

Badalamenti v Rotorway Intl.

2011 NY Slip Op 31201(U)

April 25, 2011

Sup Ct, Nassau County

Docket Number: 014755/09

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 18

_____ X

DR. ANTHONY V. BADALAMENTI,

Plaintiff,

Index No.: 014755/09
Motion Sequence...01
Motion Date...03/08/11

-against-

XXX

ROTORWAY INTERNATIONAL,

Defendant.

_____ X

Papers Submitted:

- Notice of Motion.....X
- Memorandum of Law.....X
- Affidavit in Opposition.....X
- Reply Memorandum of Law.....X

Upon the foregoing papers, the Defendant’s motion, pursuant to CPLR § 3212, granting it summary judgment against the Plaintiff, is decided as hereinafter provided.

The Plaintiff commenced this action on or about July 24, 2009, claiming that the Defendant, ROTORWAY INTERNATIONAL (“ROTORWAY”), allegedly breached its contract with the Plaintiff by failing to provide proper and safe flight instruction to a new and inexperienced pilot of a helicopter. In addition to his claim for breach of contract, the Plaintiff claims that the Defendant failed to warn him of the dangers of hovering the

Defendant's aircraft at too low of an altitude.

According to the Plaintiff's complaint, on or about October 29, 2002, the Plaintiff purchased from the Defendant Part 1 of a four (4) part kit to begin construction of a helicopter in his garage. (See Plaintiff's Verified Complaint, dated July 24, 2009, attached to the Defendant's Notice of Motion as Exhibit "A"). After the Plaintiff completed building the aircraft, he paid the sum of \$500.00 to the Defendant, ROTORWAY, as a deposit for Phase One of the flight instruction offered by the Defendant. Phase One included flight instruction, rigging, maintenance and ground school. The Plaintiff's complaint states that he arrived at the Defendant's premises in Chandler, Arizona where he paid an additional \$2,000.00 as required by the Defendant for training and flight instruction. As part of Phase One, the Plaintiff was instructed by a certified flight instructor employed by the Defendant, on how to "hover" the helicopter.

After completing Phase One of the instructional program offered by the Defendant, on June 16, 2006, the Plaintiff began practicing hovering independently on a helipad off a taxiway at Brookhaven Airport. According to the complaint, the Plaintiff decided to hover approximately one to two inches from the ground because he thought that it would be safer to hover at that altitude without a flight instructor. After approximately twenty minutes of hovering at an altitude of one to two inches, the left skid of the helicopter came into contact with the pavement causing the aircraft to rollover to the left. The Plaintiff states in his complaint that he was tossed around the aircraft and crawled out through the

passenger door. The Plaintiff claims that the entire aircraft was damaged as a result of the accident.

The Plaintiff claims that the flight instructor did not adequately warn the Plaintiff of the dangers of hovering too low and that “dynamic rollover” of the aircraft may result from hovering at too low of an altitude. Specifically, the Plaintiff claims that the only instruction given to him was that they “like to keep [the aircraft at] about 2 to 3 feet”. The Plaintiff claims that he was never warned of the danger of hovering less than six (6) inches above ground level. The Plaintiff further claims that the Defendant breached its contractual duty in that the Plaintiff was not warned during ground school nor was he given any literature such as hand-outs, pamphlets, class notes, operating handbook or text books warning of the hazard of hovering at too low an altitude. Moreover, he claims that he was never specifically warned that hovering too low may cause the helicopter to be susceptible to “dynamic rollover”, a rolling over of the aircraft which is what occurred to the Plaintiff’s helicopter on June 16, 2006. Based upon these alleged failures, the Plaintiff claims that he has been damaged in the amount of \$120,000.00 for economic loss and an additional \$30,000.00 for mental anguish and depression.

The Defendant submitted an Affidavit of its Chief Executive Officer, Grant Norwitz (Norwitz Affidavit). The Norwitz Affidavit states that the Defendant, ROTORWAY is an Arizona corporation that manufactures kits to be used by amateur builders to assemble full-size, fully-operational helicopters and operates a flight school in

Arizona that provides training on the maintenance and operation of its helicopters. (See Norwitz Affidavit, dated December 10, 2010, attached to the Defendant's Notice of Motion). According to Mr. Norwitz, the flight school consists of three multi-day phases that includes ground school lectures and in-air training. The course is supplemented with written materials, including a Flight School Syllabus ("Syllabus").

According to the Defendant, one of the skills taught in the flight school is a maneuver entitled "hovering", which is where a helicopter is maintained in a nearly motionless flight over a particular point. According to the Defendant, students are taught that normal hovering height is one to two feet above ground level and are warned of the dangers of hovering too low. Mr. Norwitz states that students are permitted to practice hovering independently after Phase One of flight school is completed and a certificate is issued to the student permitting him or her to practice independently. The certificate permits a student to practice without a flight instructor for up to sixty (60) days following the issuance of the certificate. On November 18, 2005, the Plaintiff was issued a certificate as described above permitting him to practice hovering the helicopter he built for a period of sixty (60) days from the issuance of the certificate.

The Defendant argues in its motion for summary judgment that the Plaintiff's complaint must be dismissed as a matter of law as there are no material issues of fact to be presented to a trier of fact. Specifically, the Defendant claims that the Plaintiff was adequately warned in the lecture portion of flight school, as well as during the in-air training,

that hovering at too low an altitude is dangerous. The Defendant further posits that the Syllabus, annexed to the Defendant's Notice of Motion as Exhibit "F", repeatedly warns of the hazards of hovering at too low an altitude.

The Defendant avers that the Plaintiff's breach of contract claim must be dismissed as there was no formal contract between the Plaintiff and the Defendant. Inasmuch as the Plaintiff perceives the written materials, which are provided as a supplement to the flight school, to contain the contract terms between the parties, the Defendant states that no term contained therein was breached. The Defendant maintains that the students are repeatedly taught to maintain an altitude of one to two feet. The Defendant argues that the Plaintiff's conduct of hovering the helicopter independently at one to two inches above ground level which resulted in the subject accident, despite the fact that the certificate permitting him to do so had long since expired, was not in any way caused by any breach or failure on the part of the Defendant.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law. *See Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978); *Herrin v. Airborne Freight Corp.*, 301 A.D.2d 500 (2d Dept. 2003). On a motion for summary judgment, the function of the court is issue finding, not issue determination. *See Weiner v. Ga-Ro Die Cutting*, 104 A.D.2d 331 (1st Dept. 1984), *affd.* 65 N.Y.2d 732 (1985). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion. *See*

Glennon v. Mayo, 148 A.D.2d 580 (2d Dept. 1989). To prevail upon the motion, the moving party must present prima facie evidence of its entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). Upon its failure to do so, the motion will be denied. Once a prima facie showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In this regard, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a triable issue. *Id.* at 562. Thus, summary judgment is only appropriate where the movant’s initial burden of proof has been satisfied, and the opposing party has failed to adduce competent evidence demonstrating the presence of a genuine issue of material fact. *Persaud v. Darbeau*, 13 A.D.3d 347 (2d Dept. 2004).

A liberal reading of the Plaintiff’s complaint, although not a model of clarity, seems to allege three causes of action (1) breach of contract, (2) failure to warn, and (3) negligence. The Court will analyze each claim separately.

Negligence Claim:

The Plaintiff commenced this action on or about July 24, 2009 to recover damages for an accident that occurred on June 16, 2006. Insofar as the Plaintiff’s complaint alleges any claims that sound in negligence, same must be dismissed as the three (3) year statute of limitations to commence a negligence action expired prior to the filing of the Plaintiff’s complaint.

Breach of Contract Claim:

The Defendant argues, in its motion for summary judgment, that any purported breach of contract claim in the Plaintiff's complaint is, in essence, a tort claim as the pleadings state that the Defendant failed to exercise due care in the performance of a contract. As an initial matter, the Court notes that it is well settled law that New York does not recognize a claim for negligent breach of a contractual obligation. *City of New York v. 611 W. 152nd St.*, 273 A.D.2d 125 (1st Dept. 2000). Additionally, “[m]erely charging a breach of a ‘duty of due care’, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim”. *Clark-Fitzpatrick, Inc. v. Long Is. R. R. Co.*, 70 N.Y.2d 382 (1987).

The Defendant also submits that the nature of the remedy sought by the Plaintiff, which includes damages for emotional distress, is determinative of whether the claim is one sounding in tort or in contract. It is noted that, “absent a duty upon which liability can be based, there is no right of recovery for mental distress resulting from the breach of a contract-related duty. *Wehringer v. Standard Sec. Life Ins. Co. of New*, 57 N.Y.2d 757 (1982), *quoting Marvex Processing & Finishing Corp. v. Allendale Mut. Ins. Co.*, 91 Misc.2d 683 (N.Y. County 1977). Considering the arguments of the Defendant, along with the fact that the Plaintiff is a *pro se* litigant, the Court will accord deference to the Plaintiff's complaint and analyze any potential claim for breach of contract.

Notably, the complaint does not allege the terms of the contract between the

Plaintiff and the Defendant, nor does the Plaintiff allege that there exists any formal writing between the parties. Rather, the Plaintiff testified at his examination before trial on June 30, 2010, that the terms of their agreement were contained within the advertisements and written materials provided for the flight school. (See Transcript of Examination Before Trial of Plaintiff, dated June 30, 2010, attached to the Defendant's Notice of Motion as Exhibit "C", pages 21-26). Specifically, the Plaintiff claims that the Defendant breached its contractual obligation to provide adequate flight instruction.

At best, the Plaintiff has attempted to plead an implied-in-fact contract, the elements of which are the same as an express contract. In order to plead a claim for breach of contract, the proponent of the contract must accordingly allege "in nonconclusory language ..., the essential terms of the parties' ... contract, including those specific provisions of the contract upon which liability is predicated, whether the alleged agreement was, in fact, written or oral, and the rate of compensation." *Caniglia v. Chicago Tribune-New York News*, 204 A.D.2d 233 (1st Dept.1994). Assuming arguendo that the Plaintiff sufficiently pleaded the essential terms of the contract, including an offer, acceptance, mutual assent and the rate of compensation, the Plaintiff must also sufficiently plead that there was a breach of the agreement.

A review of the Defendant, ROTORWAY's Syllabus, provided to all students participating in the flight school, contains several areas where the dangers of hovering at a low altitude is discussed. (See Flight School Syllabus, attached to the Defendant's Notice

of Motion as Exhibit “F”, pages 28-29, 31-32, 36, 91-92). The specific pages in the Syllabus cited by the Defendant states, in pertinent part, that the normal hovering height is one to two feet and that hovering too low is a common error that may result in occasional touchdown. The Syllabus unequivocally states that “when practicing hovering maneuvers close to the ground, make sure you hover high enough to have adequate skid clearance with any obstacles...”. *Id.* at page 92.

The Court finds that the Defendant proffered sufficient proof to warrant judgment as a matter of law on the Plaintiff’s breach of contract claim. The Plaintiff, in opposition, failed to raise an issue of fact. The Plaintiff has not submitted any evidence to support the allegation that the Defendant breached any agreement with the Plaintiff. The Plaintiff’s opposition merely reiterates the allegations made in his complaint and makes unavailing arguments about the Defendant’s alleged breach in failing to provide adequate warnings. The Plaintiff submitted, in support of his opposition, several inadmissible advertisements and literature from internet sites of other flight schools that are irrelevant to the Defendant herein. The Plaintiff also chose not to depose any representatives of the Defendants. Other than the Plaintiff’s own conclusory allegations, there exists no evidence in admissible form in the record tending to show that the Defendant breached an agreement with the Plaintiff. Indeed, the Plaintiff could have chosen to depose the flight instructor to support his argument that the Defendant failed to warn of the hazards of hovering at a low altitude.

Failure to Warn:

The Plaintiff's complaint also alleges that the Defendant failed to adequately warn him, as a new student pilot, of the known dangers of hovering too low.

With respect to a claim of inadequate warnings, it is well established that a manufacturer or retailer may incur liability for failing to warn third parties of the dangers inherent in the use of a particular product, especially where the danger has been brought to the manufacturer's or retailer's attention. *Cover v. Cohen*, 61 N.Y.2d 261 (1984); *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 237 (1998). However, while the existence and scope of the duty to warn is generally one of fact for the jury, the extent of the injured party's knowledge of the injury causing hazard may render the manufacturer's failure to warn superfluous as a matter of law. *Id.* at 241; *Cover v. Cohen*, 61 N.Y.2d at 276-77.

Here, the Plaintiff failed to adequately rebut the Defendant's prima facie showing that it adequately warned the Plaintiff of the known dangers of hovering too low.

In order for the Plaintiff to sustain his burden of proof regarding Defendant, ROTORWAY's alleged failure to warn, it was incumbent upon the Plaintiff to establish that the Defendant had a duty to warn the Plaintiff, that it breached its duty and that such failure was a substantial factor or proximate cause of Plaintiff's injury. *Howard v. Poseiden Pools, Inc.*, 72 N.Y.2d 972 (1988); *Boltax v. Joy Day Camp*, 67 N.Y.2d 617 (1986). Here, the Plaintiff's cause of action fails in three respects. First, the Defendant clearly discharged its duty to warn by providing a detailed Flight School Syllabus to prospective students, a manual

that contained detailed safety instructions including the altitude at which to hover the helicopter. Moreover, the Defendant provided in-air training for the hovering maneuver and the Plaintiff's own testimony establishes that he practiced hovering with an instructor for approximately seven or eight hours where the aircraft was mostly hovered at an altitude of two feet. The Plaintiff testified that he did not believe the aircraft was ever hovered at an altitude less than two feet during the in-air training. (*See Plaintiff's Examination Before Trial, attached to the Defendant's Notice of Motion as Exhibit "C", pages 39-41*).

Second, Plaintiff should have been aware, due to his training and experience as a pilot, although not of helicopters, of the inherent dangers and hazards of operating an aircraft at an altitude much lower than that which was recommended by certified flight instructors and in written materials. As a matter of law, the duty to warn of a product's danger does not arise where the danger associated with the product is obvious. *See, Lonigro v. TDC Electronics, Inc.*, 215 A.D.2d 534 (2d Dept 1995). Third, even assuming the Court was to conclude that the Defendant failed to discharge its duty to warn, and the Plaintiff was not aware of the specific hazard, there is no evidence to suggest that such failure was a substantial factor or a proximate cause of the Plaintiff's alleged injury.

It appears to be common sense that when hovering a helicopter, a pilot should try to avoid the skid of the helicopter touching the ground. Hovering, as defined by the syllabus, is "a maneuver in which the helicopter is maintained in a nearly motionless flight over a reference point at a constant altitude and on a constant heading". (*See Flight School*

Syllabus, attached to the Defendant's Notice of Motion as Exhibit "F", page 29). The Plaintiff's contention that he believed that hovering one to two inches off the ground was "safer" than hovering at the altitude of one to two feet, the altitude at which it was recommended to hover, simply strains credulity. The Court cannot, in good conscience, find that the warnings discharged by the Defendant did not put the Plaintiff on notice that hovering a helicopter an inch or two off the ground may cause the aircraft to touchdown on the ground thereby possibly causing a "dynamic rollover".


Accordingly, it is hereby

ORDERED, that the Defendant, ROTORWAY's motion, pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff's complaint, is **GRANTED**.

The Plaintiff's remaining contentions are without merit.

This constitutes the decision and order of the Court.

Dated: Mineola, New York
April 25, 2011



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

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ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE