tech. Ctr., Inc.*, 600 F. App’x 657, 665 (11th Cir. 2015)).

5. Defendant shall file a Second Amended Complaint in conformance with this Order on or before **September 14, 2020**.

**DONE AND ORDERED** in Fort Lauderdale, Florida this 3rd day of September, 2020.

A handwritten signature in black ink, appearing to read 'Rodolfo A. Ruiz II', written over a horizontal line.

**RODOLFO A. RUIZ II**  
**UNITED STATES DISTRICT JUDGE**