

**Marlowe v Ferrari of Long Is., Inc.**

2007 NY Slip Op 34025(U)

December 6, 2007

Supreme Court, Nassau County

Docket Number: 1721-04/

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

IRA MARLOWE,  
Plaintiff,

TRIAL / IAS PART 32  
NASSAU COUNTY

- against -

Index No. 11721/04

FERRARI OF LONG ISLAND, INC. and  
FERRARI OF NORTH AMERICA, INC.,

Motion Sequence No. 006

Defendants.

The following papers having been read on this motion:

|  |          |
|--|----------|
| Notice of Motion, Affidavits, & Exhibits ..... | <u>1</u> |
| Answering Affidavits .....                     | <u>2</u> |
| Replying Affidavits .....                      | <u>3</u> |
| Briefs: Plaintiff's / Petitioner's .....       | _____    |
| Defendant's / Respondent's .....               | _____    |

The defendant Ferrari of Long Island, Inc. seeks summary judgment and dismissal of the complaint, or in the alternative dismissing all claims other than the cause of action seeking a refund of a \$2,000.00 deposit. The plaintiff opposes this motion. The underlying contract action seeks damages. The plaintiff alleges on November 22, 1999, the parties entered into a written agreement for the plaintiff's purchase of a 2000 Ferrari 360 Modina Spider, and the plaintiff left a \$2,000.00 deposit for the later purchase of it. The plaintiff claims the subject vehicle was never sold to him, so the defendant breached their agreement with a bait and switch scheme which entitles the plaintiff to the return of

the \$2,000.00 deposit, and a free new 2000 Ferrari 360 Modina Spider with costs and interest, as well as punitive damages, and attorney's fees.

The attorney for the defendant Barchetta Red, Inc. d/b/a Ferrari of Long Island i/s/h/a Ferrari of Long Island, Inc. states, in a supporting affirmation dated July 26, 2007, there are no triable issues of fact, so summary judgment is warranted. The attorney for the defendant Barchetta Red, Inc. d/b/a Ferrari of Long Island i/s/h/a Ferrari of Long Island, Inc. asserts the parties had only a mere agreement to agree which does not form the predicate for a breach of contract claim, to wit the agreement was only a pre-order contract. The attorney for the defendant Barchetta Red, Inc. d/b/a Ferrari of Long Island i/s/h/a Ferrari of Long Island, Inc. points out the plaintiff did not perform under the contract fulfilling the obligation to provide consideration for the purported contract. The attorney for the defendant Barchetta Red, Inc. d/b/a Ferrari of Long Island i/s/h/a Ferrari of Long Island, Inc. avers the defendant performed its duties in offering the plaintiff two separate Ferrari 360 Modina Spiders. The attorney for the defendant Barchetta Red, Inc. d/b/a Ferrari of Long Island i/s/h/a Ferrari of Long Island, Inc. avers the plaintiff's failure to establish any damages resulting from the purported breach is fatal to the plaintiff's claim. The attorney for the defendant Barchetta Red, Inc. d/b/a Ferrari of Long Island i/s/h/a Ferrari of Long Island, Inc. maintains the plaintiff cannot sustain a claim for punitive damages. The attorney for the defendant Barchetta Red, Inc. d/b/a Ferrari of Long Island i/s/h/a Ferrari of Long Island, Inc. argues the plaintiff's claim for attorney's fees must be

dismissed, as a matter of law, because the purported contract at issue does not provide for attorney's fees.

The plaintiff's attorney states, in detail, in an opposing affirmation dated September 20, 2007, the defendants failed to eliminate all material issues of facts needed for summary judgment. The plaintiff's attorney also states the defendant did not perform under the contract, and is liable to the plaintiff. The plaintiff's attorney claims whether the defendant ordered two separate Ferrari 360 Modina Spiders on the plaintiff's behalf is disputed. The plaintiff's attorney asserts the plaintiff has established evidence for punitive damages, the plaintiff can sustain a punitive claim, and points to deposition testimony and legal authority to support those positions. The plaintiff's attorney maintains the plaintiff can recover attorney's fees based upon bad faith, and attorney's fees can be a form of punitive damages.

The attorney for the defendant Barchetta Red, Inc. d/b/a Ferrari of Long Island i/s/h/a Ferrari of Long Island, Inc. states, in a reply affirmation dated October 3, 2007, there was no sales contract, but a mere agreement to agree which does not form the proper predicate for a breach of contract claim. The attorney for the defendant Barchetta Red, Inc. d/b/a Ferrari of Long Island i/s/h/a Ferrari of Long Island, Inc. reiterates the defense assertions contained in the supporting affirmation dated July 26, 2007.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The

motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.”

Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446).

The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; *see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

This Court has carefully reviewed and considered all of the parties’ submissions on

this motion for summary judgment. The Court finds there are no triable issues of fact warranting resolution by a trier of fact except that cause of action seeking the return of the \$2,000.00 deposit plus interest which requires resolution by a trier of fact. The Court finds the plaintiff has failed to met his burden with respect to punitive damages, and attorney's fees.

Accordingly, the motion is granted, and the plaintiff's complaint is dismissed except that cause of action seeking the return of the deposit by the plaintiff plus interest.

So ordered.

Dated: **December 6, 2007**

ENTER:



J. S. C.

ANTONIO I. BRANDVEER

FINAL DISPOSITION

NON FINAL DISPOSITION

**ENTERED**

DEC 10 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**