

Bier v Staten Is. Yacht Sales, Inc.

2008 NY Slip Op 31807(U)

June 26, 2008

Supreme Court, Richmond County

Docket Number: 0103817/2007

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

DCM PART 3

THEODORE M. BIER,

**Index No: 103817/07
Calendar No: 1486-001**

Plaintiff,

-against-

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

STATEN ISLAND YACHT SALES, INC. and
CARVER BOATS CORP., LLC,

Defendants.

-----x
The following papers numbered 1 to 6 were marked fully submitted on this motion the 16th day of
May, 2008:

	Pages Numbered
Notice of Motion for Leave to Amend Complaint and to Compel Deposition Attendance or, in the Alternative to Preclude by Plaintiff Theodore M. Bier, with Supporting Papers, Exhibits and Memorandum of Law (dated April 30, 2008).....	1
Affirmation in Opposition by Defendant Carver Boat Corp., LLC, with Exhibits and Memorandum of Law (dated May 8, 2008).....	2
Affirmation in Opposition to Motion to Amend by Defendant Staten Island Yacht Sales, Inc., with Exhibit and Memorandum of Law (dated May 9, 2008).....	3
Affidavit and Reply Memorandum of Law by Plaintiff Theodore M. Bier (dated May 14, 2008).....	4
Reply Affirmations by Plaintiff Theodore M. Bier, with Exhibits and Memorandum of Law (dated May 22, 2008).....	5,6

Upon the foregoing papers, plaintiff's motion for leave to amend is granted.

Plaintiff commenced this action against defendant boat dealer, STATEN ISLAND YACHT SALES, INC. (hereinafter "SIYS"), and defendant boat manufacturer CARVER BOAT CORP., LLC

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(hereinafter “CARVER”), alleging, *inter alia*, breach of contract in connection with the purchase of a “Marquis 50LS” boat on or about March 10, 2007. It has been alleged, *inter alia*, that after a purchase agreement was signed and a deposit paid by plaintiff in the amount of \$116,845.00, it was discovered that the boat was defective and not fit for the ordinary purpose for which it was intended. In this regard, plaintiff claims that the boat experienced a complete pre-delivery engine failure which was never fully explained to plaintiff despite his request for information, and that such a situation presented an unacceptable risk of engine failure at sea, as well as a risk of concealed engine damage.

Plaintiff also alleges that defendants falsely represented the horsepower of the engines as 775, when it was actually a 755 horsepower engine, and that he relied upon such representations when he entered into the purchase agreement. In addition, plaintiff alleges that the subject boat failed to conform with several mandatory safety standards, such as the failure to provide a secondary means of emergency egress from the master stateroom (thereby creating a substantial risk of injury or death in the case of a fire), and significant gaps in the “aft” railings which exposed passengers, especially children, to the danger of falling overboard. Both of these failures are alleged to be in violation of the American Boat and Yacht Council safety standards. As a result, plaintiff refused to accept delivery of the boat and demands, *inter alia*, the return of his deposit.

In the current application, plaintiff moves to amend the complaint to include further details of the allegations contained within the original complaint. According to plaintiff, the information sought to be included was uncovered through the course of discovery, *e.g.*, during defendants’ depositions, and therefore are not new, but merely serve to amplify and further particularize the allegations existing in the complaint. In particular, these amendments relate, *inter alia*, to the alleged misrepresentations made by defendants regarding the horsepower of the engines; speed data; and the alleged results of the tests of such engines, as well as the test results pertaining the new engine that was allegedly installed after the original engine failed.

In addition, plaintiff seeks to depose additional witnesses from CARVER who are alleged to have

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specific knowledge of the circumstances and were personally involved in the events associated with the alleged engine failure in the subject vessel. According to plaintiff, the witness heretofore produced by CARVER had no knowledge of any engine-related matters or the subject vessel, and was unable to testify regarding any matters relevant to the allegations made in the complaint. In addition, it is claimed that this witness identified those individuals now sought to be deposed by plaintiff, who he believed to possess the necessary knowledge of the issues raised by plaintiff at his deposition. Accordingly, plaintiff contends that he has demonstrated a sufficient basis for the deposition of these witnesses.

In opposition, CARVER contends that plaintiff's motion to amend the pleadings should be denied, as the amendments are completely devoid of merit . In particular, CARVER contends that the amendments include allegations regarding CARVER's alleged alteration of a Motor Boating Magazine article about its ocean test of one version of the Marquis 50LS. According to CARVER, the reprint of the article in question appeared in the July 2007 issue of the magazine, some four months after the subject purchase agreement was purportedly executed. As a result, CARVER contends that plaintiff could not have relied on any such representations in making his purchase, and that his alleged reliance on same is therefore unfounded. CARVER further contends that the remaining amendments are merely repetitious of those allegations already contained in the complaint.

With regard to plaintiff's request to depose additional witnesses, CARVER contends that plaintiff has failed to demonstrate that the witness produced by CARVER had insufficient knowledge of the facts or was otherwise inadequate, and that the additional witnesses could not provide plaintiff with any further information that would be material and necessary to the prosecution of his case.

For its part, defendant SIYS contends that the proposed amendments relate solely to defendant CARVER. In addition, SIYS contends that plaintiff's proposed amendments improperly intertwine claims of breach of contract and breach of warranty against CARVER and SIYS. According to SIYS, plaintiff is required to assert separate causes of action against each defendant with regard to such claims, especially as they relate to any claimed breach of warranty against CARVER, the manufacturer. In

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addition, SIYS claims that any allegations of breach of warranty as against it are barred due to the warranty exclusion contained within the purchase agreement signed by plaintiff. Furthermore, SIYS contends that plaintiff testified at his EBT that he had (1) examined the boat at the Miami Boat Show, and (2) attended a sea trial of the boat in Ft. Lauderdale. As a result, it is said that plaintiff cannot claim the breach of any implied warranties with regard to the alleged safety defects as they relate to egress from the master stateroom, or gaps in the aft railings.

As for the amendment of the second cause of action, which relates to the alleged misrepresentations contained in the magazine article, SIYS contends that plaintiff could not have relied upon said article since it was published *after* plaintiff decided to purchase the boat. Therefore, any claimed reliance upon the misrepresentations allegedly made therein are without merit.

CPLR 3025(b) provides that “[a] party may amend his pleading *** at anytime by leave of court” and that “[l]eave shall be freely given upon such terms as may be just”. In fact, where no prejudice is shown, amendments have been allowed “during or even after trial” (*see Murray v. City of New York*, 43 NY2d 400). The decision on such a motion is committed to the sound discretion of the trial court (*see Edenwald Contr Co. v. City of New York*, 60 NY2d 957), and is to be freely given where prejudice is absent and the amendment is not palpably insufficient or patently devoid of merit (*see CPLR 3025[b]; Bolanowski v. Trustees of Columbia Univ. in the City of NY*, 21 AD3d 340).

Here, it is the opinion of this Court that defendants have failed to establish that they will suffer any prejudice as a result of the proposed amendments, or that the amendments are either palpably insufficient or devoid of merit. In addition, it is the opinion of this Court that the amended complaint sufficiently asserts separate allegations against each defendant and, in fact, the proposed amendments provide further particularization of the allegations set forth in the original complaint. With regard to the claims of false representations by each defendant, it appears from the papers submitted to the Court that the representations upon which plaintiff purports to have relied began in January 2007, when the Marquis 50LS was displayed at a boat show with advertised 775 horsepower twin diesel engines, and

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that any further representations or misrepresentations, *e.g.*, in the allegedly altered magazine article, although made subsequent to the execution of the purchase agreement, are certainly relevant on the matter of plaintiff's refusal to take delivery, as well as his claims of deceptive acts and practices and false advertising under General Obligations Law §§349 and 350. Accordingly, in the exercise of its discretion, leave to amend will be granted. Nevertheless, defendants must be permitted to conduct further discovery with regard to the new allegations pursuant to 22 NYCRR 202.21(d), including a further deposition of the plaintiff.

As for plaintiff's request for the deposition of additional witnesses, CPLR 3101(a) provides for the full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. What is "material and necessary" in this context has again been left to the discretion of the court, and may include "any facts bearing on the controversy which will assist preparation for trial" (Allen v. Crowell-Collier Publ. Co., 21 NY2d 403, 406). Here, it is the opinion of this Court that the deposition testimony of the employees identified by CARVER's witness, *i.e.*, Irwin Jacobs and Randy Peterson, is unquestionably relevant to the issues raised by plaintiff, particularly insofar as it relates to their purported knowledge of (1) the subject "engineering report", (2) the disputed horsepower ratings and (3) the failure of the original engine. In addition, the EBT testimony of CARVER's own witness suggests that the information which plaintiff seeks may lie peculiarly within the knowledge of these witnesses. Under these circumstances, it would be inappropriate for this Court to prohibit a further examination.

Accordingly, it is hereby:

ORDERED that plaintiff's motion is granted in its entirety; and it is further

ORDERED that the proposed amended complaint set forth in plaintiff's moving papers is deemed served, and defendants shall have 20 days after the service upon them of a copy of this Decision and Order with Notice of Entry within which to interpose any amended answers; and it is further

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ORDERED that the parties shall appear for a conference before this Court on July 23, 2008 for the purpose of scheduling the EBTs of the aforementioned individuals, and to establish a timetable to complete any additional discovery.

All parties shall appear in DCM Part 3 for a status conference on **July 23, 2008** at 9:30 a.m.

E N T E R,

J.S.C.

Dated: June 26, 2008