

Teachers Fed. Credit Union v Sanders

2012 NY Slip Op 32116(U)

July 31, 2012

Sup Ct, Nassau County

Docket Number: 11157-11

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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TEACHERS FEDERAL CREDIT UNION,

Plaintiff,

-against-

**MARK H. SANDERS, WESTBURY JEEP CHRYSLER
DODGE, INC., a/k/a WESTBURY JEEP EAGLE, INC.,
LOUIS A. NAVIASKY, TD BANKNORTH a/k/a
TD BANK, N.A., and the NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES,**

Defendants.

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The following papers having been read on this motion:

- Notice of Motion.....1**
- Notice of Cross Motion.....2**
- Notice of Cross Motion.....3**
- Opposition.....4**
- Reply.....5**

TRIAL PART: 10

NASSAU COUNTY

INDEX NO: 11157-11

MOTION SEQ NO.: 1,2,3

SUBMIT DATE:07/03/12

Defendant Westbury Jeep Chrysler Dodge, Inc. (hereinafter referred to as “Westbury Jeep”) moved for summary judgment pursuant to CPLR §3212. Plaintiff, Teachers Federal Credit Union (hereinafter referred to as “Teachers Federal”), cross-moved for partial summary judgment pursuant to CPLR §3212 in relation to the second and third causes of action enumerated in its Verified Complaint. Defendant Sanders then submitted a cross-motion to dismiss the summons and complaint in its entirety as against him. Westbury Jeep’s motion for summary judgment is denied. Plaintiff’s cross-motion is denied in part and granted in part. Sanders’ motion to dismiss claims against him is denied in its entirety for the reasons herein.

Plaintiff filed a Summons and Verified Complaint on June 25, 2011. (Teachers Federal Notice of Cross-Motion, Exhibit 1). In this summons and verified complaint plaintiff sought relief for the causes of action stated herein. Immediately following, defendant Westbury Jeep filed the instant motion to dismiss the verified complaint based on summary judgment.

Defendant Sanders served a Verified Answer upon plaintiff on September 27, 2011. Sanders asserted, inter alia, that he did not in fact enter into a financing agreement with Westbury Jeep, but instead entered into a lease agreement with leasing representative Rick Cohen. (Teachers Federal Notice of Cross-Motion, Exhibit 2). Additionally, Sanders claims that he made payments for the vehicle until it was returned to Rick Cohen, who then informed him no further payments were due.

FACTS

Plaintiff, Teachers Federal Credit Union, a financial institution, entered into an indirect lending agreement with defendant Westbury Jeep to provide financing for the sale of a motor vehicle to co-defendant Mark H. Sanders. Defendant Westbury Jeep submitted to plaintiff for approval an application for financing naming Sanders as the prospective buyer of a 2009 Jeep Cherokee. The application was approved and an agreement was executed on February 27, 2002. (Teachers Federal Notice of Cross-Motion, Exhibit 3). Sanders made continuous payments on the balloon loan from March 2009 until June 2010, when he ceased making payments. (Teachers Federal Notice of Cross-Motion, Exhibit 10). Plaintiff instituted this action against both defendant Westbury Jeep and defendant Sanders (as well as Louis A. Naviasky, TD Bank, N.A., and the New York State Department of Motor Vehicles) claiming inter alia that Westbury Jeep breached its signed agreement because the Loan Contract was not accurate and did not reflect the complete agreement between the buyer of the motor vehicle and Westbury Jeep. (Teachers Federal Notice of Cross-Motion, Exhibit 1). Plaintiff also claims Westbury Jeep breached its agreement with respect to its obligation to repurchase the instrument plus pay a stipulated balance in the event plaintiff so demands. The complaint states that as per the agreement, as a result of a dispute initiated by Sanders, which was not resolved within 30 days, Westbury Jeep will be obligated to pay \$26,464.59 plus interest together with attorney's fees and costs to recoup Sanders' failure to pay off the loan. A third cause of action set forth by plaintiff against Westbury Jeep states that as per Paragraph 3 of the Dealer Agreement, the car dealership must indemnify plaintiff credit union for the fees and costs incurred in conjunction with any dispute, defense or counter claim made by the buyer arising out of any "Instrument or the underlying transaction." (Teachers Federal Notice of Cross-Motion, Exhibit 3).

Additionally, plaintiff asserts three causes of action against defendant Sanders and one cause of action against the New York State Department of Motor Vehicles (hereinafter referred

to as NYSDMV). The three claims against defendant Sanders are as follows: 1) as a result of Sanders failure to make payments as provided in the Loan Contract he now owes plaintiff \$26,464.59 plus interest and late fees; 2) Sanders' breached the contract as a result of selling the vehicle without paying off the loan to plaintiff; 3) Sanders is responsible for collection costs including reasonable attorney's fees and costs. (Teachers Federal Notice of Cross-Motion, Exhibit 1). The final claim asserts that NYSDMV is in possession of a faulty document, more specifically a first lien, and that it should issue a new Certificate of Title.

DISCUSSION

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. [*Winegrad v. New York Univ. Med. Center*, 64 N.Y. 2d 851, 853]. Once plaintiff has met its burden, the burden of proof shifts to the defendants to rebut the inference of entitlement to summary judgment. [*Zuckerman v. City of New York*, 49 N.Y. 2d 557].

Defendant Westbury Jeep has not demonstrated entitlement to summary judgment because it has not presented any documentary evidence that refutes the three claims set forth by plaintiff. Specifically, defendant must put forth evidence contradicting the claims that it breached warranties, failed to abide by the repurchase clause in the agreement and failed to indemnify plaintiff.

Within the agreement with plaintiff, defendant Westbury Jeep promised that all instruments submitted would be accurate and reflect the complete agreement between defendant Sanders and defendant Westbury Jeep. (Teachers Federal Notice of Cross-Motion, Exhibit 3). It must first be determined whether or not Sanders is credible in his claim that he has had no contact with Westbury Jeep before a decision regarding a breach by Westbury Jeep can be made, which is the subject of plaintiff's first cause of action. If the court finds that Sanders did in fact sign the agreement, and his claims that he did not are false, it will follow that Westbury Jeep clearly did not breach its warranty to submit instruments that were accurate and that reflected a complete agreement.

On a motion for summary judgment the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine (*Jericho Realty Corp. v. AutoZone, Inc.* 27 AD3d 447, 449). The truthfulness of Sanders' claims is a material issue of fact

to be decided at trial, which will then determine the issue of breach of warranty. Therefore, defendant Westbury Jeep's claim for summary judgment on the first cause of action for breach of warranty must be denied, because there is a substantial and genuine issue of fact that turns on the credibility of defendant Sanders.

The second cause of action asserted by plaintiff claims that defendant Westbury Jeep failed to abide by its obligation to repurchase the loan from plaintiff after defendant Sanders raised a claim. Both plaintiff and defendant have not shown that they are entitled to summary judgment on this cause of action under Paragraph 3 or Paragraph 6 of the dealer agreement. Paragraph 3, in relevant portion, states:

“Company hereby agrees to indemnify Credit Union and hold it harmless against any claim or legal action by any Buyer(s), Co-Buyer(s) or Guarantor(s) arising out of any Instrument or the underlying transaction, including any claiming violation of any Federal or State Law, rule or regulation, whether interposed directly against Credit Union or Company or by way of defense, dispute or counterclaim...” (Teachers Federal Notice of Cross-Motion, Exhibit 3).

This portion of the agreement indicates that claims of a legal action interposed directly against the Credit Union or by way of defense, dispute or counterclaim will trigger the indemnification clause. However, the interposing of “a defense, dispute or counterclaim,” is not applicable to the subsequent portion of Paragraph 3 that refers to the issue of repurchasing the instrument. It is the court's understanding that the aforementioned language does not apply to the repurchase clause of the agreement because such language is absent as a condition precedent to exercising repurchase. The repurchase clause, in pertinent part, provides as follows:

“Company further agrees that if such claim or legal action is not resolved within 30 days after its institution Company agrees to repurchase the instrument from the Credit Union for the amount of the then unpaid balance, plus accrued but unpaid interest to the date of repurchase, plus the dealer 1% fee pro-rated to the unpaid balance. Repurchase is made without recourse or warranty from Credit Union as attorney in fact for the dealer.” (Teachers Federal Notice of Cross-Motion, Exhibit 3).

The court must deny summary judgment in relation to the repurchase clause, because there have been no claims or legal action brought forward by either of the defendants, Westbury Jeep or Sanders. The original suit by Teachers Federal cannot be used in order to trigger the repurchase clause set forward in this paragraph.

Paragraph 6 of the Dealer Agreement executed on February 27, 2002 is not a valid basis for summary judgment in the case at bar because a breach of warranty must be established first in order to trigger the repurchase clause. The agreement states, in relevant portion, that “if the Company has breached any warranty or representation set forth in the agreement... or is otherwise in default under the agreement, then, upon demand by” plaintiff, Westbury Jeep should repurchase the instruments and pay the Credit Union the “amount unpaid plus 1% of the unpaid principal balance less unearned interest charges.” (Teachers Federal Notice of Cross-Motion, Exhibit 3). Because Westbury Jeep’s obligation to repurchase hinges on the existence of a breach, and the fact that there has not yet been a determination regarding whether or not defendant did in fact breach the warranty, summary judgment by both plaintiff and Westbury Jeep must be denied on this cause of action.

The third cause of action states that Westbury Jeep is obligated to indemnify plaintiff. The duty to indemnify is to be waived only if it is established as a matter of law that there is no possible factual or legal basis on which indemnification might be necessary. [*Rhodes v. Liberty Mut. Ins. Co.*, 67 AD3d 881, 883) quoting *Allstate Ins. Co. v. Zuk*, 78 [N.Y.2d 41, 45]. Plaintiff and defendant Westbury Jeep both seek summary judgment on this issue of indemnification. In Paragraph 3 of the Dealer Agreement, Westbury Jeep promises to both “indemnify and hold harmless” plaintiff against any claim or legal action brought by any buyer in relation to an Instrument or other portion of the underlying transaction. This clause also states that claims made “by way of defense, dispute or counterclaim,” will trigger the indemnification clause. Westbury agreed to notify plaintiff within 30 days of the claim’s institution.

Sanders’ includes in his cross-motion submitted on June 22, 2012 defenses of fraud, and his subsequent filing of a complaint with the Nassau County District Attorney’s Office. (Sanders Notice of Cross-Motion, Exhibit A). It is clear from the dates that Sanders’ claim has not been resolved within the stipulated 30-day period. As a result, summary judgment is hereby granted in favor of plaintiff, which must now be indemnified by Westbury Jeep for any future relief that is granted to Sanders.

Accordingly, Westbury Jeep’s motion for summary judgment is dismissed in its entirety. Partial summary judgment is granted on plaintiff’s cross-motion on the third cause of action for indemnification but denied on the second cause of action with relation to the repurchase clause

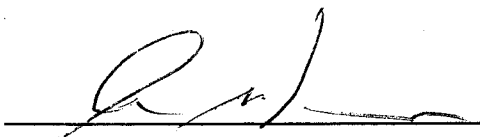
of the agreement. Sanders' cross-motion is hereby denied.

Settle Judgment on Notice.

This constitutes the decision and order of this court.

ENTER

DATED: July 31, 2012



HON. ARTHUR M. DIAMOND

J. S.C.

ENTERED

AUG 03 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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