Bank of Am., N.A. v Hillside Cycles, Inc.
2010 NY Slip Op 32247(U)
July 26, 2010
Supreme Court, Queens County
Docket Number: 27617/2009
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

x

BANK OF AMERICA, N.A.,

Plaintiff,

- against -

HILLSIDE CYCLES, INC., d/b/a HILLSIDE HONDA

Defendant.

x

Index Number 27617 2009

Motion Date May 12, 2010

Motion Cal. Number 2

Motion Seq. No. 1

The following papers numbered 1 to 14 read on this motion by plaintiff Bank of America, N. A., for an order grating summary judgment (1) dismissing defendant's affirmative defenses and granting summary judgment on all five causes of action for breach of contract and awarding (2) on the first cause of action the sum of $29,732.15, plus interest on the principal balance of $23,660.97 at the rate of 18% per annum from October 15, 2009, and attorney's fees of $5,946.43; (3) on the second cause of action the sum of $29,096.84, plus interest on the principal balance of $21,787.10 at the rate of 18% per annum from October 14, 2009, and attorney's fees of $10,683.47;(4) on the third cause of action the sum of $49,960.95, plus interest on the principal balance of $48,210.45 at the rate of 18% per annum from October 1, 2009, and attorney's fees of $9,952.19;(5) on the fourth cause of action the sum of $78,736.79, plus interest on the principal balance of $73,275.73 at the rate of 18% per annum from October 14, 2009, and attorney's fees of $15,747.36; and (6) on the fifth cause of action $46,027.02 plus interest on the principal balance of $44,564.56 from at the rate of 18% per annum September 17, 2009.

	Papers Numbered
Notice of Motion-Affirmations-Affidavits - Exhibits(A-T).........	1-7
Opposing Affirmation-Exhibits(A-G)...	8-11
Reply Affirmation-Exhibits(T-V)..	12-14

Upon the foregoing papers this motion is determined as follows:

Plaintiff Bank of America, N. A. (Bank) commenced the within action to recover damages for breach of contract on October 14, 2009. Plaintiff Bank alleges in the complaint that it entered into a Retail Dealer Agreement dated November 15, 2005, with defendant Hillside Cycles, Inc., d/b/a Hillside Honda (Hillside), a used car dealer, pursuant to which financing agreements for vehicles sold by the defendant were assigned to the plaintiff. Plaintiff Bank alleges in the complaint that Hillside entered into five separate retail installment contracts with Anthony Gonzales, Rhea Roberts, Anthony Bolden, Johnathan Spencer and Troy Hogsett, and said contracts were assigned to the Bank. The complaint, in each instance, alleges that Hillside breached the specific representations and warranty provision of the parties' agreement; that pursuant to said agreement the Bank demanded that Hillside repurchase the retail installment contract; and that Hillside failed to repurchase each installment contract.

The first cause of action alleges that the repurchase price of the Gonzales contract was $29,732.15, plus any collection or repossession expenses, plus contractual interest of 18 percent from September 18, 2009, the date of default, and that the amount of reasonable attorney's fees sought under Retail Dealer Agreement is $5,946.43, which is 20 percent of the principal amount sought.

The second cause of action alleges that the repurchase amount of the Roberts contract was $53,417.34, plus any collection or repossession expenses, plus contractual interest of 18 percent from September 16, 2009, the date of default, and that the reasonable amount of attorney's fees sought under Retail Dealer Agreement is $10,683.47, which is 20 percent of the principal amount sought.

The third cause of action alleges that repurchase price of the Bolden contract was $49,960.95, plus any collection or repossession expenses, plus contractual interest of 18 percent from September 21, 2009, the date of default, and that the reasonable amount of attorney's fees sought under Retail Dealer Agreement is $9,992.19, which is 20 percent of the principal amount sought.

The fourth cause of action alleges that the repurchase amount of the Spencer contract was $78,736.79, plus any collection or repossession expenses, plus contractual interest of 18 percent from September 16, 2009, the date of default, and that the reasonable amount of attorney's fees sought under Retail Dealer Agreement is $15,747.36, which is 20 percent of the principal amount sought.

The fifth cause of action alleges that the repurchase amount of the Hogsett contract was $46,927.02, plus any collection or repossession expenses, plus contractual interest of 18 percent from September 9, 2009, the date of default, and that the reasonable amount of attorney's fees sought under Retail Dealer Agreement is $9,385.40, which is 20 percent of the principal amount sought.

Defendant served an answer and interposed the following twelve affirmative defenses: failure to state a cause of action; failure to state a claim for breach of the Retail Dealer Agreement; that the defendant has acted in good faith and in accordance with the reasonable commercial standards applicable to its business; plaintiff's failure to reasonably mitigate or seek to mitigate its damages; unclean hands; waiver, laches or estoppel; that whatever injuries and/or damages that were sustained by plaintiff were in whole or part the result of the conduct, actions or inactions the plaintiff; that whatever injuries and/or damages that were sustained by plaintiff were in whole or part the result of the conduct, actions or inactions the non-parties Anthony Gonzales, Rhea Roberts, Anthony Bolden, Johnathan Spencer and Troy Hogsett; that whatever injuries and/or damages that were sustained by plaintiff were in whole or part the result of the carelessness, recklessness and negligence of plaintiff and not of defendant; that whatever injuries and/or damages that were sustained by plaintiff were in whole or part the result of the carelessness, recklessness and negligence of non-parties Anthony Gonzales, Rhea Roberts, Anthony Bolden, Johnathan Spencer and Troy Hogsett; that the complaint is barred by the plaintiff's own actions in materially breaching and violating the parties' various agreements; that the allegations in the complaint concerning the alleged specific warranties and representations made by defendant to plaintiff in the Retail Dealer Agreement that were breached are not sufficiently particular to give notice of the alleged occurrences to be proven or the material elements plaintiff's alleged complaint. Defendant, in a "wherefore clause", demanded judgment dismissing the complaint and awarding costs, disbursements and reasonable attorney's fees, but failed to assert a counterclaim for such relief.

The within motion was served on March 1, 2010, and a preliminary conference was held on March 18, 2010, at which time an order pertaining to discovery was issued. The parties entered into a stipulation dated March 18, 2010 whereby they agreed to adjourn the within motion until May 12, 2010, at which time said motion was fully submitted. On April 27, 2010 defendant commenced a third party action against Anthony Gonzales, Rhea Roberts, Anthony Bolden, Johnathan Spencer, Johnathan L. Spencer and Tory Hogsett for indemnification and contribution. Despite the issuance of the preliminary conference order which permitted discovery pending the full submission of the within motion, the parties have not engaged in any discovery.

It is well settled that "[o]n a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Sheppard-Mobley v King*, 10 AD3d 70, 74 [2004], *affd as mod*, 4 NY3d 627 [2005], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Sheppard-Mobley v King*, *supra*, at 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez v Prospect Hosp.*, *supra*, at 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (*see*, *Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 [2006], citing *Secof v Greens Condominium*, 158 AD2d 591 [1990]).

The elements of a breach of contract are: the existence of a contract; plaintiff's performance under the contract; defendants' breach of that contract; and resulting damages (*Furia v Furia*, 116 AD2d 694, [1986]). Plaintiff's counsel concedes that the complaint is devoid of any factual allegations concerning Hillside's alleged breach of the Retail Dealer Agreement, with respect to each of the five retail installment contracts, and asserts that the details of these breaches are set forth in the affidavit of Michael Borzi, a Senior Vice President, Consumer Loan Center Manager of the Bank. Mr. Borzi's affidavit is proffered solely in support of the within motion for summary judgment.

The Bank, in its demand letters, asserted that Hillside breached its representations and warranties as follows: with respect to the Gonzales contract "Title no clear when loan originated"; as to Roberts "4B (14) The Buyer is not who he, she or it purports to be"; as to Bolden "The Buyer is not who he, she or it purports to be"; as to Spencer "4B (8) . . . all necessary steps have been taken to ensure that Bank will have a properly perfected security interest in such Unit prior to all other security interest, liens or encumbrances, (unit titled to borrowers son, who is not on the contract) 4B(14) The Buyer is not who he, she or it purports to be"; as to Hogsett, "The Buyer is not who he, she or it purports to be".

Mr. Borzi, however, asserts in his affidavit that Hillside breached its representations and warranties under the Retail Dealer Agreement in that Hillside did not have proper title to each of the vehicles it sold to Gonzales, Roberts, Bolden, Spencer, Hogsett, and that Roberts, Bolden, Spencer and Hogsett were all straw buyers. It is noted that Mr. Borzi's assertions that Roberts and Bolden were straw buyers are based solely upon hearsay statements contained in his affidavit.

Defendant, in opposition to the within motion, asserts that it had proper title to each of the motor vehicles it sold to said individuals. Defendant further asserts that none of the purchasers were straw buyers, and that discovery is warranted as regards plaintiff's assertions regarding the purchasers of the vehicles, each of who, are now named as third party defendants.

Plaintiff's counsel, in her reply affirmation asserts additional breaches of the Retail Dealer Agreement with respect to Roberts' and Hogsett's drivers licenses. These claims were not specifically alleged in the complaint and were improperly raised for the first time in the reply papers and therefore will not be considered by the court (see, CPLR 2214; see, *Costello v Zaidman*, 58 AD3d 593 [2009]; *Schultz v 400 Coop. Corp.*, 292 AD2d 16, 21,[2002]; *Voytek Tech. Inc. v Rapid Access Consulting, Inc*., 279 AD2d 470,471, [2001]; *Dannasch v Bifulco*, 184 AD2d 415, [1992]).

The Bank has not served an amended complaint which details Hillside's alleged breaches of the Retail Dealer Agreement. Rather, it improperly seeks, in a motion for summary judgment, to amplify its pleadings via Mr. Borzi's affidavit. In view of the fact that the Bank's complaint does not specify Hillside's conduct, the court cannot determine at this time whether the documentary evidence is sufficient to establish the alleged breaches of the Retail Dealer Agreement set forth in the complaint.

With respect to the element of damages, plaintiff's evidence is insufficient to establish the amount of damages alleged in the complaint, with respect to each cause of action. In each instance, Mr. Borzi cites to the amount sought in the complaint, and to a lesser amount of principal owed, without detailing how these figures were arrived at. In addition, although Mr. Borzi states that two of the vehicles were repossessed and sold at auction, no documentary evidence has been submitted which establishes the net amounts claimed by plaintiff, as well as the gross amounts obtained at said sales, and deductions that were allegedly made by the plaintiff.

With respect to the claims for attorney's fees, the Bank's complaint seeks to recover as attorney's fees 20 percent of the principal amount claimed in each cause of action. However, there is nothing in the parties' agreement that would permit the recovery of attorney's fees on a percentage basis. In addition, the affidavit of legal services submitted here is totally inadequate. Although counsel sets forth her hourly rate, the amount of hours expended, and certain services performed, she has failed to state the amount of hours expended on each legal services rendered.

CPLR § 3212(f) permits a party to a motion for summary judgment to obtain further discovery under certain circumstances. This section generally applies where the party

opposing the motion has not had a reasonable time to obtain disclosure prior to the submission of the motion for summary judgment (*Aurora Loan Services, LLC v LaMattina & Assoc.*, 59 AD3d 578, [2009]; *see also, Canarick v Cicarelli*, 46 AD3d 587, [2007]). It is noted that discovery in the third party action is not subject to the time constraints set forth in the March 18, 2010 preliminary conference order. Defendant therefore, is entitled to conduct depositions of the third party defendants in order to defend on the claims pertaining to alleged straw buyers. Defendant is directed to serve said discovery demands on the third party defendants within 30 days from the date of the service of this order, together with notice of entry.

In view of the foregoing, that branch of plaintiff's motion which seeks summary judgment in its favor on all five causes of action is denied for the reasons stated above.

That branch of plaintiff's motion which seeks summary judgment dismissing defendant's affirmative defenses is denied as to the first, second, third and twelfth affirmative defenses, is denied.

That branch of plaintiff's motion which seeks to dismiss the fourth affirmative defense of failure to mitigate damages is granted, as plaintiff had no duty to mitigate damages under the terms of the parties' agreement (*see Bank of America v J.P.T. Automotive*, 52 AD3d 553 [2008]).

That branch of plaintiff's motion which seeks summary judgment dismissing the fifth affirmative defense is granted, as these equitable defenses are not applicable to this action for breach of contract.

That branch of plaintiff's motion which seeks summary judgment dismissing the seventh, eighth, ninth and tenth affirmative defenses is granted, as these defenses are inapplicable to this action for breach of contract.

That branch of plaintiff's motion which seeks summary judgment dismissing the eleventh affirmative defense is granted, as defendant does not allege any facts in support of its claim that plaintiff breached the agreement.

Dated: July 26, 2010

____
J.S.C.