

Argento v Colandrea Buick-Pontiac-GMC, Inc.

2010 NY Slip Op 32873(U)

October 14, 2010

Supreme Court, Orange County

Docket Number: 835-2008

Judge: Lewis J. Lubell

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Disp

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF ORANGE**

-----X
GIUSEPPE ARGENTO,

Plaintiff(s),

-against -

COLANDREA BUICK-PONTIAC-GMC, INC. and
GENERAL MOTORS COMPANY,

Defendant(s).

-----X
LUBELL, J.

DECISION/ORDER

Index No. 835-2008

Motion Date:8-27-10

The following papers were considered in connection with this motion by defendants for an Order pursuant to CPLR 3212 dismissing the complaint of plaintiff Giuseppe Argento in its entirety and directing that judgment be entered in favor of defendants General Motors LLC f/k/a General Motors Company and Colandrea Buick-Pontiac-GMC, Inc., together with costs and such other and further relief as to the Court may seem just and proper; and the cross-motion by plaintiff for an Order pursuant to CPLR 3212 directing that judgment be entered in favor of plaintiff, together with costs and such other and further relief as to the Court may seem just and proper:

PAPERS

NUMBERED

Motion	1
Affirmation/Exhibits A-G	2
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Defendant's Memorandum of Law	4
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Affirmation in Opposition/Exhibits A-B	10
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Plaintiff, Giuseppe Argento, brings this action against defendant General Motors Corporation ("GMC") and its authorized dealer, defendant Colandrea Buick-Pontiac-GMC, Inc. ("Colandrea") after his 2005 Pontiac GTO suffered catastrophic engine failure on September 23, 2007.

There is no dispute that the car had had numerous warranty covered repairs for such items as a faulty clutch switch, leaking engine seal, leaking power steering seals, and several incidents of faulty "check engine light", all of which were fully covered under warranty. The record before the Court further reflects, and there appears to be no dispute, that the motor oil was changed on the vehicle on June 3, 2007 at a private garage, something less than three and one-half months before the September 23, 2007, engine failure.

Three causes of action are advanced: breach of contract against GMC for its alleged failure to honor the manufacturer's warrant; negligence against Colandrea for negligent repair of the automobile, leading to the engine failure; and equitable relief in the form of rescission of contract.

The principal basis for defendants' motion for summary judgment is defendants' contention that the engine failure was caused by plaintiff's neglect in maintaining an adequate level of motor oil in the vehicle's engine and the "undisputed" fact that the vehicle was not leaking oil. This, defendants argue, is supported by, among other things, the affidavit of Matthew Stanton.

Mr. Stanton is a Colandrea automotive technician with over twenty-five years of experience. He is a certified Master Automobile and Light Truck Technician by the National Institute for Automotive Service Excellence in various categories, including Engine Repair and Engine Performance. Mr. Stanton's affidavit makes note of his experience in completely rebuilding "at least 100 engines, and [the] repair of thousands." It further provides:

. . .

11. Upon inspecting and diagnosing the vehicle, I found the damage to the engine . . . so severe that it required replacement.

12. All of the damage described above is the

result of excessive heat, which was generated by a lack of oil to lubricate the engine.

13. I found no oil left in the engine itself, and less than one quart of oil left at the bottom of the oil pan. . .

14. I inspected the vehicle for oil leaks or signs of oil leaks, and there were none.

15. Based on my inspection of the vehicle, since the lack of oil was not caused by an oil leak, the only possible cause of the engine damage was a failure to maintain a proper oil level in the engine.

. . .

17. GM specifications consider it normal for a vehicle to burn up to one quart of oil every 2,000 miles, and up to one quart of oil every 500 miles if the vehicle is being driven aggressively.

. . .

21. In sum, it is my opinion to a reasonable degree of technical certainty in the automotive field, that the vehicle's engine failed due to insufficient or improper maintenance, not because it suffered from a defect in factory materials or workmanship covered by the terms of the manufacturer's warranty . . .

The Court finds that defendants have established *prima facie* entitlement to judgment as matter of law by submitting, among other things, the above referenced affidavit as well as other undisputed evidence that there was no oil leak, past or at the time of the incident, and that this was not the first time that the oil level had been compromised. More particularly, there is evidence that on March 1, 2006, at 13,356 miles, plaintiff brought the vehicle to the dealership with "0%" remaining oil life, despite having had the oil changed just four months prior.

Plaintiff, the "[o]ne opposing [the] motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on

which he rests his claim ..." (Zuckerman v. City of New York, 49 N.Y.2d 557, 562). This he has failed to do, nor has he come forward with any legal basis upon which relief should be denied to defendants, or granted in his favor.

Upon ruling as it did, the Court has rejected plaintiff's spoliation and *res ipsa loquitor* arguments.

Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party of the ability to prove its claim, the responsible party may be sanctioned by the striking of its pleading . . . [A] less severe sanction [may be] appropriate where the absence of the missing evidence does not deprive the moving party of the ability to establish his or her case . . . The determination of a sanction for spoliation is within the broad discretion of the court . . .

(Gotto v. Eusebe-Carter, 69 A.D.3d 566, 567 [2d Dept., 2010]).

Here, there is no dispute that the vehicle was repossessed due to plaintiff's default on the underlying vehicle loan. There is no showing that either of these defendants are even marginally legally responsible for and/or in control of the facts and circumstances surrounding the repossession of the vehicle and plaintiff has failed to show that, even if defendants were at fault for not covering the required repair under the warranty (which they are not), that same is a legal defense to the payment of the underlying loan to a third-party.¹

Under appropriate circumstances, the evidentiary doctrine of *res ipsa loquitur* may be invoked to allow the factfinder to infer negligence from the mere happening of an event . . . Res ipsa loquitur, a doctrine of ancient origin . . ., derives from the understanding that some events ordinarily do not occur in

¹ Although not the basis for denial, the Court makes further note a request for spoliation sanctions should be made by way of a properly noticed, supported and briefed motion for same, which this is not.

the absence of negligence . . . In addition to this first prerequisite, plaintiff must establish, second, that the injury was caused by an agent or instrumentality within the exclusive control of defendant and, third, that no act or negligence on the plaintiff's part contributed to the happening of the event.

(States v. Lourdes Hosp., 100 N.Y.2d 208, 212 [2003]). Here, at the very least, plaintiff has failed to establish defendants' exclusive control. As such, the doctrine does not apply.

Finally, plaintiff has failed to come forward with any cogent reason for the Court to reject Mr. Stanton's affidavit, including the conclusions therein reached. Nor has plaintiff come forward with any expert proof to the contrary to refute the conclusions reached by Mr. Stanton. The principal issue in this case, whether or not the subject engine could consume so much oil from the date of the last noted oil change to the date of the engine failure, is not part of an ordinary person's daily experience or expertise. As such, plaintiff needed to come forward with expert proof in opposition to defendants' *prima facie* showing or, at the very least, with a sufficient attack upon Mr. Stanton's affidavit so as to cast doubt on his conclusions.

There being no merit to these or any other arguments advanced in opposition to defendants' motion for summary judgment, it is hereby

ORDERED, that defendants' motion for summary judgment be and is hereby granted, and plaintiff's cross-motion is hereby denied; and, it is further

ORDERED, that having ruled as such, all other arguments advanced by defendants in support of dismissal are deemed moot.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Goshen, New York
October 14, 2010

S/_____
HON. LEWIS J. LUBELL, J.S.C.

TO: Michael J. Gregg, Esq.
The Rose Law Firm, PLLC
501 New Karner Road
Albany, New York 12205

John W. Cobb, Esq.
Cobb & Cobb
724 Broadway
Newburgh, New York 12550