

Bill-Jay Machine Tool Corp. v Koster Industries, Inc.
2006 NY Slip Op 30046(U)
June 30, 2006
Supreme Court, Suffolk County
Docket Number: 0016646/6646
Judge: Arthur G. Pitts
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Supreme Court of the State of New York
IAS Part 43- County of Suffolk

PRESENT:

HON. ARTHUR G. PITTS

JUSTICE OF THE SUPREME COURT

BILL-JAY MACHINE TOOL CORP. and SENTRY
 INSURANCE, A MUTUAL COMPANY as
 subrogee of BILL-JAY MACHINE TOOL CORP.,

Plaintiffs,

-against-

KOSTER INDUSTRIES, INC., SAG SUPPLY
 CORPORATION, GRISCO TRANSPORT, INC.,
 PRIME TRANSPORTATION, INC. AND L.A.
 MACHINERY MOVING,

Defendants.

PRIME TRANSPORTATION, INC.,

Third-Party Plaintiff,

-against-

NEW YORK MARINE AND GENERAL
 INSURANCE COMPANY,

Third-Party Defendants.

ORIG. RETURN DATE: 1/23/06

FINAL SUBMIT DATE: 4/20/06

MOTION SEQ. NO.: 007-MD

008-MG

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Upon the following papers numbered 1 to 38+read on this motion /summary judgment
Notice of Motion/OSC and supporting papers 1-15 Notice of Cross-Motion and supporting papers 16-25; Affirmation/affidavit in
opposition and supporting papers 26-28 Affirmation/affidavit in reply and supporting papers 29-30/ 31-34/35-37 other 38 ;
(~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that defendant Koster Industries, Inc.'s motion for summary judgment is granted under the
circumstances presented herein. (CPLR 3212) It is further

ORDERED that defendant Grisco Transport, Inc.'s cross motion for summary judgment is denied.

Plaintiffs commenced this breach of contract, breach of warranty, fraud and insurance subrogation
stemming from the purchase, at auction, of two pieces of equipment in May of 2002. In May 2002, Sag
principal Joseph Sagrin notified William Toscano, president of Bill-Jay, that he had received a brochure from
Kostner Industries, Inc. ("Kostner"), which advertised a sale by auction of like new equipment. Upon
discussions, Toscano and Sagrin reached a verbal agreement whereby Sag, acting as Bill-Jay's agent, would
travel to California, investigate the machines, check their general condition and, if they were suitable, attempt
to acquire two machines for Bill-Jay. Toscano had listed five specific machines that met the criteria necessary
to be utilized by Bill-Jay. The five machines were ranked in order of preference, and a maximum bid was
assigned to each. Each of the five prospective machines was advertised as having a "B-360,000 Position" or
"B Axis" function. Upon arrival at the auction, Mr. Sagrin conducted a visual inspection of the machines,
determined their general condition to be very good and notified Mr. Toscano of this information. When
bidding commenced, it was necessary for the amount Bill-Jay was willing to pay for the machines to be
modified upward, based on the prices the equipment was selling for at auction. Ultimately, Sag acquired two
pieces of equipment plus accessories on behalf of Bill-Jay. Upon receipt and attempted use of the equipment,
Bill-Jay discovered that neither piece of equipment contained the critical "B-360,000 Position" or "B-Axis"
function. By decision and order of this Court dated October 17, 2005 defendant Sag Supply Corporation's
motion for summary judgment was granted and the complaint as to it was dismissed.

In support of the instant motion, defendant Kostner proffers the disclaimer in the sales brochure which
advertised the subject machines. Within the brochure was the TERMS & CONDITIONS section on page 2
containing the auctioneer's disclaimer which provided as follows:

Although information has been obtained from sources
deemed reliable, the auctioneer makes no warranty or
guarantee, express or implied, as to the accuracy of the
information herein contained. It is for this reason that
buyers should avail themselves of the opportunity to
make inspection prior to the sale.

Furthermore, the auction "bidder paddle" including the registration card contained "TERMS &
CONDITIONS" on the reverse side next to the caption "CONDITION OF ARTICLES SOLD." Said disclaimer
provided as follows:

The auctioneer shall not be responsible for the correct
description, genuineness, authenticity of, or defect in
any lot, and makes no warranty in connection therewith.

No sale shall be set aside nor allowance made on account of any incorrectness, error in cataloging, or any imperfection not noted. NO DEDUCTION ALLOWED ON DAMAGED ARTICLES, ALL ARTICLES BEING EXPOSED FOR PUBLIC EXHIBITION, AND SOLD "AS IS" AND WITHOUT RECOURSE. ARTICLES ARE NOT WARRANTED AS MERCHANTABILITY OR FIT FOR ANY PARTICULAR PURPOSE, AND NO CLAIM MAY BE MADE BY PURCHASER RELATING TO THE CONDITION OR USE OF ARTICLES PURCHASED, OR FOR PROXIMATE OR CONSEQUENTIAL DAMAGES ARISING THEREFROM.

Said disclaimers were also contained in the auction sale lot numbered catalogue. It is also without dispute that former defendant Sag Supply Company through its principal, Joseph Sagarin inspected the subject machinery as the plaintiff's agent prior to the successful bidding.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851,853, 487 N.Y.S.2d 316; *Zuckerman v. City of New York* 49 N.Y.2d 557,562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 [1986]).

It is well settled that where at an auction sale a catalogue listing describing the items up for bidding contains a clear disclaimer of any express or implied warranty, in the absence of a willful intent to deceive, a buyer cannot recover from the under a breach of warranty claim. (see *Weisz v. Parke-Bernet Galleries*, 7 Misc 2d 80, 351 N.Y.S.2d 911 [App Term, 1st Dept 1974]) There is nothing in the record before the Court to indicate that defendant Koster willfully intended to deceive the plaintiff. Furthermore, the plaintiff's cause of action sounding in fraud as to defendant Koster must also be dismissed. The plaintiff was a "sophisticated buyer" familiar with the type of equipment he was seeking to purchase and his agent had ample opportunity to inspect the machinery prior to bidding. Under such circumstances summary judgment as to such cause of action is also warranted. (see *T.T. Exclusive Cars v. Christie's*, 1996 WL 737204 [S.D.N.Y. Dec. 24, 1996])

Defendant Grisco Transport, Inc. ("Grisco") has also moved for summary judgment by way of cross motion. Upon the purchase of the subject machinery, the plaintiff contracted with defendant Prime Transportation, Inc ("Prime") to transport them from Madera, California to Ronkonkoma, Suffolk County, New York. Defendant Prime then subcontracted with defendant Grisco to transport the machinery. On June 17, 2002 the machines were placed on four flatbed trucks for transport to New York. Former defendant L.A. Machinery Moving was engaged to rig the machines for transport. The complaint as to L.A. Machinery Moving was dismissed by decision and order of this Court dated June 14, 2004. After the machinery was

placed on the trucks by L.A. Machinery Moving defendant Grisco's driver secured it with chains and straps and "fully tarped" it. Approximately three miles into the cross country trip, the driver stopped at a weight station and the machine fell off the truck, allegedly injuring the driver. By way of the sixth cause of action in its complaint, the plaintiff alleges that defendant Grisco was negligent in the transport of the machinery, causing damage when it slid off the truck.


In support of the instant motion defendant Grisco avers that any damage to the machinery was caused solely by improper rigging done by former defendant L.A. Machinery Moving and proffers the affidavit of the plaintiff's principal, William Toscano which states in part that it "was L.A. Machinery Moving's improper rigging of the machines that contributed greatly to the machine falling off the flat-bed damaging the machine..." However notwithstanding defendant Grisco's assertion that liability may only be assessed against L.A. Machinery Moving, the record clearly establishes that it was responsible to secure the machines on the trucks and they fell off. The function of the Court upon a motion for summary judgment is issue finding, not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact, or where an issue is even arguable. (*Stevens v. Parker*, 99 A.D.2d 649, 472 N.Y.S.2d 225 [2nd Dept. 1984]) Herein, issues of fact are present as to whether the alleged improper securing of the machinery was a contributing factor to the machinery sliding off the truck and the subsequent damage. Accordingly, defendant Grisco's motion is denied.

This shall constitute the decision and order of the Court.

Submit judgment.

So ordered.

Dated: Riverhead, New York
June 30, 2006



J.S.C.

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