SHORT FORM ORDER

INDEX No. 7926-06

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11/21/06
ADJ. DATES 2/16/07
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - XMD

BELL BROTHERS OF NEW YORK, INC. d/b/a JOS. BELLAVIA & SONS, Plaintiff, -against- F&S MOTORS INC. d/b/a F&S VOLKSWAGEN, ROBERT FRANCIAMORE and JOHN KOEPPEL, Defendants.	BELLAVIA, GENTILE & ASSOC. Attys. For Plaintiff 200 Old Country Rd. Mineola, NY 11501 RYAN S. GOLDSTEIN, PLLC Atty. For Defs F&S & Franciamore 40 Exchange Pl. New York, NY 10005 CASCIONE, PURCIGLIOTTI ET AL Attys. For Def. Koeppel 20 Vesey St. New York, NY 10007

Upon the following papers numbered 1 to 19 read on this motion for summary judgment and cross motion for dismissal; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5-8; Answering Affidavits and supporting papers 9-11; 12-14; Replying Affidavits and supporting papers 15-16; 17-19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by plaintiff for an Order pursuant to CPLR 3212(a) granting it summary judgment as to liability and for an immediate inquest regarding damages, is denied; and it is further

ORDERED that the cross motion (#002) by defendants, F&S Motors, Inc. and Robert Franciamore, for an Order pursuant to CPLR 3212(a) dismissing the first and fourth causes of action against Robert Franciamore, in his individual capacity based upon the fact that Robert Franciamore is not a proper party to this action, given the fact he did not execute any of the subject agreements in his individual capacity nor did he personally guarantee the agreements and dismissing the second and fourth causes of action as against F&S Motors, Inc., due to the unconscionable nature of the subject agreements, or in the alternative, dismissing plaintiff's claims as they are, at a minimum, entitled to a flat fee of $18,500.00, is denied; and it is further

ORDERED that a Preliminary Conference is scheduled for **July 24, 2007**, at 9:30 a.m., in the DCM Part located at the courthouse at 1 Court Street, Riverhead, New York; and it is further

ORDERED that counsel for the plaintiff and the defendants shall serve a copy of this Order upon respective counsel with Notice of Entry within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit(s) of service with the Clerk of the Court.

This action is for breach of contract wherein plaintiff, Bell Brothers of New York, Inc. d/b/a Jos. Bellavia & Sons, states that it was hired by defendant, F&S Motors, Inc. d/b/a F&S Volkswagen (hereinafter "F & S") to act as a business broker to procure a purchaser for the business assets of F&S. The parties entered into an agreement entitled "Dealer Listing Agreement" (hereinafter "Agreement"), printed on plaintiff's letterhead and signed by defendant, Robert Franciamore (hereinafter "Franciamore"), as dealer on behalf of F&S. Plaintiff now moves for summary judgement on the basis that the defendants have no basis in which to contest liability. Plaintiff is in compliance with CPLR 3212(b).

In support of its motion, plaintiff submits the affidavit of its president, Joseph Bellavia (hereinafter "Bellavia"), who states the details of the Agreement; that the Agreement was in effect for six months after date of signing, that is, May 30, 2005; that it could be cancelled after the six month period but only upon 30 days prior written notice by either party; that once plaintiff provided a prospective purchaser ready willing and able to consummate the transaction, the Agreement could not be terminated; that as consideration for entering into the Agreement, F&S and its president Franciamore agreed to pay a commission of 6% of the sale price when plaintiff procured a purchaser on terms agreeable to Franciamore and F&S; that the Agreement further provided should F&S and/or Franciamore procure their own purchaser, then a flat commission of $18,500.00 would be payable to plaintiff; that excluded from the Agreement were two named prospective purchasers, Eric Conn and Mr. Dominick; that sometime in October 2005, plaintiff procured John Koppel (hereinafter "Koppel") as a ready, willing and able purchaser for F&S on terms agreeable to F&S and Franciamore; that protracted negotiations between the parties continued until March 2006 when F&S and Koppel signed a contract for the sale of the business to Koppel; that in an obvious attempt to avoid its contractual obligation to plaintiff, F&S sent a letter, dated March 8, 2006, to plaintiff terminating the contract; that it is his contention that this was a unilateral attempt to cancel the contract, which was clearly ineffective because F&S did not provide plaintiff with a 30 day notice; that at the time the letter was sent, plaintiff already procured the prospective purchaser; and that it is his belief that Koppel and F&S closed on a contract of sale on or about May 1, 2006 after a previously scheduled closing date was ostensibly adjourned (*see* affd of Joseph Bellavia, 11/6/06).

Defendants, F&S and Franciamore, cross move pursuant to CPLR 3212(a) for an Order dismissing the first and fourth causes of action against Robert Franciamore, in his individual capacity based upon the fact that Robert Franciamore is not a proper party to this case given the fact he did not execute any of the subject agreements in his individual capacity nor did he ever personally guarantee the agreements and also dismissing the second and fourth causes of action as against F&S Motors, Inc. due to the unconscionable nature of the subject agreements, or in the alternative, dismissing plaintiff's claims that they are, at a minimum, entitled to a flat fee of $18,500.00.

In support of their cross motion, defendants submit the affidavit of Franciamore, who states he is a principal of F&S but does not indicate his title; that F&S is the owner of a Volkswagen Dealer Agreement (hereinafter "Volkswagen") which was obtained on or about October 2002; that on or about May 30, 2005, F&S entered into a Dealer Listing Agreement with plaintiff for a six month period to procure a purchaser for F&S which included the rights and assignment to Volkswagen; that upon executing the Agreement and at the request of plaintiff, he signed the Agreement as "Dealer" in order to demonstrate that an authorized person was signing on behalf of F&S; and that the Agreement was drafted by plaintiff and during negotiations leading to the signing of the Agreement, F&S was not represented by counsel.

Franciamore further stated that in January of 2005, prior to F&S executing the Agreement with plaintiff, he had discussions with his personal friend Koppel about his purchasing F&S; that Koppel was the principal in another automobile dealership; that this attempt to to sell the business to Koppel at this time was fruitless as Koppel indicated he could not purchase F&S, although the reason or reasons were not specified; that as a result of this failure to sell F&S to Koppel, F&S decided to hire a company to facilitate the sale of

F&S; that this decision ultimately resulted in the Agreement with plaintiff; that during the six month period between May 30, 2005 and November 30, 2005, plaintiff failed to perform their duties and find and produce a buyer ready, willing and able to purchase F&S; that in October 2005, a meeting was held between Joseph Bellavia, Koppel and himself to discuss a possible sale of the business; that this meeting was held after he notified plaintiff of Koppel's previously expressed interest in F&S; that the meeting was fruitless as Koppel was unable to meet F&S's proposed sale terms; that in October 2005, following the meeting, Bellavia contacted F&S to discuss the fact that plaintiff was unable to find any prospective purchasers; that it was during this telephone call that plaintiff and F&S agreed that plaintiff would no longer participate in F&S's efforts to sell the business; and that as a result of this conference call, plaintiff had no further communication with F&S between October 2005 and March 2006.

Additionally, Franciamore stated that sometime in February 2006, he and Koppel had further communications wherein he explained to Koppel that F&S would be willing to lower its asking price significantly and it would be willing to accept a promissory note in lieu of Koppel having to come up with the entire purchase price at closing; that as a result of many conversations he had with Koppel regarding the terms of sale F&S, they executed an Asset Purchase Agreement on or about February 17, 2006 to sell all of the assets of F&S, including the rights to Volkswagen to Big Apple Volkswagen, LLC (hereinafter "Big Apple"); that Koppel was a principal of Big Apple; that on or about March 2, 2006, after the sale was consummated between F&S and Big Apple, F&S received a written communication from plaintiff claiming that plaintiff is entitled to a commission on the anticipated sale based upon the fact that it had procured a prospective buyer for the business, namely, Koppel.

Franciamore's affidavit also questions the validity of plaintiff's claim that it is entitled to a commission and raises various issues, such as the passage of time from the meeting in October 2005 between Koppel, plaintiff and himself to F&S's formal Agreement with Big Apple, the terms of the sale to Big Apple and the failure of plaintiff to find a ready, willing and able buyer during the contract period; that plaintiff could not be involved in the sale to Big Apple as the motion is devoid of specific details as to the contract terms because plaintiff was not a party thereto; and that he notified plaintiff by written communication that since plaintiff was previously terminated from any involvement concerning the sale of F&S, plaintiff was not the procuring broker in the sale of F&S to Big Apple.

Franciamore again reiterates in his affidavit that he never signed a personal guaranty on behalf of F&S; that the fact he signed above a line marked "Dealer" clearly supports his claim and entitles him to have the claims asserted against him as an individual dismissed; that the only reason plaintiff named him as an individual defendant, despite knowing his involvement in the Agreement was solely as an agent of F&S, was that F&S was sold; that regarding the handwritten provision in the Agreement giving plaintiff a flat fee commission, he was not in agreement with the provision as he felt it was potentially giving plaintiff a fee without any promise of consideration; that he certainly did not understand nor agree to allow the provision to be for an indefinite time period; that it was his understanding that if F&S negotiated and sold its business to another party, without plaintiff's involvement, during the six months which the Agreement was in effect, plaintiff could then assert a claim for a commission not exceeding $18,500.00; that this was not the case as the sale of F&S to Big Apple took place over four months after the relationship between plaintiff and F&S was mutually terminated (*see* affd of Robert Franciamore, 12/5/06).

Koppel also opposes plaintiff's motion for summary judgment and seeks to have the Court search the record and grant him summary judgment dismissing the complaint. In support, he submits his affidavit which states that he has known the co-defendant Franciamore for a number of years, both as a friend and a person involved in automobile dealerships; that in January 2005, he was informed by Franciamore that he was interested in selling his Volkswagen dealership; that he was interested in putting together a group to purchase same, however, at the time, he was in the process of closing on another automobile dealership; that because of that commitment, he did not have the resources to purchase two dealerships simultaneously; that the purchase of the other dealership where plaintiff was the broker closed in January 2005; that in the fall of 2005, he was visited by Bellavia and Franciamore regarding a possible purchase of F&S; that he was informed that plaintiff was the broker for the sale; that at the time, he was not in a position to contemplate

purchasing F&S and declined the offer to purchase F&S; that the following February, he was contacted by Franciamore who informed him that Franciamore was in position to offer better terms to enable him to purchase F&S; that based upon this representation by Franciamore, he, along with a group of investors, formed an LLC to purchase F&S; that he never agreed to any relationship with plaintiff when going into this transaction; that he knew Franciamore personally and had discussed a possible purchase of F&S long before plaintiff came onto the scene; that Bellavia, who was the broker when he purchased another automobile dealership, was well aware of his prior relationship with Franciamore and knew when he called him in November of 2005 that he had expressed an interest in the Volkswagen franchise before plaintiff had the listing; that he did not purchase F&S personally; that the purchase was transacted through the LLC and he did not intend to incur any personal liability; that he is not a proper party to this lawsuit; that he did have a prior relationship with plaintiff and he had no intention of trying to cheat plaintiff out of any commission that might be due, however, it is clear from the documents that plaintiff's contract expired before Big Apple even existed and certainly before a contract was signed; that neither he nor Big Apple had any agreement, either written or oral, to purchase F&S through plaintiff; and that the claim as against him should be dismissed (*see* affd of John Koppel, 1/10/07).

Summary judgment is a drastic remedy and should not be granted where there is any doubt of the existence of a triable fact, even if arguable (*see* ***Andre v Pomery,*** 35 NY2d 361, 362 NYS2d 131 [1974]). To grant summary judgment, it is necessary that the movant establish his cause of action to warrant the court, a matter of law, to direct judgment in his favor, and he/she must do so by the tender of evidentiary proof in admissible form (*see* CPLR 3212, ***Ayotte v Gervaio,*** 81 NY2d 1062, 601 NYS2d 463 [1993]; ***Friends of Animals, Inc. v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]). "[T]he function of the Court on a motion for summary judgment is not to resolve issues of or determine matters of credibility, but merely to determine whether such issues exist" (***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005] *citations omitted*). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [and] failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (***Winegrad v New York Univ. Med. Ctr.,*** 64 NY2d 851, 853, 487 NYS2d 316 [1985], *citations omitted*; *see also* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]; ***Sillman v Twentieth Century-Fox Film Corp.,*** 3 NY2d 395, 165 NYS2d 498 [1957]) or if an issue of fact is even arguable since it deprives a party of his day in court (*see* ***Henderson v City of New York,*** 178 AD2d 129, 576 NYS2d 562 [1st Dept 1991]; ***Andre v Pomeroy,*** 35 NY2d 361, *supra*). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable, or where a material issue of fact is even arguable, summary judgment must be denied (*see* CPLR 3212[b]; ***American Home Assurance Co. v Amerford Intl. Corp.,*** 200 AD2d 472, 606 NYS2d 229 [1st Dept 1994]; ***Freeman v Easy Glider Roller Rink, Inc.,*** 114 AD2d 436, 494 NYS2d 351 [2d Dept 1985]; ***Phillips v Kantor & Co.,*** 31 NY2d 307, 338 NYS2d 882 [1982]; ***Rotuba Extruders, Inc. v Ceppos,*** 46 NY 2d 223, 413 NYS2d 141 [1978]).

Issue finding rather than issue determination is the key to the procedure (*see* ***Weiner v Ga-Ro Die Cutting, Inc.,*** 104 AD2d 331, 479 NYS2d [2d Dept 1984]; *affd* 65 NY2d 732, 492 NYS2d 29 [1985]; ***Sillman v Twentieth Century-Fox Film Corp.,*** 3 NY2d 395, *supra*). It is not for the court to determine issues of credibility on a motion for summary judgment (*see* ***Williams v Bonowicz,*** 296 AD2d 401, 745 NYS2d 58 [2d Dept 2002]; ***Ferrante v American Lung Assn.,*** 90 NY2d 623, 655 NYS2d 25 [1997]; ***Air Flow Taxi Corp. v C.I.T., Corp.,*** 258 AD 857, 15 NYS2d 965 [4th Dept 1940]; *rearg. den.; lv. to app. den.,* 258 AD 1030, 17 NYS2d 1002 [4th Dept 1940]; ***Bernstein v Kritzer,*** 224 AD 387, 231 NYS 97 [1928]); or where the facts are in dispute and where conflicting inferences may be drawn from the evidence or where, as here, in the instant matter, there are issues of credibility (*see* ***Dolitsky v Bay Isle Oil Co.,*** 111 AD2d 366, 489 NYS2d 580 [2d Dept 1985]). If an issue can only be resolved upon a determination of a particular individual's credibility, such motion cannot be granted (*see* ***Matter of Fuller,*** 45 Misc2d 353, 256 NYS2d 860 [Surrogate's Ct, Nassau County 1965]).

Furthermore, the proof of the party opposing the motion must be accepted as true and considered in

a light most favorable to the opposing party (*see* ***Nicklas v Tedlen Realty Corp.,*** 305 AD2d 385, 759 NYS2d 171 [2d Dept 2003]; ***Rizzo v Lincoln Diner Corp.,*** 215 AD2d 546, 626 NYS2d 280 [2d Dept 1995]; ***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,*** 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]; ***Glennon v Mayo,*** 148 AD2d 580, 540 NYS2d 190 [2d Dept 1989]; ***Museums at Stony Brook v The Vil. of Patchogue Fire Dept.,*** 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]; ***Matter of Bevincasa v Garrubbo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]; ***Dowsey v Megerian,*** 121 AD2d 497, 503 NYS2d 591 [2d Dept 1986]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Center,*** 64 NY 2d 851, *supra*; ***Matter of Redemption Church of Christ of Apostolic Faith v Williams,*** 84 AD2d 648, 444 NYS2d 305 [3d Dept 1981]; ***Greenberg v Manlon Realty,*** 43 AD2d 968, 352 NYS2d 494 [2d Dept 1974]).

Neither plaintiff, F&S nor Koppel have met their burden to demonstrate entitlement to summary judgment. The affidavits submitted by the respective parties in support of and in opposition to the motions raise issues of credibility and material issues of fact as to the parties' intentions concerning the contract and the terms of the contract itself (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, *supra*; ***Zuckerman v City of New York,*** 49 NY2d 557, *supra*). There is also the issue of Franciamore's personal liability as a signatory to the contract. (*see* 28 N.Y. Prac., Contract Law § 3:3; 7A West's McKinney's Forms Business Corporation Law §5:103; 3A Fletcher Cyc,. Corp.. § 1117; ***Salzman Sign Co. v Beck,*** 10 NY2d 63, 217 NYS2d 555 [1961]; *see also* ***PNC Capital Recovery v Mechanical Parking Sys.,*** 283 AD2d 268, 726 NYS2d 394 [1st Dept 2001]. *lv app dism* 96 NY2d 397, 733 NYS2d 376 [2001]; *app dism* 98 NY2d 763, 751 NYS2d 846 [2002]; *compare* ***Stuyvesant Plaza, Inc. v Emizack, LLC***, 307 AD2d 640, 763 NYS2d 146 [3d Dept 2003]) and whether Franciamore exercised due diligence to ascertain the terms of the contract he signed (*see* ***Marine Midland Bank, N.A. v Idar Gem Distrib. Inc.,*** 133 AD2d 525, 519 NYS2d 898 [4th Dept 1987]). Therefore, the application to dismiss the first and fourth causes of action as against Franciamore, is denied.

The doctrine of unconscionability is primarily a means to protect the commercially illiterate consumer who was led into a grossly unfair bargain by a deceptive vendor (*see* 22 N.Y. Jur.2d Contracts §§ 154, 155). A party seeking to establish unconscionability must show that the contract is both "procedurally and substantively unconscionable when made – i.e. some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (***Gillman v Chase Manhattan Bank,*** 73 NY2d 1, 10, 537 NYS2d 787 [1998]; *see also* ***State of New York v Avco Fin. Serv.***, 50 NY2d 383, 429 NYS2d 181 [1980]). "The procedural element of unconsionability requires an examination of the contract formation process and the alleged lack of meaningful choice. The focus is on such matters as the size and commercial setting of the transaction (*see* UCC 2-302-2), whether deceptive or high pressure tactics were employed. The use of fine print in the contract, the experience and education of the party claiming unconsconability, and whether there was disparity in bargaining power" (***Gillman v Chase Manhattan Bank,*** 73 NY2d 1 at 10, *supra; see also* ***Morris v Snappy Car Rental,*** 84 NY2d 21, 614 NYS2d 362 [1964]). The substantive element of unconscionability "entails an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged" (***Gillman v Chase Manhattan Bank,*** 73 NY2d 1 at 12, *supra, citations omitted*). While determinations of unconscionability are ordinarily based on the court's conclusions that both the procedural and substantive components are present, there have been exceptional cases where a provision of the contract is so outrageous as to "warrant holding it unenforceable on the ground of substantive unconscionability alone" (***Gillman v Chase Manhattan Bank,*** 73 NY2d 1 at 12, *supra, citations omitted*; *see also* ***Brower v Gateway 2000, Inc.,*** 246 AD2d 246, 676 NYS2d 569 [1st Dept 1998]). Under all of the facts and circumstances of this matter, the issue of unconscionability is a question of fact which cannot be resolved on a motion for summary judgment (*see* ***Jonathan Cass, Ltd. v Wal-Mart Stores, Inc.,*** 216 AD2d 31, 627 NYS2d 569 [1st 1995]; ***Currie v Three Guys Pizzeria, Inc,*** 207 AD2d 578, 615 NYS2d 494 [3d Dept 1994]; ***Niosi v Niosi,*** 205 AD2d 514, 613 NYS2d 50 [2d 1994]). Therefore, the application to dismiss the second and fourth causes of action as against F&S, is denied.

Clearly, based upon the affidavits submitted, issues of fact have been raised. As such, it is for the trier of facts to determine the issues not the Court on a motion for summary judgment. The Court declines

to grant summary judgment to plaintiff or F&S and declines to grant Koeppel's application for the Court to search the record pursuant to CPLR 3212(b) and grant him summary judgment (*accord* ***Whitman Realty Group, Inc. v Galano,*** ____ AD3d ____, ____ NYS2d ____ [2d Dept 2007]). However, after discovery has been completed, Koeppel may renew his application if the facts so warrant.

Accordingly, the motion and cross motion are denied as herein indicated. This constitutes the Order and decision of the Court.

DATED: 6/19/07

THOMAS F. WHELAN, J.S.C.