

Albina v Citipups NYC Corp.
2018 NY Slip Op 33352(U)
December 14, 2018
Supreme Court, New York County
Docket Number: 654414/2016
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEOVITS **PART** **IAS MOTION 7EFM**
Justice

-----X
INDEX NO. 654414/2016
TIFFANY ALBINA
Plaintiff, MOTION SEQ. NO. 005

- v -

CITIPUPS NYC CORP., **DECISION AND ORDER**
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for JUDGMENT - DECLARATORY

Anthony Core, P.C., New York (Bradley Stover of counsel) for plaintiff.
Christopher Lynn, New York (Christopher Lynn of counsel) for defendant.
GERALD LEOVITS, J.:

Defendant Citipups NYC Corp. (Citipups) moves for summary judgment dismissing the complaint. Plaintiff Tiffany Albina cross-moves for partial summary judgment.

In her complaint, plaintiff sues Citipups for breach of contract, promissory estoppel, breach of warranty and violation of section 349 of the General Business Law (GBL), based on a sale transaction, the sale of a dog. The complaint alleges that plaintiff purchased a dog from Citipups, and at the time of the purchase, Citipups failed to give plaintiff proper notice to her as a purchaser, and failed to provide her with a healthy dog or a dog fit for sale. After the sale, the dog became seriously ill and eventually died. Plaintiff alleges that the dog died soon after Citipups advised her to take the dog to the veterinarian. From Citipups, plaintiff seeks the recovery of money she paid for in veterinarian services, among other damages.

Citipups moves for summary judgment dismissing the complaint. Citipups served an answer, which includes counterclaims sounding in defamation and unjust enrichment. Here, Citipups argues that plaintiff lacks standing to sue because she was not the purchaser of the dog. Submitting documentary evidence, Citipups contends that plaintiff's "sister," Christina, is the actual purchaser of the dog, as her signature is on the sales documents, not plaintiff's. According to Citipups, the documents provide that all the warranties related to the sale are made to

Christina in her capacity as a purchaser and are not transferable. Thus, Citipups contends that plaintiff cannot sue it over the warranties, even if she is the owner of the dog.

In reply, plaintiff admits not signing any documents and has alleged in the complaint that she did not take the dog out of the store. She states that her sister-in-law Christina took the dog on the day after she purchased the dog. Plaintiff also states that her sister-in-law signed the documents, but asserts that she, her sister-in-law, did not know what she had signed. Plaintiff insists that she is the owner of the dog, claiming that she purchased the dog with gift cards belonging to her husband. She states that the cards were used surreptitiously by her, and she had intended to surprise her husband with the purchase of the dog. Plaintiff submits copies of payment receipts from the cards which bear the name and address of Citipups. Plaintiff also states that a copy of her driver's license was made by Citipups in the course of the purchase.

Plaintiff makes a partial cross-motion regarding the payment of the veterinarian services and the dismissal of the counterclaims. She seeks the recovery of the service fees, contending that she paid in full the cost of the dog and has accurate records as to the amount of the service fees spent on the dog. She argues that she is entitled to the amount pursuant to section 753 of the GBL. She argues that Citipups' counterclaims lack merit, fail to state any counterclaim, and should be dismissed.

In reply, Citipups argues that Christina signed the sales documents related to the dog's purchase, tendered the gift cards and took physical possession of the dog. Citipups argues that only the purchaser can seek the remedies sought by plaintiff.

In reply, plaintiff argues that Citipups did not respond to the cross-motion regarding the counterclaims and the claim for the service fees. Plaintiff states that she is entitled to the granting of the cross-motion.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted] (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2006]).

Citipups contends that whatever claims in breach of contract, or breach of warranty can be brought against it, those claims can only be brought by the purchaser of the dog, which is Christina Albina. The sales documents submitted, which include the terms of sale, warranties and feeding instructions, were executed by Christina, which indicates her as the purchaser as well as the owner of the dog. The terms of the documents also expressly provide that the warranties of fitness, pertinent in this case, are not transferable (*see* Terms of Sale, Terms of Sales Addendum). Citipups submits an affidavit from its employee, Matthew Rivera, which asserts that he went over the terms of the documents with Christina Albina. It is settled that a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see Kolmar Americas, Inc. v Bioversal, Inc.*, 89 AD3d 493, 494 [1st Dept 2011]).

Plaintiff admits that she did not enter into any written agreement with Citipups and that her sister-in-law did execute the papers. Her argument that Christina did not know what she was

signing is too conclusory. Plaintiff does not offer any details or evidence to substantiate her argument. Nor does plaintiff raise any issue about whether the execution of the documents was the result of fraud, coercion or mistake. Moreover, no affirmation or affidavit from Christina Albina has been submitted, which would ultimately resolve this matter. Here, Citipups has made out a motion for summary judgment. Once it succeeds in meeting its burden of entitlement to judgment, the burden shifts to plaintiff to demonstrate that there exists a triable issue of fact, precluding the granting of the motion (*see Richardson v County of Nassau*, 156 AD3d 924, 925 [2d Dept 2017]).

Plaintiff has not shown an issue of fact and Citipups is entitled to its remedy. Thus, her claims regarding breach of contract and warranty are dismissed. With respect to her claim under section 349 of the GBL, which is broadly construed, one needs to allege that the subject transaction was consumer-oriented and involved fraud or deception of a material nature. Here, plaintiff failed to allege fraud on Citipups's part with sufficient particularity (*see CPLR 3016 [b]*). This claim is also dismissed.

Plaintiff's cross-motion shall be determined as it applies to the counterclaims. In the answer, Citipups alleges that, on February 9, 2016, plaintiff told a New York Post reporter that Citipups intentionally sold her a sick and unhealthy dog, said statement subsequently published in the newspaper and widely disseminated. Citipups alleges defamation per se on plaintiff's part, asserting that the dog did not become ill until several days after the sale. Citipups also alleges in a separate claim that plaintiff failed to mitigate her damages and did not take the dog for treatment when she was instructed. Citipups alleges that plaintiff was contractually limited as to the extent of damages she could pursue.

In her cross-motion, plaintiff argues that the alleged defamatory statement was never reported or published. She refers to a deposition of David Jacoby, Citipups' general manager, who testified, upon questioning from plaintiff's counsel, that he could not specifically attribute any such words to plaintiff. Plaintiff contends that in the absence of any substantiated defamation by her, this counterclaim is dismissed.

Plaintiff seeks dismissal of the unjust-enrichment claim because it raises the issue of unclean hands and fails to make out a cause of action. Citipups does not respond to the cross-motion's arguments against the counterclaims.

Defamation consists of a false statement published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se (*see Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]). A statement that suggests improper performance of one's professional duties constitutes defamation per se (*see Chiavarelli v Williams*, 256 AD2d 111, 113 [1st Dept 1998]). Plaintiff has submitted proof that the alleged defamatory statement was not substantiated by Citipups. Regarding unjust enrichment, it has been shown that plaintiff's damages are not subject to the terms of the sales documents, because she did not execute any of the documents. Plaintiff made out a cross-motion for summary judgment, and Citipups failed to respond with evidence indicating a triable issue of fact which would preclude the granting of judgment.

Accordingly, it is

NYSCEF DOC. NO. 109

RECEIVED NYSCEF: 12/24/2018

ORDERED that defendant Citipups NYC Corp.'s motion for summary judgment is granted and the complaint is dismissed with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff Tiffany Albina's cross-motion for partial summary judgment is granted to the extent that the counterclaims in the answer are dismissed; and it is further

ORDERED that defendant serve a copy of this decision and order on the County Clerk's office, which is directed to enter judgment accordingly.

<u>12/14/2018</u> DATE		 GERALD LEBOVITS, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE