SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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ANOWAR HUSSAIN,

Plaintiff,

- against -

AUTO PALACE, INC., PLANET MOTOR CARS, INC., TD AUTO FINANCE LLC, ALLY FINANCIAL, INC., MOHAMMED MASAUD, FARMINGDALE MOTORS, INC., HOOSHMAND KOHANANO, FERESHTEH KOHANANO and JULIO ESTRADA (A/K/A JAY TORRES),

Defendants.

Index No.: 705420/2014

Motion Date: 6/14/16

Motion No.: 77

Motion Seq.: 2

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The following electronically filed documents read on this motion by defendant ALLY FINANCIAL, INC. (Ally) for an order pursuant to CPLR 3211(a)(7) dismissing plaintiff's complaint on the grounds that plaintiff has failed to state a cause of action and awarding defendant Ally costs incurred and reasonable attorney's fees:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF 15 - 20
Affirmation Opposition.....	EF 22
Reply Affirmation.....	EF 23 - 24

On August 3, 2014, plaintiff commenced this action to recover damages for breach of implied covenant of good faith and fair dealing, conversion, breach of contract, negligence fraudulent inducement and concealment of contract terms, deceptive trade practices, unconscionable and malicious actions in violation of public policy, and punitive damages. Each cause of action is asserted against the nine defendants collectively, except count four which is asserted only against TD Auto Finance LLC (TDAF), Auto Palace, Inc. (Auto Palace), and Planet Motor Cars, Inc. (Planet Motor Cars).

The complaint alleges that on February 21, 2011, plaintiff purchased a 2007 Acura MDX from a dealership operated by defendant Auto Palace for a purchase price of $37,558.05. Defendant Planet Motor executed the retail installment contract. Plaintiff financed the purchase through defendant Ally, which placed a lien on the vehicle. Plaintiff contends that several months after the purchase of the vehicle, Auto Palace notified him that the financing contract with Ally for the vehicle was cancelled. Plaintiff further alleges that defendant Julio Estrada a/k/a Jay Torres (Torres) told him to bring the vehicle to the Auto Palace showroom. Torres allegedly told plaintiff that Auto Palace had new financing in place which would cost plaintiff less on a monthly basis. Based on this representation, plaintiff entered into a retail installment contract with Auto Palace to finance the vehicle and defendant TDAF placed a lien on the vehicle. Plaintiff alleges that subsequently Auto Palace and Planet Motor Cars paid off the TDAF lien and towed his vehicle into their possession.

Defendant Ally joined issue by service of a verified answer on January 18, 2016. Defendant TDAF filed a motion to dismiss plaintiff's complaint, which was granted by this Court's Short Form Order dated March 10, 2016. Defendant Ally now moves to dismiss plaintiff's complaint for failure to state a claim.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83[1994]; Greer v National Grid, 89 AD3d 1059 [2d Dept. 2011]; Prestige Caterers, Inc. v Siegel, 88 AD3d 679 [2d Dept. 2011]). A complaint must allege the material elements of the cause of action (see Lewis v Village of Deposit, 40 AD2d 730 [1972]; Kohler v Ford Motor Company, Inc., 93 AD2d 205 [3d Dept. 1983]). A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) (see CPLR 3211[c]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]). When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (see Basile v Wiggs, 98 AD3d 640 [2d Dept. 2012]).

In support of the motion, Ally submits an affirmation from counsel, Michael B. Rothenberg, Esq., a copy of the pleadings, and a copy of this Court's prior Order.

Counsel first contends that the complaint fails to comply with CPLR 3013 in that it fails to specify any alleged wrongdoing by Ally and is insufficient to allow Ally to adequately frame a response to the complaint (citing Aetna Cas. & Sur. Co. v Merchs. Mut. Ins. Co., 84 AD2d 736 [1st Dept. 1981][dismissing a complaint where "the first four causes of action are pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant. . ."]). Counsel then argues specifically as to why each separate cause of action should be dismissed.

Plaintiff submits an affirmation from counsel, Mitchell Segal, Esq., in opposition contending that the verified complaint on its face alleges sufficient particularity to give notice of the intended action to be proved and the material elements of each cause of action. Counsel contends that Ally's affiliated agents and vehicle loan dealers were engaged in an enterprise funding initial loans through Ally, and thereafter, placing loans from other lenders on the same assets which Ally already had liens on. As Ally continued to take plaintiff's loan payments, counsel argues that Ally engaged in conversion.

In reply, Ally contends that plaintiff fails to set forth any specific factual support for the allegations against Ally, and thus, the allegations do not suffice to withstand a motion to dismiss. Additionally, Ally points out that since the prior motion to dismiss, plaintiff failed to remedy the defects contained in the complaint. This Court will now address each cause of action separately as was done in the prior Order.

Breach of Implied Covenant of Good Faith and Fair Dealing

In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance (see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002]; Smith v General Acc. Ins. Co., 91 NY2d 648 [1998]). The breach of implied covenant of good faith must have the effect of depriving one party of the fruits of the contract (see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002]; Dalton v Educational Testing Serv., 87 NY2d 348 [1995]).

Ally contends that plaintiff failed to provide a copy of a contract between himself and Ally, failed to allege the terms of any such contract, and failed to address how Ally's conduct may have prevented plaintiff from realizing benefits under the contract. For example, plaintiff fails to demonstrate that Ally failed to advance the funds to plaintiff.

Plaintiff argues that dismissal at this juncture would be premature because the contract issues are not so defined as to determine whether this cause of action is truly redundant of the contract claims.

Here, it is undisputed that Ally advanced the funds that plaintiff requested. In opposition, plaintiff failed to provide any evidence demonstrating that he was deprived of certain rights under a contract. Thus, this cause of action must be dismissed.

Conversion

To establish a cause of action for conversion, "the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question. . . to the exclusion of the plaintiff's rights" (Castaldi v 39 Winfield Assocs., 30 AD3d 458, 458-59 [2d Dept. 2006], citing Batsidis v Batsidis, 9 AD3d 324, 343 [2d Dept. 2004]).

Ally contends that plaintiff failed to allege that Ally ever possessed the vehicle. Additionally, although money may be the subject of a conversion action, the money must be specifically identifiable. Here, Ally accepted a payment from Auto Palace, not plaintiff. As plaintiff failed to allege that the money Auto Palace provided to Ally was his money and that Auto Palace did not first deposit plaintiff's money into its business account, Ally argues that a claim for conversion cannot stand (see D'Amour v Ohrenstein & Brown, LLP, 17 Misc.3d 1130[A][Sup. Ct., New York Cnty.][finding that "money that has been paid into a business entity's general account, and commingled with the business entity's other funds, is generally not considered to be specifically identifiable for purposes of a conversion claim."]; Auguston v Spry, 282 AD2d 489 [2d Dept. 2001]).

Plaintiff contends that discovery is necessary to determine whether the money that Auto Palace received from plaintiff was paid directly to Ally.

Here, this Court finds that plaintiff has failed to plead the necessary elements to maintain a cause of action for conversion. Plaintiff's complaint does not allege any facts showing that Ally exercised dominion and control over his property or his money.

Breach of Contract

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (El-Nahal v FA Mgt., Inc., 126 AD3d 667. 668 [2d Dept. 2015]). Although it is not required that the complaint quote contractual provisions verbatim, or that plaintiff annex a copy of the contract to the complaint, the essential terms of the contract upon which liability is predicated must be stated (see Stabulas v Brooks Piece Dye Works Corp., 111 AD2d 803 [2d Dept. 1985]; Caniglia v Chi. Tribune-N.Y. News Syndicate 204 AD2d 223 [1st Dept. 1994]; Jara v Strong Steel Doors, Inc., 851 NYS2d 58 [Sup. Ct., Kings Cnty. 2007]).

Ally contends that plaintiff fails to identify an executed contract between Ally and plaintiff or allege the terms of a contract.

In opposition, plaintiff contends, and this Court agrees, that he is not required to annex a copy of the contract to the complaint. However, plaintiff is required to set forth the provisions of the contract upon which the claim is based. Plaintiff has failed to do so, for the second time, and as such, has failed to allege a cause of a action for breach of contract.

Negligence

In a cause of action founded upon negligence, plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of damages suffered by the plaintiff (see Becker v Schwartz, 46 NY2d 401 [1978]).

Ally contends that plaintiff has failed to allege that the lender-borrower relationship between Ally and plaintiff gave rise to any specific duty (citing Baumann v Hanover Cmty. Bank, 100 AD3d 814 [2d Dept. 2012]). Ally also contends that plaintiff has failed to allege any facts that establish a principal-agent relationship between Ally and Auto Palace.

In opposition, plaintiff fails to address such. In any event, and as stated in the prior Order, the relationship between Ally and plaintiff was a contractual relationship, "which does not give rise to a duty which could furnish a basis for tort liability" (Baumann v Hanover Cmty. Bank, 100 AD3d 814 [2d Dept. 2012], quoting Rakylar v Washington Mut. Bank, 51 AD3d 995 [2008]). Moreover, the elements of agency necessary to impose

liability upon Ally regarding a principle-agent relationship between Ally and Auto Palace and Planet Motors are not alleged in the complaint.

Fraudulent Inducement and Concealment of Contract Terms

Pursuant to CPLR 3016(b), when a cause of action is based upon fraud, "the circumstances constituting the wrong shall be stated in detail." "A fraud claim must be pleaded with particularity" and "the circumstances constituting the alleged wrong must be stated in detail." (Ramos v Ramirez, 31 AD3d 294 [1st Dept. 2006]).

Ally argues that it cannot be required to frame a response to the complaint as plaintiff fails to specify the fraudulent inducement acts of the individual defendants.

In opposition, plaintiff states that upon information and belief, Ally engaged in numerous transactions with Auto Palace which resulted in fraudulent activity conducted by Auto Palace. Once again, plaintiff fails to allege the elements of the agency relationship in the complaint.

This Court finds that the complaint fails to plead fraud against Ally with any particularity. The complaint refers to fraudulent conduct against the defendants collectively, however such grouping does not suffice to state claim for fraud (see Abrahami v UPC Const. Co., 176 AD2d 180 [1st Dept. 1991]; Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co., 84 AD2d 736 [1st Dept. 1981]; CIFG Assur. N. Am., Inc. v Bank of Am., N.A., 980 NYS2d 275 [Sup. Ct., N.Y. Cnty. 2013]).

Deceptive Trade Practices

To state a claim under GBL 349, the conduct charged must be consumer-oriented, which is conduct that potentially affects similarly situated consumers (see New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]). While consumer-oriented conduct does not require a repetition or pattern of deceptive behavior it does exclude single shot transactions which are not typical consumer transactions (see New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]; Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20 [1995]).

Ally contends that plaintiff's dispute is a private contract dispute which is unique to the parties, and would not fall under GBL 349.

Plaintiff contends that Ally was involved in numerous fraudulent findings with other defendants, and thus, this transaction falls under GBL 349. However, plaintiff fails to allege what fraudulent acts Ally engaged in. Accordingly, plaintiff failed to state a cause of action regarding deceptive trade practices.

Punitive Damages

As a last cause of action, plaintiff seeks punitive damages. Plaintiff contends that defendants' deceptive actions and practices of deceiving plaintiff into entering into a fraudulent financing agreement warrants punitive damages. Conduct warranting an award of punitive damages must manifest "spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilfull or wanton" (Dupree v Giugiano, 20 NY3d 921 [2012]). Here, plaintiff's complaint fails to allege any specific facts regarding Ally's conduct, and thus, his claim for punitive damages must fail.

Regarding that branch of Ally's motion seeking costs and reasonable attorney's fees, this Court declines to award such.

Accordingly, and based on the foregoing, it is hereby

ORDERED, that defendant ALLY FINANCIAL INC.'s motion to dismiss plaintiff's complaint is granted, and plaintiff's complaint is dismissed as against defendant ALLY FINANCIAL INC.

Dated: June 29, 2016
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.