

Liffey Van Lines v Mercedes-Benz Manhattan

2007 NY Slip Op 30613(U)

April 5, 2007

Supreme Court, New York County

Docket Number: 0101047/2005

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____
Justice

PART 2

Index Number : 101047/2005

LIFFEY VAN LINES

vs

MERCEDES-BENZ MANHATTAN

Sequence Number : 003

OTHER

INDEX NO.

101047/2005

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is granted in accordance
with accompanying memorandum decision.

FILED

APR 11 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/5/07

LOUIS B. YORK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART: 2

----- x
LIFFEY VAN LINES, INC.

Plaintiff,

INDEX NO. 101047/2005

- against-

MERCEDES-BENZ MANHATTAN, INC.
MERCEDES-BENZ USA, LLC and
TERESA DI ROBERTO,

Defendants.
----- x

LOUIS B. YORK, J.,

Defendants move to clarify this Court's decision in Motion Sequence Number 2, which resolved a motion and cross motion for summary judgment. There was no opposition; and, indeed, the parties were directed to seek clarification by the Court mediator. After consideration, the Court grants the motion and clarifies the decision as follows.

Initially, the Court clarifies that it intended to dismiss all claims asserted against Teresa Di Roberto, the individually named defendant. Although only the fraud claims were asserted against her, the Court dismissed claims not asserted against Ms. Di Roberto, at times discussing their applicability to her. This was unintentional, albeit a harmless error.

Defendants also seek clarification as to the Court's decision regarding the second, third and fourth causes of action – which assert conversion, breach of contract and unjust enrichment respectively. The Order dismissed the claims as against Mercedes Benz USA (MBU) & Teresa Di Roberto. However, movants state that these causes of action were not asserted against MBU and Teresa Di Roberto, but against Mercedes Benz Manhattan (MBM). Therefore, movants seek to clarify whether the claims have been dismissed against MBM.

To clarify, the motion as it relates to the second, third, and fourth causes of action is denied as to MBM. The Court directs movants to page 7, paragraph 2, in the original Order, which states that “as asserted against MBM, the service records and deposition testimony annexed . . . raise triable issues of fact.” Any language in the Order deciding the motion as relating to MBU and Di Roberto was inadvertent.

In addition, as to the fifth cause of action, for Lemon Law violation was asserted against MBM and MBU. The order dismisses the claim against MBM – and, according to movants, dismisses against Ms. Di Roberto although she was not named in this claim. According to movants, the Court also did not address MBU's motion for summary judgment on the fifth cause of action.

The Court directs movants to page 5 in the original order, in which the Court stated, “as asserted against [MBU], the cross-motions for summary judgment . . . are denied.” Although the Court inadvertently referred to the cross-motions for summary judgment and not to the motion, the substance of the determination – that MBU’s application for summary judgment was denied – reflects the intention of the Court. To the extent that the Court decided the claim as against Di Roberto, this was inadvertent.

Finally, the motion states that the sixth cause of action, arising under the Magnuson Moss Act, was only asserted against MBM and MBU. However, the decision dismisses the claim only against Ms. Di Roberto, who is not mentioned in this cause of action. Movants state they do not understand whether the claim was dismissed against MBM or MBU.

As stated, the dismissal of this claim against Ms. Di Roberto, against whom plaintiff did not assert the claim, was an unintentional, but harmless, error. As to movants’ confusion as to whether the claim was dismissed against them, the Court directs them to the bottom of page 8 of the decision, in which the Court states: “As asserted against [MBU] and [MBM], however, there are triable issues

of fact”

Accordingly, it is

ORDERED that the motion to clarify this Court’s decision in Motion Sequence Number 2 is granted, and the decision in Sequence Number 3 is vacated and replaced with the following:

Defendants move for summary judgment dismissing plaintiff’s second amended complaint, which asserts five causes of action against Mercedes-Benz Manhattan, Inc. (MBM), Mercedes-Benz USA, LLC, and MBM sales associate Teresa Di Roberto. Plaintiff cross-moves, for summary judgment on the fifth and sixth causes of action alleged in the second amended complaint, arising under the New York new car Lemon Law (Gen Bus L §§ 198-a), and the Magnuson-Moss Warranty Act (15 U S C § 2301).

It is undisputed that the corporate plaintiff, Liffey Van Lines, Inc., purchased a 2002 Mercedes Benz S-Class 600 automobile from defendant MBM on or about November 12, 2003. At the time of the purchase, there were 16,341 miles on the car, and plaintiff purchased the vehicle for \$94,859.67. The car was purchased primarily for use by plaintiff’s president, Daniel Moloney.

According to plaintiff’s second amended complaint, Mr. Moloney made the decision to purchase the automobile based upon false representations by MBM sales associate, Teresa Di Roberto, that: 1) the automobile purchased by plaintiff was a "demo;" 2) the vehicle had no prior owners and was never in an accident; and 3) Mercedes Benz would always provide plaintiff with a "loaner" car in the event the car was in the dealership for service or repairs. Plaintiff alleges that the S 600 purchased was not a "demo," but a used vehicle, that had been in a prior accident. Plaintiff alleges that the vehicle had recurrent problems with the front wheels and electrical system during the 13 month period that the vehicle was in Mr. Moloney’s possession, that MBM either did not or could not correct the alleged non-conformities within a reasonable period of time, and that MBM

did not provide plaintiff with a "loaner" car every time the vehicle was in the dealer for service. Plaintiff seeks reimbursement of the full purchase price of the vehicle, plus punitive and other compensatory damages.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering proof, in non-hearsay form (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make a *prima facie* showing requires denial of the motion (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the opposing party to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact that require a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d at 324; *Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

In this case, the deposition testimony annexed to defendants' moving papers creates credibility based issues regarding whether Ms. Di Roberto did, or did not, represent that the vehicle ultimately purchased by plaintiff was a "demo." The parties all agree, however, that if the car was a "demo" it would be classified as a new car. The documents annexed to defendants' moving papers, that were given to plaintiff, or executed by plaintiff's principal, in connection with the purchase and financing of the vehicle, all denominate the vehicle as "used." These documents include an invoice describing the vehicle as "used" with 16,341 miles on it, a Retail Installment Contract (3/29/06 Weisman Aff., Exh J), a Retail Certificate of Sale reflecting the fact that the vehicle had been driven 16,340 miles at the time of purchase (3/29/06 Weisman Aff. Exh K), and a Tele Aid Subscription Agreement for a "Pre-Owned" vehicle (3/29/06 Weisman Aff, Exh L). Where "an express provision in the written contract contradicts the claimed oral representations in a meaningful fashion ... the conflict between the written contract and the oral representations negates

the claim of reliance upon the latter" (*Bango v Naughton*, 184 AD2d 961, 963 [3rd Dept 1992], citing *Danann Realty Corp. v Harris*, 5 NY2d 317, 320-21 [1959]; in accord, *AFG Industries, Inc. v Empire Glass Co., Inc.*, 226 AD2d 487 [2d Dept 1996]; *Mariani v Dyer*, 193 AD2d 456 [1st Dept], *lv denied* 82 NY2d 658 [1993]). The "used" designation also appeared on the Certificate of Title issued to Van Lines by the New York State Department of Motor Vehicles on December 29, 2003. As a matter of law, therefore, plaintiff cannot claim reliance on any representations that the car was a "demo" or "new," or assert a basis for rescission of the contract based upon the alleged misrepresentation (*see e.g. Lewin Chevrolet-Geo-Oldsmobile Inc. v Bender*, 225 AD2d 916 [3rd Dept 1996]). The conflict in testimony, therefore, fails to create a triable issue of fact for trial.

Conversely, designation of the car as "used," does not prevent analysis under the new car "Lemon Law" (General Business Law §198-a [a][2]), which defines motor vehicles within its coverage as "subject to a manufacturer's express warranty at the time of original delivery and ... purchased, leased or transferred in this state within either the first eighteen thousand miles of operation or two years from the date of original delivery, whichever is earlier." There is no dispute, in this case, that the car was subject to an express warranty at the time of original delivery on January 1, 2002, and that it was purchased by plaintiff both within 2 years of the original delivery date, and before it accumulated eighteen thousand miles. Plaintiff, however, has failed to make out a *prima facie* right to judgment under the statute.

First, a cause of action under the new car Lemon Law runs only against the manufacturer of the automobile (*see General Elec. Capital Auto Lease, Inc. v D'Agnese*, 239 AD2d 462 [2d Dept 1997]; *Luciano v World-Wide Volkswagen Corp.*, 127 AD2d 1 [3rd Dept 1987]). Thus, as asserted against MBM, plaintiff's fifth cause of action must be dismissed. Secondly, New York's new car Lemon Law gives the purchaser of a motor vehicle the right to either a replacement vehicle, or return

of the purchase price if the vehicle does not perform according to warranty (General Business Law §198-a [b][1]). MBM's representative testified, during deposition, that the tires on the vehicle did not fall within the express warranty given by Mercedes Benz, USA. Plaintiff offered no evidence to demonstrate the existence of a Mercedes Benz warranty covering the "sports package" tires that were on the vehicle at the time of purchase, or covering the replacement tires he subsequently purchased. The affidavit of plaintiff's expert, Scott Featherman, does not support plaintiff's theory that the tires incurred undue wear during the extended warranty period due to an accident that purportedly occurred prior to the time plaintiff purchased the vehicle. Mr. Featherman did not inspect the vehicle until September 6, 2005, over a year after plaintiff relinquished control of the car, and his findings, moreover, are consistent with the service records annexed to the moving papers of both plaintiff and defendants, demonstrating that plaintiff brought the vehicle in for front end collision damage in November 2004. In addition, although the vehicle was brought in for service on more than one occasion during the 18,000 mile/2year period for ignition, battery problems, and failure to start, the service records do not conclusively demonstrate that defendants made four (4) attempts to remedy the same non-conformity without success (General Business Law § 198-a [d][1]), or that the alleged defects or warranty non-conformities caused the vehicle to be out of service for a cumulative total of thirty (30) days (General Business Law § 198-a [d][2]). In that regard, defendants have countered plaintiff's evidence with evidence which tends to show that much of the service time plaintiff seeks to attribute to MBM, was accrued in relation to collision damage incurred by plaintiff in November 2004. Defendants also submit evidence in support of their asserted affirmative defense, that the alleged electrical defects were the result of "abuse, neglect or unauthorized modifications or alteration of the motor vehicle," and thus, cannot be attributed to the manufacturer's failure to correct the alleged pre-existing defects or non-conformities (*see* General

Business Law § 198-a [c][3][ii]). Accordingly, as asserted against Mercedes-Benz USA LLC, the cross-motions for summary judgment on plaintiff's General Business Law § 198-a claim are denied.

Plaintiff has also failed to make a *prima facie* showing with respect to that portion of the fraud claim that is based upon an alleged misrepresentation that the car was "never in an accident." Plaintiff's complaint and answers to interrogatories do not indicate when or where that statement allegedly was made. Mr. Mahoney did not testify that the statement was made, and none of the other witnesses, who testified that they heard Ms. Di Roberto tell Mr. Moloney that the vehicle was a "demo," heard her represent that the car was never in an accident. Contrastingly, defendant Teresa Di Roberto acknowledged that Mr. Mahoney asked her if the car had been in an accident, that she told him that MBM did a "Carfax," and that the vehicle "had to be certified." MBM manager, Raymond Costello testified that when the vehicle came back into to the dealership, it had some paint work done on the rear corner panel but passed the Mercedes Benz "Starmark" certification process, and had a clean "Carfax" history. According to Mr. Costello, in order to be "certified," the maintenance department had to determine that the car did not incur "frame damage" as a result of an accident, and determine that the vehicle met all of the additional requirements of a 134 point check (see 3/26/06 Patrick Weisman Aff., Exh A). The Carfax annexed to plaintiff's cross-motion states that the vehicle was owned, not leased, that there were "no severe accidents or other total loss events reported," and that the vehicle qualified for "Certified History" status (Cross Motion Exhibits, Exh D). The affidavit of plaintiff's alleged expert, Scott Featherman, upon an investigation conducted nearly a year later, after the car was brought in for front end collision damage in November 2004, is of no probative value for purposes of varying or contradicting this evidence (*see Serbalik v General Motors Corp.*, 246 AD2d 724, 725 [3rd Dept 1998]). On the issue of whether the vehicle was in a prior accident, therefore, plaintiff has failed to show that the alleged

misrepresentation was made, that the statement admitted to was false, or that the rear bumper damage admitted by MBM substantially impaired the value of the car or otherwise caused plaintiff damage.

The additionally alleged misrepresentation supporting plaintiff's fraud claim, that Ms. Di Roberto falsely represented that plaintiff would be provided with a loaner car every time the vehicle was serviced, at best, is redundant of the breach of contract claim (*see 34-35th Corp. v 1-10 Industry Assoc., LLC*, 2 AD3d 711 [2d Dept 2003]; *Best Payphones, Inc. v Empire State Payphone Assn.*, 272 AD2d 139 [1st Dept 2000]; *First Bank of the Americas v. Motor Car Funding, Inc.*, 257 AD2d 287, 291-92 [1st Dept 1999]).

Thus, plaintiff has failed to show a material misrepresentation of existing fact, that was false and known to be false by the defendants when made, for the purpose of inducing plaintiff's reliance, actual reliance, or damages as a result of the alleged misrepresentations (*see Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413 [1996]; *Friedman v Andersen*, 23 AD3d 163, 166 [1st Dept 2005]; *Serbalik v General Motors Corp.*, 246 AD2d at 725-26 [purchaser failed to establish link between purported fraud by dealership and salesperson and damages allegedly sustained]). Accordingly, the first cause of action alleged in plaintiff's second amended complaint, for fraud, is dismissed.

Plaintiff's second and third causes of action are for conversion and unjust enrichment. Plaintiff's fourth cause of action, for breach of contract, under the facts of this case, is actually a claim for rescission or revocation of acceptance with a failure to cure (*see UCC 2-608; Peak v Northway Travel Trailers Inc.*, 260 AD2d 840 [3rd Dept 1999]; *see also discussion in Williams v Planet Motor Car, Inc.*, 190 Misc 2d 22 [Civ Ct, Kings County 2001]). All of these claims are dependent upon a finding that the car sold to plaintiff was defective or was not properly certified as represented. As the service records and deposition testimony annexed to the moving papers are

sufficient to raise triable issues of fact regarding the condition of the car at the time of purchase, the motion is denied as to these claims.

Plaintiff's sixth cause of action, under the Magnuson-Moss Warranty Act (15 U S C § 2301, et seq.), asserts a breach of the implied warranty of merchantability (*see Mendelson v General Motors Corp.*, 105 Misc 2d 346, 352 [Sup Ct, Nassau County 1980], *aff'd* 81 AD2d 831 [2d Dept 1981]). The Magnuson-Moss Warranty Act provides that written warranties regarding consumer products shall be fully and conspicuously disclosed in simple and readily understood language to the consumer (15 U S C § 2302[a]), and allows a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under the Act, or under a written warranty, implied warranty, or service contract, to bring a civil action (15 U S C § 2310 [d][1]), and recover a refund or replacement in the event the defect, malfunction or failure to conform cannot be remedied reasonably promptly by the warrantor (15 U S C § 2304 [a] [1], [4]; *DiCintio v Daimler Chrysler Corp.*, 97 NY2d 463 [2002]). Warrantors under the Act have been deemed to include automobile dealers based upon written service contracts (*see Shuldman v Daimler Chrysler Corp.*, 1 AD3d 343 [2d Dept 2003]), and pre-delivery dealer inspection forms (*see Marine Midland Bank, N.A. v Carroll*, 98 AD2d 516 [3rd Dept 1984]). Defendant Di Roberto, is not an express "warrantor" under the Act. Accordingly, as asserted against Mercedes Benz USA, LLC and MBM, there are triable issues of fact which prevent summary disposition of this claim.

Accordingly, for the reasons stated above, it is:

ORDERED, that the first cause of action asserted in plaintiff's second amended complaint, for fraud, is severed and dismissed in its entirety; and it is further

ORDERED, that plaintiff's second amended complaint, as asserted against defendant Teresa Di Roberto, therefore is severed and dismissed, in its entirety; and it is further

ORDERED, that the fifth cause of action alleged in plaintiff's second amended complaint, under General Business Law §198-a, as asserted against defendant Mercedes Benz Manhattan, Inc., is severed and dismissed; and it is further

ORDERED that the second, third, and fourth causes of action, for conversion, unjust enrichment, and breach of contract, continue as against MBM, the fifth cause of action continues as against MBU, and the sixth cause of action continues as to MBM and MBU; and it is further

ORDERED, that the motion and cross-motion, in all other respects, are denied.

DATED: 4/5/07

ENTER:

Lee

LOUIS B. J. CHAN
J.S.C.
J.S.C.

FILED

APR 11 2007

NEW YORK
COUNTY CLERK'S OFFICE