

**American Petroleum & Transp., Inc. v Gellatly &  
Co., Inc.**

2008 NY Slip Op 31430(U)

May 9, 2008

Supreme Court, Nassau County

Docket Number: 0640-06/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 4  
NASSAU COUNTY

\_\_\_\_\_  
AMERICAN PETROLEUM & TRANSPORT,  
INC.,

Plaintiff,

INDEX No. 000640/06

MOTION DATE: April 21, 2008  
Motion Sequence # 002

-against-

GELLATLY & COMPANY, INC. and  
PETER O. GELLATLY,

Defendants.

\_\_\_\_\_  
The following papers read on this motion:

- Notice of Motion..... X
- Affirmation/Affidavit in Opposition..... XX
- Affirmation in Support..... X
- Reply Affirmation ..... X
- Memorandum of Law..... X

This motion, by defendants, for an order granting summary judgment on behalf of defendants Gellatly & Company, Inc. and Peter O. Gellatly pursuant to CPLR 3212 and for such other, further and different relief as this Court may deem just and proper, is determined as hereinafter set forth.

This action arises out of the plaintiff's purchase of two small oil tankers, the M/V

Patrick Sky and the M/V Scotty Sky, on November 8, 2004, for the respective purchase prices of \$448,000 and \$300,000. The plaintiff paid \$100,000, on contract, for the Patrick Sky, and the remainder, on a promissory note, to be paid over five years in sixty equal monthly installments of \$6,687.44. The bills of sale for the vessels are dated, respectively, November 15, 2004 and November 8, 2004.

The complaint sets forth three causes of action: misrepresentation of material facts, and bad faith by the defendants in order to secure a purchase price well in excess of the fair market value of the vessels; unjust enrichment by the withholding of material facts; and fraud. As a result of these allegations, the plaintiff seeks the difference between the fair market value and the purchase price of the vessels, or the cost of retrofitting the vessels to comply with the hull thickness requirements of the "New Regulations" of Shell Motiva, the operator of two petroleum terminals in Seawarren and Newark, New Jersey. Inter alia, the defendants assert several affirmative defenses: Statute of Frauds, negligence on the plaintiff's own part; and that the defendants owed no duty to the plaintiff. The Shell Motiva Terminals have excluded these two vessels because they did not meet the minimum hull thickness of .281 inches, by the rules promulgated in 2000.

The individual defendant admits that he did know of the rule, but that he thought that the plaintiff's principal, Stephen Bragoli knew of the rule. He asserts that Mr. Bragoli, who was an experienced businessman involved with the business of trading, shipping and selling marine diesel fuel in an oil tanker similar to the tankers at issue herein and had contacts and contracts with customers which would purchase oil and fuel from him, and who had full knowledge of the hull thickness measurements of the tankers at issue, purchased the tankers in an "as-is" condition. He contends that Mr. Bragoli, after a period of time, after negotiations, entered into the contract of sale for the M/V Patrick Sky, which contained twelve warranties — none of which pertained to the condition of the vessel or the thickness of its hull. The contract of sale for the M/V Scotty Sky similarly contained several warranties, none of which concerned the condition of the vessel, and also was sold "as-is". Additionally, counsel for the defendants notes that both vessels were inspected, at the request of the plaintiff, by an independent agency, and that the sales relate only to the vessels and not to the business of the defendants. Counsel also notes that the thickness measurement of the shell for both vessels was provided to the plaintiff six weeks prior to the sale. The testimony of the individual defendant reveals a factual background, to wit: that this defendant and Mr. Bragoli had discussed a joint venture to provide fuel oil to New York Waterways; that the defendant had picked up orders of heating oil at varied locations within the Port of New York during the regular course of its business; that he had discussed a partnership with plaintiff

prior to the time in question; that discussions regarding the sale of the vessels started after that partnership discussion stage; that the change in the enforcement of Motiva's rules did not influence the defendant to sell rather than seek a partnership; that the defendant had only one discussion with plaintiff to not mention the sale of the vessels to the crews or the defendants' customers; and that Mr. Bragoli never asked about Motiva's rules or regulations and knew, prior to the sale, that the vessels would not be able to call at the Motiva terminals. Counsel avers that testimony reveals that, while the vessels could not call at the Motiva terminals, there were about ten other terminals at which they could call. Counsel for the defendants further avers that testimony shows that the defendants were not aware that the vessels could not call at the Motiva terminals until gaugings were reviewed during the vessels' drydocking in late July or early August, and the last time the vessels called at a Motiva terminal in New Jersey was seven months before the sale. Counsel further contends that the full information about hull gauging was fully available from Shell Motiva to any interested party or customer of Motiva, and would have been available to the plaintiff if the plaintiff had inquired prior to becoming the owner of the vessels. Counsel also argues that the evidence shows that the plaintiff was aware of the exclusionary rule on or prior to the sale of the vessels. All of which demonstrates that the doctrine of caveat emptor and the plaintiff's cause of action sounding in fraud and deceit cannot be demonstrated; that there was no special relationship between the parties; and that the defendants did nothing to prevent the plaintiff from discovering the Motiva rules and application of the rules to the subject vessels.

In opposition, the plaintiff avers that the past relationship is significant to an understanding of the instant action, in that, contrary to the defendants' characterization of a "discussion" of a joint venture, the parties, in fact, did have such a relationship "... begun in 2003 and lasting until mid-2004"; and during that time, another joint venture was discussed, but not concluded. The plaintiff characterizes this as an "informal fiduciary relationship", and its position is that such relationship obligated the defendant to affirmatively inform the plaintiff of the existence of, and the enforcement of, the hull thickness regulation imposed by Shell/Motiva, which would result in the vessels being barred from entry into the Motiva Terminals. The plaintiff asserts that, as proof of the defendants' deception, the individual defendant asked the plaintiff not to discuss the pending sale with the crew or customers because such news may cause the crew to seek other jobs and the customers to seek other suppliers. Counsel for the plaintiff asserts that the defendants' facts and arguments in support of the motion for summary judgment do not meet the standard proof, prima facie, necessary to demonstrate entitlement to that relief. Plaintiff's counsel disputes the defendants' argument that the "special facts" doctrinal exception does not apply

herein, and asserts that the defendants' superior knowledge of facts unknown to the plaintiff has rendered these sales inherently unfair; and that the plaintiff should have known of the Motiva rules by exercise of ordinary intelligence, is a question of fact that cannot be determined on this motion. Counsel cites to case law which he avers supports his client's position.

In reply, the defendants' attorney repeats his assertion that the exclusionary regulations of Motiva were readily available to any reasonable request. He argues that the defendants had no superior knowledge in this case that the defendants should have imparted to the plaintiff as a buyer. He contends that the facts of this case do not show that there was any special relationship between the plaintiff's principal and the defendants so as to impose a duty on the defendants to give the plaintiff any information regarding the Motiva regulations. He further asserts that there is no proof that the defendants actively interfered with any investigation by the plaintiff, or that the defendants knew that the plaintiff was making a purchase based on mistaken information. Counsel argues that the plaintiff's submission of a new allegation (regarding that the defendants were operating the vessels in New York Harbor and calling at Motiva without any restrictions), and subsequent arguments thereon, should not be considered on this motion for summary judgment based on the pleadings. He further argues that such belated allegation is actually contradicted by the plaintiff's testimony.

### DECISION

The basis for this litigation is the plaintiff's allegation that there was a fiduciary or quasi-fiduciary relationship between the principals of the parties which was initiated and incubated by a joint venture which lasted approximately eight months. Plaintiff asserts that such "informal fiduciary relationship" was further prolonged and established by a short discussion of another joint venture, which never materialized. The plaintiff's legal theory is that such "informal fiduciary relationship" necessarily engendered the defendants affirmative duty to disclose the changed Motiva rules to the plaintiff. The plaintiff's position is also that the defendants actively deceived the plaintiff from such rules by asking the plaintiff's principal to refrain from speaking to the crew and the defendants' customers about the pending sale of the two vessels.

"New York adheres to the  
doctrine of **caveat emptor** and  
imposes no liability on a seller

for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment (see Matos v Crimmins, 40 AD3d 1053, 837 NYS2d 234; Jablonski v Rapalje, 14 AD3d 484, 485, 788 NYS2d 158; Platzman v Morris, 283 AD2d 561, 562, 724 NYS2d 502; London v Courduff, 141 AD2d 803, 804, 529 NYS2d 874). The mere silence of the seller, without some act or conduct which deceived the buyer, does not amount to a concealment that is actionable as a fraud (see Matos v Crimmins, *supra*; Slavin v Hamm, 210 AD2d 831, 832, 621 NYS2d 393). To maintain a cause of action to recover damages for active concealment in the context of a fraudulent nondisclosure, the buyer must show, in effect, that the seller thwarted the buyer's efforts to fulfill the buyer's responsibilities fixed by the doctrine of *caveat emptor* (see Jablonski v Rapalje, *supra*; Platzman v Morris, *supra*)”.

(Simone v Homecheck Real Estate Services, Inc., 42 AD3d 518, 840 NYS2d 398, 400, 2<sup>nd</sup> Dept., 2007).

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651, 1994):

“It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). 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 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; Zuckerman v City of New York, *supra*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)”.

Applying these principles to the facts of the case at bar has warranted an intensive examination of the record as presented to this court, which includes the pertinent pleadings, deposition transcripts, letters, e-mails, and other relevant data.

The defendants have demonstrated, by submission of admissible evidence, that no “informal fiduciary relationship” between the plaintiff’s principal and the defendants has been established. Those persons had a short-lived business relationship which ended for reasons external to the relationship, and there was a brief discussion (that may have lasted for a month) about leasing the vessels from the defendants, which then morphed into a negotiation for the purchase of the vessels.

“A fiduciary relationship arises  
“ ‘between two persons when  
one of them is under a duty to  
act for or to give advice for the  
benefit of another upon matters  
within the scope of the relation’”  
(EBCI, Inc. v Goldman, Sachs

& Co., 5 NY3d 11, 19, quoting Restatement [Second] of Torts §874, comment a [emphasis supplied]). This definition expressly refers to an agency relationship and an advisory relationship in the disjunctive. Hence, either is sufficient to establish the fiduciary relationship (see Matter of Granirer, 131 AD2d 477, 479)".

(Pergament v Roach, 41 AD3d 569, 838 NYS2d 591, 2<sup>nd</sup> Dept., 2007). The defendants have demonstrated that no such relationship existed between the parties or their principals.

Relative to the plaintiff's allegation of fraudulent concealment of special facts, i.e., knowledge of the Motiva hull thickness requirements, to the advantage of the defendants, the defendants have demonstrated that: neither the plaintiff nor its principal — who had captained a tanker in New York Harbor since 1996 and dealt with Motiva for a significant period of time — made any affirmative inquiry to Motiva prior to the sale of the vessels; and these were not special facts as defined by New York courts.

“It is well established that, absent a fiduciary relationship between the parties, a duty to disclose arises only under the “special facts” doctrine where “ ‘one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair” ’ ”  
(Swersky v Dreyer & Traub, 219 AD2d 321, 327 [1996], quoting Beneficial Commercial Corp. v Murray Glick Datsun,

Inc., 601 F Supp 770, 773 [SD NY 1985], quoting Chiarella v United States, 445 US 222, 248 [1980]; see also P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V., 301 AD2d 373, 378 [2003]; Strasser v Prudential Sec., 218 AD2d 526 [1995]”.

(Jana L v West 129<sup>th</sup> Street Realty Corp., 22 AD3d 274, 277, 802 NYS2d 132, 1<sup>st</sup> Dept., 2005).

With respect to the issue of deception, the defendants have demonstrated, by this record, that, indeed, the defendants requested that the plaintiff’s principal not to reveal the pending sale to either the vessels’ crew or the defendants customers “. . .so that customers might seek other suppliers and crew might seek other employment”. (plaintiff memorandum of law, p.11). The admissible proof demonstrates that there is no showing that such request prevented the plaintiff from learning that there was a minimum hull thickness restriction enforced by Motiva; nor is there any proof that the plaintiff made any affirmative attempt to inquire of the Motiva regulations/restriction.

“Pursuant to the doctrine of **caveat emptor**, the plaintiff had a duty to inquire whether the tenants had a written lease and, if so, request a copy of the lease or request any other documents pertaining to the tenancy (see London v Courduff, supra at 804, 529 NYS2d 874). The plaintiffs claim of justifiable reliance on alleged misrepresentations of Shooock regarding the lease and the status of the tenancy is unsupportable”.

(Adrien v Estate of Zurita, 29 AD3d 498, 499, 814 NYS2d 709, 2<sup>nd</sup> Dept., 2006). The case herein is eminently analogous to Adrien (supra), substituting Motiva regulations for the

references to leases and tenants. Of particular significance to the instant case, the Court of Appeals, in **Black v Chittenden** (69 NY2d 665, 669, 1986), which involved the sale of a bowling alley, ruled that

“The condition of the lanes was a matter “peculiarly within [defendant’s] knowledge” (133 NY, at p596, supra) and whether plaintiffs could have discovered the truth about them through the “exercise of ordinary intelligence” (ibid.) likewise present questions of fact mandating the denial of defendant’s summary judgment motion. Not only was defendant the sole shareholder and manager of the bowling alley for the seven years prior to its sale, but also he attested in the parties’ noncompetition agreement to his expertise in the management of its affairs. In contrast, the individual plaintiff had no prior involvement with the corporation and no prior expertise in the bowling business, and the condition of which she now complains was, according to plaintiffs’ expert, not detectable to the untrained eye at the time when the misrepresentation allegedly was made”.

Herein, in contrast, the plaintiff did not exercise any due diligence in inquiring of Motiva and was experienced in the fuel shipping business. Moreover, Motiva was not the seller but a vendor, and the seller did not promulgate the rules, nor did he make an affirmative representation that the hulls of the vessels were adequate for calling at all terminals or

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Motiva specifically.

An examination of the case law cited by the plaintiff's attorney, in support of his assertion of the "special facts" doctrine, are factually distinguishable from the case at bar, specifically because there is no demonstration that the defendants' knowledge was superior nor that the information was not readily available to the plaintiff or its principal.

A necessary component to the caveat emptor doctrine is that it is the purchaser's burden to fulfill its duty to inquire (Adrien v Estate of Zurita, supra), and the plaintiff's proof fails in that aspect.

Accordingly, the defendants have demonstrated their prima facie entitlement to summary judgment herein, and the burden has now shifted to the plaintiff to show an issue of fact by competent admissible evidence.

An examination of the competent admissible evidence submitted by the plaintiff does not succeed in meeting the burden of creating an issue of fact so as to necessitate a trial. Its submission consists largely of the plaintiff's principal's misunderstandings and misperceptions of the facts, which do not rise to the level of fraud, but do establish the lack of due diligence on the part of the plaintiff.

Therefore, the defendants' motion for summary judgment in their favor is granted.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated MAY 09 2008

*Stephen P. Scaramia*  
XXX J.S.C.

**ENTERED**

MAY 15 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE