

Holohan v Amity Nissan Superstore

2008 NY Slip Op 31645(U)

June 9, 2008

Supreme Court, Nassau County

Docket Number: 9318-07/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

JAMES HOLOHAN and MAUREEN R. HOLOHAN,
Plaintiffs,

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 19318/07

- against -

Motion Sequence No. 001, 002

AMITY NISSAN SUPERSTORE, NISSAN MOTOR ACCEPTANCE CORPORATION, NISSAN NORTH AMERICA, SEAN CLARKE, and RICHARD CARDELLA,
Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u> </u>
Briefs: Plaintiff's / Petitioner's	<u>4</u>
Defendant's / Respondent's	<u> </u>

The plaintiffs move for an order pursuant to CPLR 3016 and 3211 (a) (7) granting the plaintiff's motion to dismiss the defendants' counterclaim. The defendants Amity Nissan Superstore, Sean Clarke and Richard Cardella oppose the plaintiffs' motion, and cross move for an order dismissing the plaintiffs' motion, granting preclusion of evidence demanded by the plaintiffs, and never produced, dismissing the complaint against the defendants Amity Nissan Superstore, Sean Clarke and Richard Cardella, and granting them summary judgment.

The plaintiff James Holohan states, in a supporting affidavit dated March 31, 2008, he leased a 2006 Nissan Altima, vehicle identification number 1N4AL11D36N376602 on

March 27, 2006 from Amity Nissan Superstore, 4500 Sunrise Highway, Massapequa, New York. The plaintiff James Holohan states he received a recall notice for oil consumption not long after taking possession of the vehicle, and on December 22, 2006, the vehicle was serviced under the recall notification. The plaintiff James Holohan claims, after that service was rendered, he observed fresh oil stains whenever he parked the vehicle, so he returned with the car to the service center to check for the oil leak, but the service staff did not find it. The plaintiff James Holohan alleges he continued to observe the leak, as instructed by the service staff, and returned to the service center meeting with the Assistant Manager Sean Clark in July 2007. The plaintiff James Holohan states Clark told him he personally inspected the vehicle, and determined there was no leak, but to return with the vehicle in a week to investigate. The plaintiff James Holohan states his son subsequently brought the vehicle to the service center for an ultraviolet light inspection, and was told no leak was detected. The plaintiff James Holohan asserts on August 14, 2007, his son operated the car, when without notice, the instrument panel oil signal illuminated, and the engine shut off. The plaintiff James Holohan avers he had the car towed to Amity Nissan Superstore on August 15, 2007, and later that day Clark called him stating when the vehicle arrived there the oil drain plug was missing. The plaintiff James Holohan reports Clark also told him the engine was seized, incapable of repair and the plaintiff was responsible for the approximately \$3,100.00 engine replacement deemed excessive wear and tear. The plaintiff James Holohan states on August 18, 2007, the vehicle was towed from Amity Nissan to a private repair shop where it was inspected on August 20, 2007. The plaintiff James Holohan claims the private repair shop found the leak came from the oil pan gasket which

was changed. The plaintiff James Holohan states a Nissan regional specialist called him on August 24, 2007, and stated he spoke with the Amity Nissan Superstore staff, and was told the vehicle arrived without an oil plug, and due to the excessive wear and tear by the plaintiff the warranty was voided. The plaintiff James Holohan details the subsequent circumstances between the parties involving the leasing arrangement of the vehicle, and the plaintiff's credit situation resulting from the defendants' actions.

The plaintiffs' attorney states, in a supporting affirmation dated February 15, 2008, the motion to dismiss should be granted because the defense counterclaim falls short of even the most basic pleading requirements. The plaintiffs' attorney asserts the counterclaim does not identify the cause of action being alleged, the parties alleging the cause of action, the persons against whom the cause of action is alleged nor the conduct upon which the claim is based.

The defense counsel states, in an opposing affirmation dated February 25, 2008, the plaintiffs failed to reply to the defense counterclaim from November 16, 2007 to February 15, 2008, when the motion to dismiss the counterclaim was submitted. The defense counsel points out CPLR 3211 (e) provides a party may move at any time before the service of the responsive pleading is required on the grounds set forth in CPLR 3211 (a), and the plaintiffs failed to move in the time required to serve a responsive pleading which is 20 days after service of the counterclaim. The defense counsel contends the plaintiffs waived the right to challenge the counterclaim.

The defense counsel states Clarke was an assistant service manager at the Nissan agency in 2006, but he no longer works for Nissan, and Cardella is a regional manager, who

never spoke with the plaintiffs. Cardella has also presented a sworn statement dated February 26, 2008, which details the defense assertions regarding the circumstances of the underlying litigation, and Clarke leaving the employ of Nissan. The defense counsel asserts the motor vehicle here was leased from Nissan Motor Acceptance Corporation, but neither Amity Nissan nor Cardella could legally take possession of that automobile since they had no proprietary interest. The defense counsel avers the plaintiffs never returned that automobile to the service facility for routine maintenance, but they had Conlon Automotive, 1150 North Broadway, North Massapequa, change the oil and perform periodic maintenance on it. The defense counsel alleges, after one oil change, conducted by Conlon Automotive, the oil drain plug vibrated off the engine, and oil drain out onto the highway. The defense counsel alleges, when the car was taken to the Nissan Service facility, the mechanic immediately spotted the missing oil drain plug, photographed the empty hole, inspected the vehicle, and concluded the engine was seized. The defense counsel states Nissan North America was immediately contacted, but after review of the circumstances it declined to provide warranty repair. The defense counsel avers the plaintiffs returned the car to Conlon Automotive where the rod bearings were replaced. The defense counsel claims trained mechanics at Nissan recommended a complete engine change because of the engine oil starvation. The defense counsel argues the entire episode was caused by unskilled labor working for Conlon Automotive which admitted the mistake, and changed the rod bearings for the plaintiffs.

The defense counsel states, in an unsworn memorandum, the combined demands served on November 16, 2007, were never answered by the plaintiffs. The defense counsel

states the plaintiffs refused to answer the demands, so the defense is entitled to an order of preclusion for the plaintiffs' failure to comply with proper discovery demands. The defense counsel asserts, if the Court provides an order of preclusion, the defendants then move for judgment dismissing the frivolous complaint because there will be no evidence to support the alleged causes of action.

The plaintiffs' attorney states, in another supporting affirmation dated April 1, 2007 [sic], the defense counsel mistakenly claims the answer and counterclaim were served on November 16, 2007. The plaintiffs' attorney points out the defense counsel employs that inaccurate assertion as the sole argument against dismissal, to wit the plaintiffs' motion is untimely. The plaintiffs' attorney notes the defense supporting papers conceal the impossibility of these assertions. The plaintiffs' attorney avers the defense contention the plaintiffs did not respond to a set of discovery demands served upon the plaintiffs' counsel in November 2007, is erroneous. The plaintiffs' attorney asserts those demands were for items in a personal injury which is inapposite to the underlying matter involving consumer fraud. The plaintiffs' attorney indicates these circumstances would be sanctionable as an attempt to harass.

The Court has carefully reviewed and considered all of the parties submitted by the parties with respect to the motion and cross motion. CPLR 3211 (a) (7) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the pleading fails to state a cause of action." CPLR 3016 (a) and (b) provide:

In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally; where a cause of action or defense is based upon

misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

This statute requires the defense counterclaim be pled with specific particularity. The Second Department holds:

The plaintiff's claim of defamation fails to comply with the special pleading requirement contained in CPLR 3016 (a) that the complaint set forth the "the particular words complained of", thereby mandating dismissal (*see, Gardner v. Alexander Rent-A-Car*, 28 A.D.2d 667, 280 N.Y.S.2d 595; *Kahn v. Friedlander*, 90 A.D.2d 868, 869, 456 N.Y.S.2d 482). The claim is further defective in that it fails to state the particular person to whom the allegedly defamatory comments were made (*see, Buffolino v. Long Is. Sav. Bank, supra*, 126 A.D.2d at 510, 510 N.Y.S.2d 628).

The defendants have not met their burden under CPLR 3016 (a) nor (b), hence the counterclaim is dismissed for failing to state a cause of action, and that branch of the defense cross motion seeking to dismiss the plaintiffs' motion is denied.

CPLR 3101 (a) provides, in pertinent part: "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." CPLR 3124 provides: "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." CPLR 3126 provides:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing

in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The Second Department holds:

The defendant was not entitled to the dismissal of the complaint under CPLR 3126 (3) without first moving to compel the deposition she seeks, accompanied by an affirmation that she made a good faith effort to resolve the discovery dispute (*see* 22 NYCRR 202.7[a]; *Dennis v. City of New York*, 304 A.D.2d 611, 758 N.Y.S.2d 661; *Charter One Bank v. Houston*, 300 A.D.2d 429, 430, 751 N.Y.S.2d 573; *Hegler v. Loews Roosevelt Field Cinemas*, 280 A.D.2d 645, 720 N.Y.S.2d 844; *Barnes v. NYNEX, Inc.*, 274 A.D.2d 368, 711 N.Y.S.2d 893). The defendant's attorney failed to demonstrate that any attempt was made to confer with his adversary regarding the resolution of this issue. Further, while the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court (*see Kingsley v. Kantor*, 265 A.D.2d 529, 697 N.Y.S.2d 141), to invoke the drastic remedy of striking a pleading, a court must determine that the party's failure to comply with a disclosure order was the result of willful and contumacious conduct (*see Mangiapane v. Brookhaven Beach Health Related Facility*, 305 A.D.2d 642, 759 N.Y.S.2d 890; *Patterson v. New York City Health & Hosps. Corp.*, 284 A.D.2d 516, 726 N.Y.S.2d 715; *Centerport Ins. Agency v. Atlantic Fabricators of Rhode Is.*, 277 A.D.2d 414, 715 N.Y.S.2d 908; *Olmoz v. Town of Fishkill*, 258 A.D.2d 447, 684 N.Y.S.2d 611) *Diel v. Rosenfeld*, 12 A.D.3d 558, 558-559, 784 N.Y.S.2d 379 [2nd Dept, 2004]; *see also Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condominium*, 2008 WL 2065942, 2008 N.Y. Slip Op. 04509, 04509 (2nd Dept, 2008).

The defense assertions do not support the defense contention the plaintiffs lack of response to the discovery demands was the result of willful and contumacious conduct. Moreover, the disclosure demands regarding personal injury circumstances are not material and necessary in the defense of this consumer fraud action. Finally, the defendants have failed to demonstrate any attempt was made to confer with the plaintiffs' attorney regarding the

resolution of this issue.

Accordingly, the plaintiffs' motion is granted, and the defense cross motion is denied.

So ordered.

Dated: **June 9, 2008**

ENTER:



J. S. C.
HON. ANTONIO I. BRANDVEEM

FINAL DISPOSITION

NON FINAL DISPOSITION XXX