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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

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x

JOSEPH COLLINS,

Plaintiff,

- against -

STAR NISSAN and NISSAN NORTH AMERICA,

Defendants.

x

Index Number 700236 2009

Motion Date October 12, 2010

Motion Cal. Number 7

Motion Seq. No. 6

The following papers numbered 1 to 5 read on this motion by defendant Star Nissan and defendant Nissan North America for an order pursuant to CPLR 2221 permitting them to reargue a prior motion by plaintiff Joseph Collins for summary judgment on his first, second, fourth, and fifth causes of action.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits	1-2
Answering Affidavits - Exhibits.....	3
Reply Affidavits.....	4
Memorandum of Law	5

Upon the foregoing papers it is ordered that leave to reargue is granted. Upon reargument, the court adheres to its prior decision and order dated August 25, 2010 (one paper).

On or about January 24, 2009, plaintiff Joseph Collins purchased a 2009 Nissan GT-R from defendant Star Nissan, an automobile dealer located on Northern Boulevard in Bayside, New York. Defendant Star Nissan is a franchisee of defendant Nissan North America (NNA).

In connection with the transaction, defendant Star Nissan issued Invoice No. 67644 which states the purchase price to be $94,853.18. The sum included: (1) the price of the vehicle, (2) tag and title fees, (3) taxes and service charges, (4) the price of a LoJack security system, (5) the price of a seven-year/100,000 mile extended warranty, (6) a five-year/75,000 mile service/maintenance package, (7) a five-year/75,000 mile tire service maintenance package, (8) a "Security Plus" Vehicle Protection Plan, (9) a "Maintenance Plus" vehicle service plan, and (10) an "Easy Driver Care" plan.

In or about February, 2009, after plaintiff Collins had paid the purchase price in full and taken possession of the vehicle, one of defendant Star Nissan's employees informed him that the vehicle was not covered by the extended service/maintenance plans. Explaining that the salesman had made an error in computing the price of the vehicle and packages, Star Nissan demanded that plaintiff Collins pay an additional $10,000.00 for coverage under the extended service/maintenance plans. Collins rejected the demand and informed the dealer that he would rescind the contract unless the dealer placed the vehicle under the plans. The parties could not settle the dispute, and the plaintiff began the instant action.

On May 25, 2010, the plaintiff submitted a motion for summary judgment on his first, second, fourth, and fifth causes of action. Pursuant to a decision and order dated August 25, 2010, this court, inter alia, granted that branch of the plaintiff's motion for summary judgment on his first cause of action, which sought damages for breach of contract, on the issue of liability. This court also granted that branch of the plaintiff's motion for summary judgment on his second cause of action, which was for rescission and damages, to the extent of directing that (1) the contract between the parties shall be rescinded, (2) defendant Star Nissan shall return to the plaintiff all sums that he paid on the contract within twenty days of his return of the vehicle and service of a copy of the order dated August 25, 2010 together with notice of entry, and (3) defendant Star Nissan is found liable on the issue of damages.

Leave to reargue is warranted because the defendants have attempted to show that "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*Schneider v Solowey*, 141 AD2d 813; *see*, CPLR 2221[d]; *Grassel v Albany Med. Ctr. Hosp.*, 223 AD2d 803; *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22.) However, the purpose of a motion to reargue is "not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided ***." (*Foley v Roche*, 68 AD2d 558, 567; *Mayer v National Arts Club*, 192 AD2d 863.) A motion to reargue also "does not afford an unsuccessful party an opportunity to advance arguments different from those proffered in the original application ***." (*People v Cordes*, 270 AD2d 430; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374; *McGill v Goldman*, 261 AD2d 593; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22.)

The plaintiff met his burden of establishing his entitlement to summary judgment on his causes of action for breach of contract and rescission. "[A]n action for breach of contract requires proof of (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages ***." (*Rexnord Holdings, Inc. v Bidermann*, 21 F3d 522, 525; *First Investors Corp. v Liberty Mutual Ins. Co.*, 152 F3d 162; *Furia v Furia*, 116 AD2d 694; *WorldCom, Inc. v. Sandoval*, 182 Misc 2d 1021; *Lehmann v Lehmann*, 182 Misc 2d 22.) Contrary to the defendants' argument, the plaintiff did not have to produce a signed sales contract embodied in one document which completely expressed the parties' agreement. As this court stated in its previous decision: "The plaintiff correctly alleges that the sales invoice and conduct of the parties in this case provide sufficient evidence of a contract, and, in any event, the plaintiff's payment for and receipt of the vehicle renders the Statute of Frauds inapplicable. (*See*, UCC 2-201 [3][c]; *Bourdeau Bros., Inc. v Bennett*, 74 AD3d 1542; *Pae v Chul Yoon,* 41 AD3d 681.)" Insofar as performance by the plaintiff is concerned, the assertion made by the defendants' attorney at page 6 of his affirmation that "there is nothing within the motion that would serve as proof of payment of the vehicle" borders on the frivolous. (*See*, 22 NYCRR 130-1.1 [c].)

Defendant Star Nissan alleges that Exhibit A-1 attached to the plaintiff's reply papers on the prior motion is the contract between the parties and that it does not mention extended warranties. The defendant's attorney asserts that by attaching the document to reply papers, the plaintiff denied him an opportunity to argue that there was a contract in existence which contradicted the plaintiff's claims. However, this is not a case where a party has been denied the opportunity to respond to new evidence improperly submitted in reply papers. (*See*, *GJF Const. Corp. v Cosmopolitan Decorating Co., Inc.,* 35 AD3d 535.) The terms of the parties' contract have been in issue in this case from its inception. Once the plaintiff established his prima facie right to judgment as a matter of law, the burden on the prior summary judgment motion shifted to the defendant to produce evidence showing that there is an issue of fact which must be tried (*see*, *Alvarez v Prospect Hospital*, 68 NY2d 320) or to demonstrate the existence of a defense warranting the denial of summary judgment. (*See*, *Plantamura v Penske Truck Leasing, Inc*., 246 AD2d 347.) Exhibit A-1 gives every appearance of being defendant Star Nissan's own form contract, and the argument made by the defendant's attorney that his client had no obligation to produce it on the prior motion is devoid of merit. Defendant Star Nissan allegedly wanted to make use of the document, undoubtedly found in its own files, to establish a defense. "It is incumbent upon a [party] who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his [complaint or] answer are real and are capable of being established upon a trial." (*Di Sabato v Soffes*, 9 AD2d 297, 301; *Tobron Office Furniture Corp. v King World Productions, Inc*., 161 AD2d 355; *World Trade Knitting Mills, Inc. v Lido Knitting Mills Inc*., 154 AD2d 99.) Star Nissan inexcusably failed to reveal its proofs, and the defendant may not now make new arguments based on Exhibit A-1. (*See*, *People v Cordes*, *supra*; *Amato v Lord*

& Taylor, Inc., supra; McGill v Goldman, *supra*; *William P.Pahl Equip. Corp. v Kassis*, *supra*.)

On the prior motion, plaintiff Collins alleged facts showing that the extended service plans had importance to him because of the particular type of vehicle (a high performance sports car) that he had purchased. Star Nissan now argues that the facts of this case do not warrant the remedy of rescission. The defendant again impermissibly raises new arguments on a motion to reargue. (*See*, *People v Cordes*, *supra; Amato v Lord & Taylor, Inc*., *supra*; *McGill v Goldman*, *supra*; *William P. Pahl Equip. Corp. v Kassis*, *supra*.) In any event, as this court noted in its decision dated August 25, 2010, UCC § 2-608, "Revocation of Acceptance in Whole or in Part," provides in relevant part: "(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it ***." (*See*, *Cliffstar Corp. v Cape Cod Biolab Corp*., 37 AD3d 1073.) As the court further noted in its previous decision, a buyer who "rightfully rejects or justifiably revokes acceptance" may "cancel" the contract. (UCC § 2-711.) "As a general rule, rescission of a contract is permitted 'for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but ... only for such as are material and willful, or, it not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract' ***." (*RR Chester, LLC v Arlington Bldg. Corp*., 22 AD3d 652, 654, quoting *Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284.) This court found in its decision dated August 25, 2010 that after Star Nissan discovered its error it demanded that plaintiff Collins pay an additional $10,000.00 for coverage under the extended service/maintenance plans. The failure to provide the plaintiff with the extended service/maintenance plans that he bargained for was not a "slight, casual, or technical breach." This was a breach that "substantially impair[ed]" the value of the car to the plaintiff. The defendant failed to show that, under all of the facts and circumstances of this case, the court overlooked issues of fact concerning whether its default substantially impaired the value of the contract to the plaintiff or whether the defendant committed a material breach of the contract justifying rescission. (*See, RR Chester, LLC v Arlington Bldg. Corp*., *supra*.)

While there is a common law rule that rescission is generally unavailable where the parties cannot be substantially restored to the status quo ante (*see*, *Singh v Carrington*, 18 AD3d 855), the defendant did produce any authority showing that the rule applies to a sales transaction subject to the Uniform Commercial Code where the buyer rightfully cancels. UCC § 2-608 does not expressly state any such condition, and the court finds none by implication. In any event, "[t]he rule that rescission is unavailable where a party cannot be returned to the status quo ante will not be strictly enforced where the party against whom rescission is sought is a wrongdoer who is exploiting its change of position to shield its wrongdoing ***." (*Sokolow, Dunaud*, Mercadier & Carreras LLP v Lacher, 299 AD2d 64,

72.) While a new car loses some of its value the minute it is driven off the lot, this loss should not fall on the plaintiff.

The defendants did not raise any issues of fact showing their entitlement to offset the value of the plaintiff's use of the vehicle on the original motion for summary judgment, and they may not submit new evidence or raise new arguments on this motion. The plaintiff is entitled to cancel the contract and to recover the purchase price of the vehicle. (*See*, *Fischer v Bright Bay Lincoln Mercury, Inc*., 234 AD2d 586 ["Since Bright Bay breached the warranty of title, the plaintiffs were entitled to restitution and, on that basis, were properly awarded the purchase price of the vehicle."].)

Dated: December 13, 2010

AUGUSTUS C. AGATE, J.S.C.