

Krobath v Tractor Barn

2010 NY Slip Op 33578(U)

December 16, 2010

Sup Ct, Nassau County

Docket Number: 001409/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 20

_____ X

MALCOLM ERIC KROBATH,

Plaintiff,

-against-

Index No.: 001409/09
Motion Sequence...03, 04
Motion Date... 09/23/10

THE TRACTOR BARN, and ROBERT
CASH MOLINE,

Defendants.

_____ X

- Papers Submitted:
- Notice of Motion.....X
- Memorandum of Law.....X
- Notice of Cross-motion.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X
- Supplemental Affirmation.....X

Upon the foregoing papers, the motion by the Defendant, Robert Cash Moline d/b/a The Tractor Barn (hereinafter collectively referred to as "Tractor Barn") for an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint and the Cross-motion by the Plaintiff, Malcolm Eric Krobath ("Krobath") seeking an order pursuant to CPLR § 3212 granting him summary judgment, are determined as hereinafter provided.

In September, 2008, the Plaintiff contracted with the Defendants for the

purchase of a 1970 John Deere 450 Track Loader Crowell Tractor (“the tractor”) for the total sum of \$14,700. The actual price was \$13,500 plus a shipping cost of \$1,200.

The Plaintiff commenced this action to recover damages for breach of contract, fraud and breach of warranties.

For a detailed version of the facts, this court refers to the order of Hon. William LaMarca dated September 21, 2009 (“the ‘09 order”).

In the ‘09 order, Justice LaMarca denied Tractor Barn’s motion for an order dismissing the complaint pursuant to CPLR § 3211 (a) (7) and (8). In upholding jurisdiction pursuant to CPLR § 302 (a) (1), the court expressly stated that the Defendants “sufficiently availed itself of the benefits of doing business in the State, such that due process would not be offended by subjecting it to this State’s jurisdiction” *Zottola v. AGI Group, Inc.*, 63 A.D.3d 1052 (2nd Dept. 2009). The court further found that the allegations set forth in the complaint sufficiently stated a cause of action for breach of contract and denied the Plaintiff’s cross-motion which sought leave to amend the complaint to assert a cause of action alleging fraud.

Both parties now move for summary judgment pursuant to CPLR § 3212.

In support of its motion, Tractor Barn contends, *inter alia*, that: 1) the Plaintiff’s claim for consequential damages in the amount of \$75,000 (\$14,700 plus \$60,300) must fail for want of proof of actual loss; 2) there was no breach of contract or warranty; 3) the Defendants’ statements regarding the tractor constituted “puffing”; and 4) the Plaintiff

failed to preserve his rights to recourse under the UCC. The Defendants also seem to import great significance to the fact that the Plaintiff uses “Mr. Mean Streets” as his moniker on the internet.

In support of its Cross-motion for summary judgment, the Plaintiff relies upon his own affidavit, the affidavit of Philip Scura dated July 13, 2009, and the affidavit of Michael Wilkinson dated July 13, 2009 and all prior pleadings and proceedings.

On September 16, 2008, Michael J. Wilkinson, an ASE certified parts specialist with the National Institute for Automotive Service Excellence (ASE) inspected the subject track loader and found that it was in extremely poor condition. On September 27, 2008, Philip Scura, a former John Deere heavy equipment diesel mechanic who worked at the B&B Equipment Company located on Nassau Road and Avenue A in Uniondale, New York, from July 1, 1983 to January 30, 1990, and who is presently employed as the mechanic for the Incorporated Village of Island Park, conducted an inspection of the subject track loader and found it to be in extremely poor condition and nothing more than a salvage piece of machinery.

On a motion for summary judgment, it is incumbent upon the movant to 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 (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). The failure to make that showing requires the denial of the motion regardless of the

sufficiency of the opposing papers (*Mastrangelo v. Manning*, 17 A.D.3d 326 [2nd Dept. 2005]; *Roberts v. Carl Fenichel Community Servs., Inc.*, 13 A.D.3d 511 [2nd Dept. 2004]). Issue finding, as opposed to issue determination is the key to summary judgment (*see Kriz v. Schum*, 75 N.Y.2d 25 [1989]). Indeed, “[e]ven the color of a triable issue forecloses the remedy *Rudnitsky v. Robbins*, 191 A.D.2d 488, 489 [2nd Dept. 1993]).

To recover damages for breach of contract, “the non-breaching party may recover ‘general’ consequential contract damages which are the natural and probable consequence of the breach” *Reeds Co., LLC v. Katz*, 72 A.D.3d 1054 [2nd Dept. 2010]; *Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 319 [1989]. “In order to recover ‘special’ or extraordinary contract damages that do not flow directly from the breach, however, a plaintiff is required to plead that the damages were foreseeable and within the contemplation of the parties at the time the contract was made.” *Reeds Co., LLC v. Katz, supra*; *American List Corp. v. U.S. News & World Report*, 75 N.Y.2d 38, 43-44 [1989]; *see Kenford Co. v. County of Erie, supra*. Further, “[a] party may not recover damages for lost profits unless they were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty.” *Ashland Management v. Janien*, 82 N.Y.2d 395, 403 (1993); *Reeds Co. v. Katz, supra*.

At bar, the Plaintiff is seeking to recover “economic losses as a result of being unable to conduct motorcycle races” (¶ 31 of Plaintiff’s affidavit). Specifically, the Plaintiff alleges that he “advised the Defendant, Moline, that he would be using the track loader on

the property for the purpose of maintaining the dirt course and using it on wet loam over gravel/rock base” and that he needed it for an upcoming race at his property located in New York.

On this record, the Defendant has demonstrated that such special damages were not within the contemplation of the parties (*Id*; see *Yenrab, Inc. v. 794 Linden Realty, LLC*, 68 A.D.3d 755 [2d Dept. 2009]) and the Plaintiff has failed to raise a triable issue of fact. Accordingly, the Plaintiff may not recover for special damages (*Reads Co. v. Katz, supra*; *Yenrab, Inc. v. 794 Linden Realty, LLC, supra*), and the branch of the Defendants’ motion which seeks to dismiss the Plaintiff’s claim for special contract damages in the approximate amount of \$60,300 is **GRANTED** and the Plaintiff’s First, Second and Third causes of actions seeking \$75,000 in each cause of action are **DISMISSED**.

As to the remainder of the Plaintiff’s claim for damages, we note that the Defendant has made a firm offer to pick up the tractor at Deposit, New York at its cost and have the driver deliver a bank cashier’s check in the amount of \$13,500. The Plaintiff was also given the option to keep the tractor with a \$1,000 adjustment (\$900 plus the gasket kit). This offer was made by the dealer, Larry Kalbas. The Plaintiff, however, insists on the refund of \$1,200 for shipping costs.

While the Plaintiff asserts that the Defendant guaranteed that the tractor was a “9/10 mechanically,” the bill of sale states “guaranteed real good and as described as shown on eBay. . .” The advertisement further provided that a full refund will be made if there was

an obvious description mistake on defendant's part.

In response, the Defendant contends that it is not "paying the trucking since the dozer does operate real good for the age without touching a thing on it and will do everything it was designed to do."

The record makes clear that the Plaintiff purchased this old tractor (1970) without inspecting it; the purchase was consummated outside of eBay and the Defendant has offered the Plaintiff the full return less the shipping costs.

Inasmuch as an issue of fact exists as to whether a description mistake was made and hence whether the contract was breached, neither party is entitled to summary judgment and the portion of the Plaintiff's First cause of action seeking the return of \$14,700 remains viable at this time.

In view of the foregoing, the Defendant's motion for summary judgment is **GRANTED** to the extent that the Plaintiff's claim for special consequential damages is **DISMISSED** and the balance of the Defendant's motion is **DENIED**.

The Cross-motion by the Plaintiff, Malcolm Eric Korbath seeking an order pursuant to CPLR § 3212, granting him summary judgment, is **DENIED**.

In addition, pursuant to CPLR § 325 (d), the remaining cause of action amounting to \$14,700 is removed from the Supreme Court and transferred to the Nassau County District Court to be heard and determined as if initially lodged therein.

Accordingly, it is hereby


ORDERED, that the Plaintiff's counsel shall serve a copy of this Order upon the Nassau County Clerk, the Clerk of the District Court and upon adverse counsel. The Nassau County Clerk, upon receipt of a copy of this Order and the payment of the requisite fee, if any, shall transfer the file maintained under index number 001409/09 to the Clerk of the Nassau County District Court; and it is further

ORDERED, that the Clerk of the Nassau County District Court, upon receipt of a copy of this Order and the transferred file is to assign, without additional cost, an index number to this action and the pleadings previously served shall be deemed served as to this action; and it is further

ORDERED, that the Clerk of the Nassau County District Court, upon receipt of a copy of this Order and the transferred file is to assign, without additional cost, an index number to this action and the pleadings previously served shall be deemed served as to that action.

This constitutes the order and judgment of this court.

DATED: Mineola, New York
December 16, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED
DEC 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE