

**Ray v Malouf Ford-Lincoln Mercury, Inc.**

2013 NY Slip Op 33760(U)

November 12, 2013

Supreme Court, Westchester County

Docket Number: 60235/11

Judge: Orazio R. Bellantoni

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

**HON. ORAZIO R. BELLANTONI**  
**JUSTICE OF THE SUPREME COURT**

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PAM L. RAY,

Plaintiffs,

- against -

MALOUF FORD-LINCOLN MERCURY,  
INC. and FORD MOTOR COMPANY,  
Defendants.

**SHORT FORM ORDER**

Index No. 60235/11  
Motion Date: 8/21/13

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Defendants move for an order, pursuant to CPLR 3212, granting them summary judgment and dismissing plaintiff's complaint. Plaintiff cross-moves for an order, pursuant to CPLR 3211 or 3212, dismissing various affirmative defenses raised by defendants or granting her summary judgment as to those affirmative defenses and for an order, pursuant to CPLR 3025(b), granting her leave to amend the complaint to include a claim based on section 349 of the General Business Law.

The following papers were read:

Notice of Motion, Affirmation in Support, and Exhibits A-F	1-8
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Affidavit in Opposition and in Support and Exhibits A-H	17-25
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Upon the foregoing papers, it is hereby ORDERED that the motion is decided as follows:

By way of background, this action arises out of the purchase of a motor vehicle. Plaintiff alleges that, on May 24, 2011, she entered into a contract with defendant Malouf Ford-Lincoln Mercury, Inc. (“Malouf Ford”) for the purchase of a Ford Mustang. Plaintiff alleges that she relied upon various advertising and statements of defendants regarding a certain feature, known as a “TracKey,” which would allow the vehicle to be used as a race car. After she acquired the vehicle, plaintiff alleges that she determined that the vehicle did not have a working TracKey. Plaintiff then alleges that she notified defendant of this issue and that she was electing to rescind the contract. Plaintiff claims that defendants did not remedy the situation for approximately six months after the purchase and approximately three months after plaintiff demanded rescission.

At the outset, the Court addresses plaintiff’s motion for leave to amend. Such motions are committed to the broad discretion of the trial court and CPLR 3025(b) provides that “[l]eave shall be freely given upon such terms as may be just . . . .” And indeed, absent prejudice or surprise, courts generally grant leave unless the proposed amendment is “palpably insufficient or patently devoid of merit” (*see G.K. Alan Assoc., Inc. v. Lazzari*, 44 A.D.3d 95, 99 [2<sup>nd</sup> Dep’t 2007]). However, when the moving party has long delayed in seeking leave and when the matter has been certified ready for trial, courts must exercise this discretion in a manner that is more “discrete, circumspect, prudent, and cautious” (*see Trataros Const., Inc. v. New York City School Const. Authority*, 46 A.D.3d 874, 874 [2<sup>nd</sup> Dep’t 2007]). Such is the case here. Plaintiff commenced this action in December 2011 and the action was certified ready for trial on April 16, 2013. Moreover, plaintiff does not offer any explanation for the delay in seeking leave nor does plaintiff articulate how the proposed amendment has merit. As such, this aspect of plaintiff’s cross-motion will be denied.

Turning now to defendant’s motion for summary judgment. On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

In support of their motion, defendants cite to portions of deposition transcripts, which,

according to defendants, demonstrate that defendants did not make any false or misleading representations about the TracKey feature to plaintiff or to her friend, Jeff Kaplan. Defendants cite to testimony of plaintiff where she testified that Mr. Kaplan made contact with defendants about ordering the vehicle in February 2011. Defendants then cite to testimony of Mr. Kaplan, who testified that, in his initial conversation with Steve Close, a representative of defendant Malouf Ford, Mr. Close did not know any specifics about the TracKey feature. Mr. Kaplan also testified that no one at defendant Malouf Ford told him that the TracKey would be activated upon receipt of the vehicle. Defendants also cite to the testimony of Mr. Close, who testified that between February 2011 and May 2011, he alerted Mr. Kaplan that the TracKey was not available upon delivery of the vehicle. This testimony is sufficient to establish plaintiff's *prima facie* entitlement to judgment as a matter of law.

In opposition, plaintiff submits affidavits of plaintiff Pam Ray and Mr. Kaplan. In her affidavit, plaintiff avers that she was interested in acquiring the vehicle because of the TracKey feature. Plaintiff also avers that no one at defendant Malouf Ford informed her that the TracKey software was not available prior to the purchase of the vehicle in May 2011 nor at the time that the vehicle was delivered to plaintiff. Plaintiff avers that she was simply informed when the vehicle was delivered in May 2011 that the TracKey software "could be installed shortly." Plaintiff avers that she would not have purchased the vehicle had she known that the TracKey software would not be available until approximately November 2011.

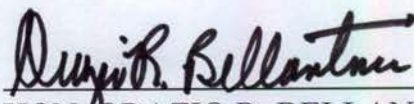
In his affidavit, Mr. Kaplan avers many of the same facts. Specifically, Mr. Kaplan avers that no one at defendant Malouf Ford informed him that the TracKey software was not available prior to the purchase of the vehicle in May 2011 nor at the time that the vehicle was delivered to plaintiff. Mr. Kaplan further avers that when he contacted Mr. Close to schedule the installation of the software to make the TracKey feature operational, he was informed that it could not be installed immediately, but could be installed shortly in the future.

Although plaintiff's complaint alleges that "[t]he features and specifications of the TracKey were advertised by Ford to the public, and were read and relied upon by Plaintiff" and the affidavits of plaintiff and Mr. Kaplan make reference to advertisements about the TracKey feature, plaintiff has only produced two advertisements, which simply state that the TracKey software will be available to be installed by an authorized Ford dealer. There is no dispute that the software was available to be installed by defendant Malouf Ford; plaintiff simply complains that it was not available for six months after delivery of the vehicle. Moreover, the undisputed testimony is that, prior to plaintiff's purchase of the vehicle, the representative of defendant Malouf Ford did not know any specifics about the TracKey feature. Although plaintiff offers various documents, which plaintiff claims "show that this was a TracKey car," none of these documents assert that the TracKey software

would be available immediately upon receipt of the vehicle. It is also undisputed that the vehicle is a "TracKey car;" there was no mistake as to the type of vehicle, but simply as to when the software to make the TracKey feature operational would be available. In short, plaintiff has failed to produce any admissible evidence to indicate that defendants ever made any false or misleading representations to plaintiff or Mr. Kaplan regarding the TracKey feature prior to the purchase of the vehicle. It was plaintiff's burden to produce admissible evidence demonstrating the existence of a factual issue requiring a trial of this action or an acceptable excuse for her failure to do so (*see Zuckerman*, 49 N.Y.2d at 559). Plaintiff has failed to do either.

Based upon the foregoing, plaintiff's motion seeking leave to amend the complaint is denied and defendants' motion for summary judgment is granted in its entirety. Accordingly, plaintiff's cross-motion for summary judgment is denied as moot. This order is being filed electronically.

Dated: November 12, 2013  
White Plains, New York

  
HON. DRAZIO R. BELLANTONI  
Justice of the Supreme Court

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