Voloshko v Planet Motor Cars Inc.
2019 NY Slip Op 30818(U)
March 28, 2019
Supreme Court, Kings County
Docket Number: 503516/13
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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IGOR VOLOSHKO,

Plaintiff,

-against-

PLANET MOTOR CARS INC.
and M&T BANK CORPORATION,

Defendants.

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DECISION / ORDER

Index No. 503516/13
Motion Seq. No. 12
Date Submitted: 1/10/19
Cal No. 54

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant M&T Bank Corporation's motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed and Memo of Law.....	171-192
Affirmation in Opposition and Exhibits Annexed.....	196-203
Reply Affirmation and Memo of Law.....	206-210

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is an action arising out of the purchase and financing by plaintiff of two used cars from defendant Planet Motor Cars Inc. (hereinafter "Planet") pursuant to two retail installment agreements that were assigned by Planet to defendant M&T Bank Corp. (hereinafter "M&T"). Plaintiff has asserted ten causes of action in his complaint. He contends that although he agreed to a cash price for each of the vehicles, defendant Planet Motor Cars required plaintiff to finance the sales, and at higher prices than they had agreed to. The complaint alleges that Planet Motor Cars made false representations and failed to disclose certain information in connection with the sale and financing of the two

vehicles; that plaintiff's signature was forged on the two Retail Installment Agreements, which reflect amounts higher than the agreed-upon prices and higher than the reasonable value of the cars he purchased. The complaint seeks money damages and includes causes of action sounding in fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, unjust enrichment, forgery, violation of GBL § 349, violation of Personal Property Law

§ 302, violation of New York City Admin. Code § 20-700, aiding and abetting fraud and forgery, and intentional infliction of emotional distress. Despite the foregoing, plaintiff has no complaints about the vehicles themselves. He has kept them and has made all of the required installment payments. The disputed loans are now paid in full.

Defendant Planet Motor Cars answered the complaint on August 6, 2013, by an attorney, as has movant M&T Bank, with cross claims against defendant Planet. Defendant Planet answered the cross claims, also by an attorney. A preliminary conference was held on April 12, 2014 and all three attorneys were present. A compliance conference was held on October 29, 2014, and again all three attorneys were present. Plaintiff then made a motion to compel EBTs of both defendants, which resulted in a so-ordered stipulation dated February 19, 2015, signed by all three attorneys. Plaintiff's attorney again brought a motion to compel depositions, and defendant M&T Bank cross-moved to dismiss the complaint for failing to prosecute. Counsel for Planet then brought an Order to Show Cause to be relieved as counsel (Mot. Seq. #5), signed April 25, 2016, heard on May 19, 2016 and granted without opposition. Planet has not retained new counsel. On September 8, 2016, the court granted plaintiff's motion to strike Planet's answer for failing to appear at an EBT. A further motion and cross motion resulted in a discovery order dated May 1, 2017, and after several further discovery-related motions, a note of issue was filed on

February 28, 2018. The case is now on the trial calendar.

M&T Bank moves for summary judgment, contending that the complaint should be dismissed as against it. Movant avers that it was not involved in setting the prices for the vehicles, nor was it involved with the negotiation or signing of the two Retail Installment Agreements which indicate the terms of the transactions. Movant avers that the two loans were assigned to M&T Bank and that it had no notice of any alleged forgery; that it was a holder in due course without knowledge, thus it is not subject to the plaintiff's claim of forgery. Consequently, M&T Bank maintains that the causes of action for forgery (Fifth), and for aiding and abetting fraud and forgery (Ninth), must be dismissed as against it. M&T also contends that as an assignee of the Retail Installment Agreements, the causes of action against it for fraud (First and Second), negligent misrepresentation (Third), unjust enrichment (Fourth), violation of GBL § 349 (Sixth), violation of Personal Property Law §302 (8) (Eighth), and intentional infliction of emotional distress (Tenth) must be dismissed. Alternatively, M&T argues that under Personal Property Law § 302(9), as the assignee of a retail installment contract, even if Planet Motor Cars, Inc. is found liable, M&T's liability is capped at the amount of money that was owed to M&T by plaintiff on the date of the commencement of the action.

In support of the motion, defendant provides an affidavit from Michael Major, an administrative vice president and product manager, who describes the process employed by the consumer lending department at M&T, by which the bank approves auto loan applications, as well as the procedures for making copies of the loan applications, and the retail finance agreements which are prepared by Planet Motor Cars Inc. Movant also provides excerpts of plaintiffs' deposition testimony. It is noted that plaintiff disputes the validity of his signature on the two Retail Installment Agreements, not on the applications

for financing, which seem to be for the same amounts of money as are reflected on the Retail Installment Agreements.

Plaintiff opposes the motion and argues that M&T Bank has failed to make a prima facie showing of its entitlement to summary judgment. Plaintiff claims the affidavit of Michael Major is insufficient, as it is from an employee who fails to document either his qualifications to make the affidavit or his knowledge or involvement in the subject transaction. Further, plaintiff contends there are issues of fact as to whether M&T is really a holder in due course and whether it accepted the assignment of the retail installment agreements in good faith and without notice of plaintiff's claims. Plaintiff argues that the documents indicate highly inflated prices for the cars, which were the collateral for the loans, and thus there is an issue whether the bank had "unclean hands." Further, plaintiff maintains that under Personal Property Law § 302(9), M&T Bank, as the assignee of the retail installment agreements, is subject to all claims and defenses plaintiff can assert against the seller, as the assignee stands in the shoes of the assignor, although plaintiff acknowledges that the assignee's liability is limited to the amount owing at the time the plaintiff served the assignee with his suit.

"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" (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat summary judgment, the opposing party must come forward with admissible evidence showing that there are material issues of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Defendant M&T Bank's claim that it is a holder in due course, and therefore protected from a forgery claim, is misplaced. Personal Property Law § 302(9)(a), the Motor

Vehicle Retail Installment Sales Act, expressly provides that all claims arising out of a retail installment contract are available against an assignee of the loan, effectively barring an assignee from asserting a holder in due course defense. As the Court of Appeals noted with respect to respect to a similar provision in Personal Property Law § 403[5)] (now 403[4]) in *Gramatan Home Investors Corp. v Lopez* (46 NY2d 481, 487 [1979]):

> defendants' principal reliance on subdivision 5 (of section 403) is misplaced. That statute (Personal Property Law § 403) provides in relevant part that "the assignee of a retail installment contract or obligation shall be subject to all claims and defenses of the buyer against the seller arising from the sale notwithstanding any agreement to the contrary." Both its express terms and legislative history (see Governor's Memorandum of Approval, N.Y.Legis.Ann., 1970, p. 490), make plain that section 403 was enacted to remove the frequently asserted holder in due course defense from the field of consumer credit sales.

However, for plaintiff to make a valid claim against an assignee, it must have a valid claim against the assignor/seller, and a bald conclusion of forgery is insufficient to raise an issue of fact in opposition to a motion for summary judgment, particularly after the loan is paid in full. As the Court of Appeals holds in *Banco Popular N. Am. v Victory Taxi Mgmt., Inc.* (1 NY3d 381, 384 [2004]), in connection with a motion for summary judgment with regard to a retail installment contract:

> Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature. Here, there is an absence of factual assertions supporting a claim of forgery and Albaz has not demonstrated that her pre-litigation conduct was consistent with a denial of genuineness. Hence, Albaz's affidavit alone was inadequate to raise an issue of fact necessitating a trial.

Here too, plaintiff offers only his assertion of forgery. He offers no expert affidavit and his pre-litigation conduct was inconsistent with a denial of the genuineness of his signature. Thus, the 5th and 9th causes of action, based upon forgery, must be dismissed.

However, as noted above, under Personal Property Law § 302(9), M&T Bank, as

the assignee of the retail installment contract, is subject to all claims which could be asserted against the seller (*see State v DeFranco Ford, Inc.*, 202 AD2d 593, 594 [2d Dept 1994] ["Pursuant to Personal Property Law § 302(9), the appellant, as an assignee, is subject to "all claims and defenses of the buyer against the seller arising from the sale."]). M&T has failed to make a prima facie showing that it is entitled to summary judgment with regard to the claims of fraud (First and Second causes of action), negligent misrepresentation (Third cause of action), unjust enrichment (Fourth cause of action), violation of GBL § 349 (Sixth cause of action), or violation of Personal Property Law § 302 (8) (Eighth cause of action). The motion does not address the plaintiff's claim based upon a violation of New York City Administrative Code § 20-700 (Seventh cause of action). While M&T has shown that it had no role in negotiating the terms of the sales of the two cars, or the preparation of the subject documents, and approved the car loans based upon the loan applications submitted by Planet which were signed by plaintiff, and later took assignment of the installment agreements, these facts do not make a prima facie case for summary judgment dismissing the complaint. Plaintiff is permitted by law to assert causes of action directly against M&T which are based upon Planet Motor Cars' actions. M&T has failed to make a prima facie showing that the claims asserted lack merit (see *Ramirez v National Coop. Bank*, 91 AD3d 204, 209 [1st Dept 2011] [Buyer's action against automobile dealership and its assignee bank, alleging that he was the victim of an illegal "scheme" by dealership to fraudulently induce him to purchase three overpriced cars that he could not afford, reinstated against assignee]). Movant cannot make a prima facie showing of its entitlement to summary judgment by attempting to poke holes in plaintiff's claims.

However, the court must note that Personal Property Law § 302(9) provides that "the assignee's liability under this subdivision shall not exceed the amount owing to the

assignee at the time the claim or defense is asserted against the assignee." Consequently, any recovery by plaintiff against M&T bank is so limited. Finally, the Tenth cause of action, for intentional infliction of emotional distress, must be dismissed. The allegations are not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community" (*Murphy v Am. Home Prod. Corp.*, 58 NY2d 293, 303 [1983]).

Accordingly, it is

ORDERED that defendant M&T Bank Corporation is awarded summary judgment to the extent that the Fifth, Ninth and Tenth causes of action against it are dismissed, and it is further

ORDERED that, pursuant CPLR 3212(g) and Personal Property Law § 302(9), defendant M&T Bank Corporation's liability, if any, shall not exceed the amount owing to M&T Bank Corporation at the time the plaintiff's claims were asserted against it, July 12, 2013.

This shall constitute the decision and order of the court.

Dated: March 28, 2019

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court