

**Weiss v North Shore Motor Group, Inc.**

2011 NY Slip Op 32489(U)

September 14, 2011

Supreme Court, Nassau County

Docket Number: 12622-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**MICHAEL S. WEISS and JONATHAN M.  
WEISS,**

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Plaintiffs,**

**Index No: 12622-10  
Motion Seq. No. 5  
Submission Date: 8/5/11**

**-against-**

**NORTH SHORE MOTOR GROUP, INC.,  
R.A. COHEN a/k/a RICK COHEN,  
BANK OF AMERICA,  
DCFS USA LLC d/b/a  
MERCEDES-BENZ FINANCIAL,  
DAIMLER FINANCIAL SERVICES,  
DAIMLER FINANCIAL and/or  
DAIMLER TRUCK FINANCIAL,  
GENERAL MOTORS ACCEPTANCE CORP. d/b/a  
GMAC FINANCIAL SERVICES,  
BMW FINANCIAL SERVICES NA, LLC d/b/a  
BMW BANK OF NORTH AMERICA and  
VW CREDIT, INC. d/b/a  
VOLKSWAGEN CREDIT, INC.,  
AUDI FINANCIAL SERVICES and/or  
BENTLY FINANCIAL SERVICES,**

**Defendants.,**

**CLEAN CORP. (NY), NSMG LLC,  
CDMS, INC., CORTNEY RHEN DUBIE,  
and KATHLEEN GIBSON HAMBURGER,**

**Cross-Claim Defendants.**  
-----x

The following papers have been read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x
- Affidavit of Service.....X

This matter is before the Court for decision on the motion filed by Plaintiffs Michael S. Weiss (“Michael”) and Jonathan M. Weiss (“Jonathan”) (collectively “Plaintiffs”) on July 18, 2011 and submitted on August 5, 2011. For the reasons set forth below, the Court grants the motion and refers the matter to an inquest to determine Plaintiffs’ damages.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 3215, awarding Plaintiffs a judgment of default against Defendants North Shore Motor Group, Inc. (“North Shore”) and R.A. Cohen a/k/a Rick Cohen (“Cohen”).

B. The Parties’ History

The parties’ history is set forth in a prior decision of the Court dated September 13, 2010 (“2010 Decision”) in which the Court denied Plaintiffs’ application for injunctive relief, and the Court incorporates the 2010 Decision herein by reference. As noted in the 2010 Decision, in the Complaint, Plaintiffs allege certain improprieties by Defendants in connection with Plaintiffs’ leasing and purchase of certain vehicles including but not limited to 1) submitting forged documents; and 2) entering into agreements, purportedly on behalf of Plaintiffs, without Plaintiffs’ consent or authority.

The Complaint (Ex. A to Vatter Aff. in Supp.) contains the following causes of action: 1) by Michael against North Shore and Cohen for breach of their agreement to satisfy certain outstanding lease and loan obligations of Michael in exchange for Michael’s agreement to purchase certain vehicles, 2) by Michael against North Shore and Cohen for breach of contract for failing to provide Michael with an unencumbered vehicle, failing to pay off the existing financing for the trade-in vehicles and obtaining financing without Michael’s consent or authority, 3) by Jonathan against North Shore and Cohen for breach of contract by failing to provide Jonathan with an unencumbered vehicle and failing to pay off existing financing for trade-in vehicles, 4) by Michael against North Shore and Cohen for fraud in the inducement

based on their fraudulent misrepresentations that they would pay off existing financing on the trade-in vehicles and Michael would be the lawful owner of an unencumbered vehicle, 5) by Jonathan against North Shore and Cohen for fraud in the inducement based on their fraudulent misrepresentation that they would pay off existing financing on the trade-in vehicles and Jonathan would be the lawful owner of an unencumbered vehicle, 6) unjust enrichment, 7) conversion, 8) constructive trust, 9) negligent misrepresentation, 10) negligent misrepresentation, 11) request for a declaratory judgment regarding Michael's rights and obligations, and 12) request for a declaratory judgment regarding Jonathan's rights and obligations. The Complaint requests damages, as well punitive damages, costs, interest and attorney's fees.

In his Affirmation in Support, Plaintiffs' counsel affirms that the Complaint was served on Defendants North Shore and Cohen, and provides affidavits of service in support (Ex. B to Vatter Aff. in Supp.). Plaintiffs agreed to extend the time for Defendants North Shore and Cohen to answer the Complaint to August 13, 2010, as reflected by the stipulation provided (*id.* at Ex. C). Pursuant to the stipulation, the Defendants waived any defenses to service of the Complaint. No further extensions of time were granted. The Court subsequently issued an Order relieving counsel for Defendants North Shore and Cohen (*id.* at Ex. D) and on April 1, 2011, a copy of that Order with Notice of Entry was served on Defendants North Shore and Cohen. Pursuant to the Order, all counsel for the parties, including substitute counsel for Defendants North Shore and Cohen, were directed to appear before the Court for a conference on May 25, 2011 at 9:30 a.m. On May 25, 2011, neither new counsel for Defendants North Shore nor Cohen appeared in court, and no substitute attorney has entered an appearance on their behalf. Defendants North Shore and Cohen have not interposed an answer and are now in default in answering the Complaint.

### C. The Parties' Positions

Plaintiffs submit that they have demonstrated their right to a judgment against Defendants North Shore and Cohen in favor of Plaintiffs and ask that the Court schedule an inquest to determine Plaintiffs' damages.

Defendants North Shore and Cohen have not answered the Complaint or appeared in this action, and have submitted no response to Plaintiffs' motion.

## RULING OF THE COURT

### A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

### B. Declaratory judgment

CPLR § 3001 provides, in pertinent part:

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

Declaratory relief is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action. *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931), *reh. den.*, 256 N.Y. 681 (1931).

### C. Relevant Causes of Action

The essential elements of a cause of action sounding in fraud are 1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, 2) made for the purpose of inducing the other party to rely upon it, 3) justifiable reliance of the other party on the misrepresentation or material omission, and 4) injury. *Colasacco v. Robert E. Lawrence Real Estate*, 68 A.D.3d 706 (2d Dept. 2009), quoting *Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2d Dept., 2007). CPLR § 3016(b) provides that an action for fraud must be pled with particularity.

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract,

plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

The four elements of a constructive trust are: 1) a confidential or fiduciary relation, 2) a promise, 3) a transfer in reliance thereon, and 4) unjust enrichment. *Sharp v. Komalski*, 40 N.Y.2d 119, 121 (1976); *Church of God Pentecostal Fountain of Love, MI v. Iglesia De Dios Pentecostal, MI*, 27 A.D.3d 685 (2d Dept. 2006). A constructive trust will not be imposed unless it is demonstrated that a legal remedy is inadequate, *Evans v. Winston & Strawn*, 303 A.D.2d 331, 333 (1st Dept. 2003); *Bertoni v. Catucci*, 117 A.D.2d 892, 894 (3d Dept. 1986), and a constructive trust is essential to prevent unjust enrichment, *Counihan v. Allstate Ins. Co.*, 194 F.3d 357, 362 (2d Cir. 1999).

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d.

A claim for negligent misrepresentation requires the plaintiff to demonstrate 1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff, 2) that the information was incorrect; and 3) reasonable reliance on the information. *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007), *rearg. den.*, 8 N.Y.3d 939 (2007).

A conversion takes place when defendant, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. Organ Donor Network*, 8 N.Y.3d 43, 49-50 (2006). The two key elements of conversion are 1) plaintiff's possessory right or interest in the property, and 2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. *Id* at 50.

D. Application of these Principles to the Instant Action

The Court grants Plaintiffs' motion for a default judgment on the first, second, third, fourth, and fifth causes of action in the Complaint. The Court denies Plaintiffs' motion for a default judgment on the sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action in the Complaint based on the Court's determination, *inter alia*, that 1) judgment on the unjust enrichment cause of action is not appropriate in light of the fact that the Court has granted Plaintiffs' motion for judgment on the breach of contract claims; 2) judgment on the constructive trust and declaratory judgment causes of action is not appropriate because the legal remedy is adequate to compensate Plaintiffs; and 3) Plaintiffs have not established the necessary duty to warrant judgment on the negligent misrepresentation cause of action. The Court declines to award punitive damages. The Court also declines to award counsel fees, in the absence of a contractual provision or other authority supporting such an award.

In light of the foregoing, it is hereby

**ORDERED**, that the Court grants the motion of Plaintiffs Michael S. Weiss and Jonathan M. Weiss for a default judgment against Defendants North Shore Motor Group, Inc. and R.A. Cohen a/k/a Rick Cohen on the first, second, third, fourth, and fifth causes of action in the Complaint; and it is further

**ORDERED**, that this matter is respectfully referred to Special Referee Frank N. Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of damages, interest, costs, and expenses on October 20, 2011 at 9:30 a.m.; and it is further

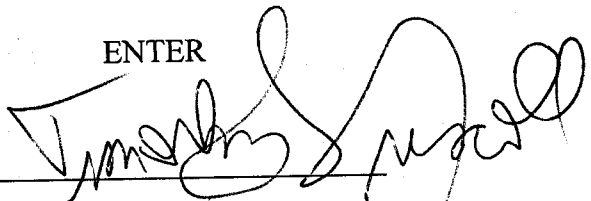
**ORDERED**, that Plaintiffs Michael S. Weiss and Jonathan M. Weiss shall serve upon Defendants North Shore Motor Group, Inc. and R.A. Cohen a/k/a Rick Cohen, by regular mail, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before October 6, 2011; and it is further

**ORDERED**, that the County Clerk, Nassau County is directed to enter a judgment in favor of Plaintiffs Michael S. Weiss and Jonathan M. Weiss and against North Shore Motor Group, Inc. and R.A. Cohen a/k/a Rick Cohen in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.  
This constitutes the decision and order of the Court.

DATED: Mineola, NY  
September 14, 2011

ENTER



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HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
SEP 19 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE