Islam v Audi Manhattan
2023 NY Slip Op 35023(U)
June 28, 2023
Supreme Court, Queens County
Docket Number: Index No. 721261/2019
Judge: Leonard Livote

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **Leonard Livote** Commercial Division Part A
Supreme Court Justice

----------x

NAZMUL N. ISLAM Index No.: 721261/2019

Plaintiff,

-against- Motion Date: 12/13/2022

AUDI MANHATTAN AND BANK OF AMERICA Seq: #1

Defendants.

----------x

The following papers numbered 1 - 10 below read on this motion by Defendant for an Order: pursuant to CPLR § 3212 granting summary judgment in favor of defendants Audi Manhattan and Bank of America, N.A., i/p/a Bank of America.

	PAPERS NUMBERED
Notice of Motion, Affirmation, Affidavits and Exhibits.....	1-4
Cross Motion, Affirmation, Affidavits and Exhibits.....	
Answering Affirmations, Affidavits And Exhibits.....	5-7
Reply Affirmations, Affidavits And Exhibits.....	8-10
Other	

Upon the foregoing papers, the motion is granted.

On or about July 27, 2017, plaintiff purchased a used 2014 Audi Q5 Premium Plus ("subject vehicle") in or around July 2017 from defendant Audi Manhattan. Plaintiff alleges that Audi Manhattan showed him a "clean" CARFAX Vehicle History Report that showed no prior damage reports. In 2019, plaintiff was considering trading the car in, and was provided a CARFAX report, dated September 21, 2019, that disclosed damage sustained prior to plaintiff's purchase. Plaintiff commenced this action alleging fraud, breach of U.C.C. 2 § 2-714-715,

violation of GBL § 349, breach of the Implied Warranty of Merchantability, (U.C.C. 2 § 2-314), and breach of contract against defendant Audi. Plaintiff also alleges a violation of the FTC Holder Rule (16 C.F.R. § 433.2), against defendant Bank of America. Defendants move to dismiss.

In support of the motion, defendants submitted evidence which establishes that On or about July 27, 2017, plaintiff agreed to purchase the subject vehicle from Audi Manhattan pursuant to a signed Pre-Owned Vehicle Purchase Agreement. At the time plaintiff signed the Pre- Owned Vehicle Purchase Agreement, Audi Manhattan provided plaintiff with a copy of a five page CARFAX Vehicle History Report containing information supplied to CARFAX about the subject vehicle and available as of July 27, 2017 at 6:19:27 P.M. The first page of the CARFAX report stated "[n]o accidents reported to CARFAX" but also noted "[o]ther damage reported[.]" In an "Additional History" section, the second page of the CARFAX report stated "damage reported on 09/21/2015[.]" At the bottom of the second page and top of the third page, the CARFAX report listed a damage report dated 09/21/2015, noting damage to the front and left side of the vehicle. On July 27, 2017, plaintiff signed the bottom of the CARFAX report, which stated:

> "I have reviewed and received a copy of the CARFAX Vehicle History Report for this 2014 Audi Q5 vehicle (VIN: WA1DGAFP9EA102643), which is based on information supplied to CARFAX and available as of 7/27/17 at 6:19 PM (EDT)."

On the same date, plaintiff signed a document titled "Delivery Disclosure," which provides, in pertinent part: New & Pre-owned Vehicles:

> "You also agree that your vehicle is free of damage and you have inspected the car thoroughly in regards to dings, dents, scratches and cleanliness.
>
> In regards to all pre-owned vehicles you have agreed and accepted to the physical condition of the vehicle in respect to the purchase price. Any cosmetic items to be repaired must be agreed upon and noted at the time of sale.
>
> To protect your interest and Audi Manhattan's all or any additional items promised by the salesperson or Manager must be in writing and signed by you and by Audi Manhattan in order to be valid. ORAL PROMISES WILL NOT BE HONORED.
>
> If you are not comfortable with any part of the delivery process, please request to see the Manager before signing this document and leaving the

dealership."

Also on the same date, plaintiff signed another document titled "Vehicle History Report Acknowledgment," which provides:

> "Audi Manhattan provides its customers with a vehicle history report prepared by a commercial service, as a courtesy to our customers. This report was not prepared by and the Dealership is not responsible for its content.
>
> By signing below, you acknowledge that the Dealership does not endorse, warrant, or guarantee any statements or information contained in the vehicle history report that you have received. You also acknowledge that you have been advised that the report contains a disclaimer, in which the company that prepared the report disclaims responsibility for the accuracy of information obtained from its sources that is contained in that report and expressly disclaims all warranties and any responsibility for any errors or omissions contained in the report. In the event of any dispute or issue arising from the information contained in this report, you agree that your sole recourse is against the service that
>
> prepared the report and that any dispute will be governed by the terms of the disclaimer contained in the report. In providing this report, Dealership makes no representations or warranties that the vehicle is free from any prior damage and/or repairs. Dealership's obligation is limited to the disclosure of known damage or prior repairs."

Plaintiff confirmed that he had a chance to read all documents at the time of his purchase and that he signed same voluntarily and willingly.

In opposition, plaintiff avers that he was provided with a "clean" CARFAX report which he is unable to produce.

Summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of a material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2nd Dept 2005]). "Issue finding, rather than issue determination is the court's function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]). "In the context of a motion for summary judgment, the court is obliged to draw all reasonable inferences in favor of the non-moving party, and may not pass on issues of credibility" (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 2005]).

The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (CPLR Section 3212(b); *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Megafu v. Tower Ins. Co. of New York*, 73 A.D.3d 713 [2d Dept 2010]). However, once the moving party has satisfied this obligation, the burden then shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v. City of New York*, *supra*).

In the instant case, the evidence presented by defendants is sufficient to meet their initial burden. The plaintiff's affidavit is contradicted by the documentary evidence including statements signed by the plaintiff. Thus, plaintiff's allegations are "not genuine, but feigned" and insufficient to establish an issue of fact *(Glick & Dolleck v. Tri–Pac Export Corp.,* 22 N.Y.2d 439, 441, [1968]). Accordingly, the motion is granted and it is,

ORDERED, that the action is dismissed.

This constitutes the Order of the Court.

Dated: June 28, 2023

FILED
7/11/2023
COUNTY CLERK
QUEENS COUNTY

Leonard Livote, J.S.C.