Helguson v AlphaPerformance USA, LLC
2024 NY Slip Op 30200(U)
January 5, 2024
Supreme Court, New York County
Docket Number: Index No. 654581/2020
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

---X

GRIMUR HELGUSON,

Plaintiff,

- v –

ALPHAPERFORMANCE USA, LLC and GEORGE VILLAR,

Defendants.

---X

INDEX NO. 654581/2020

MOTION DATE 05/02/2023, 05/02/2023

MOTION SEQ. NO. 003, 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 123, 124, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 152, 154, 156, 157, 159

were read on this motion to/for PARTIAL SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 149, 150, 151, 153, 155, 158, 160

were read on this motion to/for SUMMARY JUDGMENT .

I. INTRODUCTION

In this breach of contract action, the plaintiff, Grimur Helguson, seeks to recover, *inter alia*, $68,038.51 he paid to defendant AlphaPerformance USA (Alpha) for the production and delivery of a custom-made racing motorcycle which was delivered late and short of the promised 225 rear wheel horsepower. He also seeks consequential damages for the alleged loss of sponsorship opportunities and incidental damages for travel expenses and attorney's fees. Defendant Alpha moves for partial summary judgment dismissing so much of the plaintiff's breach of contract claims as seek consequential and incidental damages (MOT SEQ 003). The plaintiff opposes that motion and moves for summary judgment on the complaint and dismissal of the defendant's affirmative defenses and counterclaim for storage fees (MOT SEQ 004).

The defendant's' motion for partial summary judgment is granted and the plaintiff's motion for summary judgment is granted in part.

II. BACKGROUND

The plaintiff is a resident of Iceland who builds and races high-performing racing motorcycles. He also owns a home in Florida and travels extensively for racing purposes. In mid to late 2014, he contacted defendant Alpha, a New York company that built customized racing motorcycles and was run by defendant George Villar (Villar)[1], for the purpose of having Alpha build him such a customized motorcycle. The plaintiff maintains that at that time, he was negotiating with potential sponsors, including BMW retailers in Iceland, but never executed any written agreements with any potential sponsors. He had obtained only "a promise" to sign a written agreement if he was able to procure a racing motorcycle to use in Iceland.

On December 21, 2014, the plaintiff traveled from Florida to New York to meet with Villar. The plaintiff entered a contract with Alpha (First Contract), in which the parties agreed that Alpha would transfer ownership of a custom-built BMW "Motorrad" motorcycle upon receipt of $59,988.00 as payment for the vehicle. The First Contract included detailed specifications for upgrades to the motorcycle, including, in relevant part, a 2013 BMW S1000 (HP4) 2013 HP4 Chassis and Swingarm 1, with a capability of 225+ rear wheel horsepower (RWHP). The First Contract also stated that the buyer would be responsible for "any and all shipping and crating costs." The contract did not contain a term for the time of performance. Nor did the plaintiff disclose to Alpha that he had potential sponsorship deals that were contingent on the procurement of a motorcycle by a particular date.

Soon after execution of the contract, on December 29, 2014, the plaintiff transferred $20,000.00 to Alpha as the first installment of his payment. In February 2015, Villar told the plaintiff that the motorcycle would be ready for shipping in two weeks. On April 9 or 10, 2015, the plaintiff transferred additional monies totaling $38,980.00 to Alpha. Around that time, the plaintiff traveled to New York to visit Alpha and take possession of the motorcycle. However, before he left, Alpha informed him that the motorcycle was not ready and that assembly had not yet started. Still, the plaintiff visited New York and met with Villar, who promised him that the motorcycle would be completed within a week and be ready for shipping in either late April or early May of 2015. On April 27, 2015, the plaintiff paid an additional $9,057.51 to Alpha,

[1] **This court dismissed the complaint as against defendant George Villar by an order dated August 4, 2021, as set forth herein.**

bringing the total amount paid to $68,037.51. In the following weeks, however, the plaintiff's attempts to contact Villar went unanswered.

The plaintiff emailed Villar on May 12, 2015, requesting a meeting. The next day, Villar emailed the plaintiff, advising him that the motorcycle was being built and would be crated and ready for delivery in two days, May 15, 2015, attaching photos of a partially assembled motorcycle. A few days later, on May 16, 2015, the plaintiff traveled to New York, to BMW of Manhattan, where Villar sometimes worked, to check on the progress of the motorcycle. He was told by Villar that the work was delayed due to the illness of a technician but learned from a BMW representative that Alpha had not obtained the base motorcycle from BMW only a month prior, on or about April 16, 2015. The motorcycle was not delivered on May 15, 2015.

On August 5, 2015, the plaintiff's counsel in Iceland sent a letter to Alpha demanding either a full repayment of the agreed upon purchase price of the motorcycle or delivery of the motorcycle. The counsel sent an additional letter on August 28, 2015, demanding damages the plaintiff allegedly suffered as a result of Alpha's failure to deliver the motorcycle, including the $68,037.51 in payments made, damages of $35,000.00 due to the loss of a sponsorship agreement, $9,965.00 in attorneys' fees, and $2,392.00 in unspecified taxes.

On September 9, 2015, plaintiff again traveled to New York to meet with Villar and discuss a settlement of the matter. After these discussions, the parties executed a second agreement (Second Contract) dated November 4, 2015, wherein Alpha agreed to finish building the motorcycle as previously agreed and to supply additional uninstalled parts to the plaintiff for the subject motorcycle plus additional parts at dealer cost. In the Second Contract, Alpha further stated, "We anticipate that it will take us 60-75 days to complete the work[] and get the bike on our new Superflow dynamometer for controlled break-in and tuning for the WSBK engine at no charge." Alpha represented it "will be present for NJ track testing for 2 days of [plaintiff's] choice", pay for "race fuel for the break-in and tuning" and "give [plaintiff] technical support and Racer pricing for the 2016-17 race seasons."

In late 2015 or early 2016, Villar assured the plaintiff that the motorcycle was close to being completed. However, it was not completed in January 2016 as agreed in the Second Contract. Nor were any of the additional parts delivered.

Four months later, on April 4, 2016, the plaintiff again traveled to New York to inspect the motorcycle. He appeared at the SuperMoto Italia motorcycle shop (the SuperMoto) in Saint

James, New York, where Alpha had shipped the completed motorcycle for testing with a dynamometer, a device for measuring the performance of a motorcycle motor. Villar, who was ill, was not present. Joseph Tortora (Tortora), the President of SuperMoto Italia LLC, which runs the SuperMoto, represents in an affidavit that the plaintiff arrived unannounced to inspect the motorcycle. The motorcycle was put through a preliminary dynamometer test and was only able to produce 199 RWHP, falling short of 225 RWHP as agreed in the First Contract. Tortora showed plaintiff a document reflecting the test results. A second test was done with the plaintiff present, with the same result. According to Tortora, the motorcycle would be tested again and fine tuned after a break-n period of at least 600 miles on the road. Tortora represents that he explained this to the plaintiff but after seeing the results from the dynamometer test, the plaintiff refused to take possession of the motorcycle and left the facility. The plaintiff maintains that any such break-in period was to occur before delivery, and usually on the dynamometer at the shop, not on the road.

Alpha opines that when Alpha shipped the motorcycle to SuperMoto for testing in April 2016, this constituted delivery of the motorcycle. Villar testified and avers in his affidavit that he expected the plaintiff to perform the break-in of the motorcycle after he arrived at the SuperMoto by riding the motorcycle on a road for several hundred miles, after which Villar intended to make further adjustments to the motorcycle, allowing the motorcycle to achieve optimal performance. Villar maintains that of at least 50 custom modifications, the plaintiff alleges only that one was not made, the one requiring 225 RWHP, and that Alpha never represented that the motorcycle would run at 225 RWHP on the date of delivery. The plaintiff testified that in addition to the RWHP issue, Alpha installed an old suspension system rather than a new one, and that he did not inspect the motorcycle for additional problems since the RWHP and suspension system and delay were major problems. Villar also testified, without support, that the motorcycle was tested at a later unspecified date and found to have reached a RWHP of 223, and that the motorcycle remains "in parts" in Alpha's storage facility in Commack, New York. It has never been ridden.

On September 21, 2020, the plaintiff filed the instant complaint, which includes five causes of action, alleging (1) breach of contract as to the First Contract, (2) breach of contract as to the Second Contract, (3) fraudulent inducement, (4) piercing the corporate veil to impose individual liability on Villar, and (5) unjust enrichment. As damages for both the first and second causes of action, the plaintiff demands recovery of the $68,037.51 he paid to Alpha, $35,000.00 he allegedly lost due to the failure of an opportunity for sponsorship due to Alpha's breach,

$9,965.00 for attorneys' fees, $2,392.00 in taxes—the nature of which the plaintiff does not specify, as well as an unspecified amount in costs of traveling to the United States.

On November 6, 2020, defendants Alpha and Villar filed separate but identical pre-answer motions to dismiss all causes of action in the complaint pursuant to CPLR 3211(a)(1), (5) and (7). By a decision and order dated August 4, 2021, the court denied the motions as to the first and second causes of action, alleging breach of contract, and granted the motions as to the third and fifth causes of action, piercing the corporate veil and unjust enrichment. The compliant was dismissed in its entirety as to defendant Villar, leaving only the breach of contract claims as alleged against defendant Alpha.

Defendant Alpha answered the two remaining causes of action of the complaint on September 2, 2021, and asserted eight (8) affirmative defenses - (1) the complaint fails to state a cause of action, (2) the complaint is barred by the statute of limitations, (3) the complaint is barred by the statute of frauds, (4) the consequential damages were not within the contemplation of the parties, (5) Alpha has fully performed, (6) "the Plaintiff should be estopped due to" [and Alpha does not complete the sentence], (7) the plaintiff refused to accept delivery, and (8) the complaint is not properly verified in accordance with CPLR article 30. In addition, Alpha asserted a counterclaim for money damages for storage fees incurred after the plaintiff rejected the motorcycle and left it at Alpha's facility.

Defendant Alpha now moves pursuant to CPLR 3212 seeking partial summary judgment dismissing so much of the two breach of contract causes of action that seek incidental and consequential damages arising from the plaintiff's alleged loss of sponsorship opportunities, travel expenses, and attorneys' fees (MOT SEQ 003). The plaintiff opposes the motion and moves separately for summary judgment on the breach of contract claims as asserted against Alpha and for dismissal of Alpha's affirmative defenses and counterclaim (MOTS SEQ 004).

III. DISCUSSION

A. Defendant Alpha's Motion for Partial Summary Judgment

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR

3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

Defendant Alpha moves for partial summary judgment pursuant to CPLR 3212 dismissing so much of the remaining causes of action for breach of contract that demand consequential damages for lost sponsorship opportunities and incidental damages for travel expenses and attorneys' fees. Alpha argues that the plaintiff is not entitled to any such damages as a matter of law even if it prevails in the breach of contract claims. In support of the motion, Alpha submits, *inter alia*, the pleadings, the First Contract, the Second Contract, a transcript of the plaintiff's deposition, an attorney's affirmation, and an affidavit from Villar. In opposition, the plaintiff submits, *inter alia*, a transcript of the deposition of Villar, a series of emails between the plaintiff and Tortora with a copy of the dynamometer readings attached thereto, and the letter from the plaintiff's counsel in Iceland dated August 28, 2015.

1. *Consequential Damages: Loss of Sponsorship*

An award of consequential damages requires a showing that such damages were "within the contemplation of the parties as a probable result of a breach at the time of or prior to contracting." Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of NY, 10 NY3d 187, 192 (2008). "[P]roof of consequential damages cannot be speculative or conjectural" (Id. at 192) and "must be proven with reasonable certainty and be capable of measurement based upon known reliable factors." Ashland Mgt. v Janien, 82 NY2d 395, 403 (1993) [lost profits claim]; Kenford Co. v County of Erie, 67 NY2d 257, 261 (1986) [same]. In this regard, Uniform Commercial Code § 2-715, "Buyer's Incidental and Consequential Damages", expressly provides:

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and case and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expenses incident to the delay or other breach.
(2) Consequential damaged resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which seller at the time of contracting had reason to know and which could not reasonably be prevented

by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

Here, the defendant establishes, *prima facie*, that the parties did not contemplate the potential loss of sponsorships at the time of either of the two Contracts. Neither of the two Contracts contain any language about any potential sponsorships much less any requirement that Alpha' was to compensate for loss of any sponsorship opportunity. Furthermore, the plaintiff expressly testified at his deposition that he never informed Alpha that he had any pending deals with potential sponsors at the time of the First Contract. Although the plaintiff's counsel in Iceland informed Alpha in the letter dated August 28, 2015, that the plaintiff had lost $35,000 in "lost sponsor fees" from BMW motorcycle retailers in Iceland, the letter did not contain any information about any pending negotiations with potential sponsors. As such, Alpha could not have contemplated liability for lost sponsorships when it entered into the Second Contract on November 4, 2015. Therefore, Alpha had no "reason to know" at the time of contracting for either Contract that the plaintiff could incur these damages if Alpha breached its obligations. See UCC 2-715(2)(a); Mil-Spec Indus. Corp. v Expansion Indus., LLC, supra.

According to the plaintiff, at the time of the First Contract, he was in discussions with BMW retailers in Iceland for a sponsorship deal, but he had no written contract or written evidence of any negotiations with any sponsors. By his own admission, he had no more than a "promise" of an agreement upon the delivery of the motorcycle, and he was merely in the process of "look[ing] for sponsors." Further, nowhere in his papers does the plaintiff name any specific sponsors with whom he was in discussions or provide any proof of how he calculated the $35,000 in lost sponsorship fees he allegedly suffered. Accordingly, Alpha is entitled to judgment as a matter of law on the issue of the consequential damages.

2. *Incidental Damages: Travel Expenses*

The plaintiff also seeks recovery of travel expenses he incurred when traveling to New York to inspect the motorcycle. As stated above, under the UCC, parties to a contract for goods are permitted to recover incidental damages for various expenses "reasonably incurred in inspecting, receiving, or maintaining custody and care of rightfully rejected goods, expenses incurred in connection with effecting cover, and other reasonable expenses incident to the delay or other breach." UCC §2-715(1). "Expenses of inspection . . . may be recovered from the seller if the goods do not conform and are rejected." UCC §2-513(2). According to his own representation, the only time that the plaintiff traveled for the purpose of inspecting the

motorcycle was on April 4, 2016. Accordingly, the only travel expenses that could be deemed to constitute inspection expenses would be for the travel that occurred on April 4, 2016. However, the parties had agreed that Alpha would ship the motorcycle to Iceland, and they never agreed to change the method of delivery. Indeed, in his May 12, 2015 email to the plaintiff, Villar continued to promise to "crate[]" the motorcycle soon, presumably for shipping, as the parties had agreed. In the August 5, 2015 letter from the plaintiff's Icelandic counsel, the counsel complained that the motorcycle had not been "delivered" yet and demanded that the motorcycle be made "ready for shipment." Nonetheless, as the plaintiff admits, he arrived unannounced at the SuperMoto on April 6, 2016 demanding to inspect the motorcycle. The parties did not contemplate that the plaintiff would incur costs in traveling to New York for the purpose of inspecting or taking possession of the motorcycle. The plaintiff's demand for damages for travel expenses is thus dismissed.

3. *Incidental Damages: Attorneys' Fees*

Under the prevailing rule in New York, known as the "American Rule," attorneys' fees are considered merely incidental to litigation and may not be recovered unless recovery is authorized by statute, court rule or written agreement of the parties. See Sage Systems, Inc. v Liss, 39 NY3d 27 (2022); Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Hooper Assocs. v AGS Computers, 74 NY2d 487 (1989). The parties' Contracts do not provide for the recovery of attorneys' fees, and the plaintiff cites no statute or rule that permits him to recover the same. As such, defendant Alpha is entitled to summary judgment dismissing the plaintiff's claim for attorney's fees.

B. Plaintiff's Motion for Summary Judgment

The plaintiff moves for summary judgment pursuant to CPLR 3212 on the two causes of action for breach of contract and dismissal of Alpha's counterclaim and eight affirmative defenses. That motion is granted, as limited by the granting of Alpha's motion.

In support of its motion, the plaintiff submits, *inter alia*, a copy of the pleadings, the First Contract, the Second Contract, a transcript of the plaintiff's deposition, a transcript of the deposition of Villar, a series of emails between the plaintiff and Tortora with a copy of the dynamometer readings attached thereto, the letter from the plaintiff's counsel in Iceland dated August 28, 2015, receipts from the plaintiff's wire transfers to Alpha dated December 29, 2014, April 9, 2015, April 10, 2015, and April 27, 2015, an email dated February 9, 2015 in which Villar

represented to the plaintiff that the motorcycle would be ready for delivery within two weeks of the email, an email dated May 12, 2015 in which the plaintiff requested a meeting with Villar, and the letter from the plaintiff's Icelandic counsel dated August 5, 2015.

In opposition to the plaintiff's motion, Alpha submits, *inter alia*, affidavits of Villar and Tortora, portions of the plaintiff's deposition testimony, a motorcycle rider's manual for a BMW Motorrad S1000RR, and a Dynometer test result graphic. Alpha fails to meet its burden of raising a material issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. Accordingly, summary judgment is granted in favor of the plaintiff on his two breach of contract claims, except as to the issues of consequential and incidental damages, and the counterclaim and affirmative defenses are dismissed.

1. Summary Judgment on First and Second Causes of Action

Recovery under breach of contract requires (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Hous. Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). The plaintiff has met that burden by establishing, with proof in admissible form, that Alpha breached their agreement by belatedly delivering a non-conforming motorcycle.

Moreover, the terms of a contract include any express warranties, which are "[a]ny description of the goods which is made part of the basis of the bargain." UCC § 2-313. The seller's "breach of warranty occurs when tender of delivery is made." UCC § 2-725. If a good or the "tender of delivery fail in any respect to conform to the contract, the buyer may . . . reject the whole." UCC § 2-601. If the buyer then "rightfully rejects" the goods, the buyer may cancel the contract and seek a remedy for the breach. UCC §2-711(1).

In opposition, Alpha argues that a material issue of fact exists as to whether it did in fact deliver a motorcycle capable of running at 225 RWHP on April 6, 2016. It argues that, while the dynamometer reading of the motorcycle's motor only showed an RWHP of 199, the motor was capable of reaching 225 RWHP had two subsequent events occurred: (1) a break-in of the motor and motorcycle and (2) a final adjustment following the break-in. Alpha submits, *inter alia*, Villar's affidavit, Tortora's affidavit, an article from Bell Performance entitled "The Proper Procedure for Breaking-in Your Motorcycle" discussing the need to break in new motorcycles,

an excerpt from the plaintiff's deposition, a "Rider's Manual" for the BMW Motorrad motorcycle which, in relevant part, discusses the need to break in new motorcycles.

Alpha relies on the Tortora affidavit, in which Tortora avers that, "[n]ormally," motorcycle engines are submitted to several hundred miles of break-in riding on the road and additional adjustments and tuning afterward, after which the motor can reach optimal performance. Villar avers that, "had Helguson driven the bike as recommended by the manufacturer . . . and brought it back for the final adjustments[,] it could have easily passed the 225 [RWHP] level."

The article and the manual are inadmissible hearsay evidence to the extent that they are submitted for the truth of the matter asserted therein. See People v Thibodeau, 31 NY3d 1155 (2018). However, they may be considered as they are not the "only evidence upon which the opposition to summary judgment is predicated." Gonzalez v 1225 Ogden Deli Grocery Corp., 158 AD3d 582 (1st Dept. 2018). The article from Bell Performance and the "Rider's Manual" for the BMW Motorrad motorcycle also indicates that a break-in is necessary for the motorcycle to reach its optimal performance. Nevertheless, Alpha's submitted proof does not create a material issue of fact as to whether Alpha delivered a conforming motorcycle to the plaintiff. Even assuming that motorcycles must undergo a break-in and additional adjustments to reach optimal performance, Alpha failed to perform these additional steps and deliver to the plaintiff a motorcycle capable of 225 RWHP when it made a tender of delivery. Moreover, even after Alpha later performed a break-in, the motor was only able to produce a maximum of 223 RWHP, still failing to conform with terms of the First Contract.

Alpha argues that the plaintiff's interpretation of the contract that Alpha was to deliver a motorcycle that was immediately able to produce 225 RHWP on a dynamometer test is unreasonable. However, the plaintiff's interpretation is the plain reading of the contract, which must be enforced where the agreement is "complete, clear and unambiguous." Greenfield v. Philles Records, 98 NY2d 562, 569 (2002). The First Contract expressly warrants the delivery of a motorcycle with a motor with an RWHP exceeding 225. The agreement does not state that it must reach this RHWP after a break-in. Furthermore, in the Second Contract, Alpha estimated "60-75 days to complete the work," including time to "get the bike on our new Superflow dynamometer for controlled break-in and tuning for the WSBK engine at no charge." The natural reading of this language is that the "work" includes the "controlled break-in and tuning." The interpretation that Alpha urges, that Alpha was to produce a motorcycle that may initially fail to produce 225 RWHP but would eventually be able to reach that RWHP, is

unsupported by the clear and unambiguous language of the Contract. See Greenfield v Philles Records, supra. Nowhere in the Contract did the parties agree that the plaintiff was to perform a break-in, and the court does not read such an additional term into the Contract. Id. The fact that the Second Contract mentions the need for a break-in only indicates that Alpha was to perform this procedure. Simply put, the Contract required Alpha to deliver a motorcycle with a RWHP exceeding 225, and Alpha failed to do so when it tendered delivery.

Moreover, Alpha cannot reasonably argue that even of the April 2016 date is considered as a delivery date, it was untimely.

As for damages for the breach of Contract, the plaintiff demands $68,038.51, the total amount he paid to defendant Alpha in installments from December 2014 to April 2015. Under UCC 2-711(3), upon the rightful rejection of a good, a buyer may recover "any payments made on [its] price". See Patitucci v Consumers Warehouse Ctr., Inc., 17 Misc 3d 136[A], 2007 NY Slip Op 52288[U] (App Term, 2nd Dept. 2007); Parker v Hoppe, 257 NY 333 (1931); Motor Veh. Mfrs. Assn. v State, 146 AD2d 212 (3rd Dept. 1989). Here, the plaintiff is entitled to the amount he paid toward the purchase price of $59,988.00 for the motorcycle. However, to the extent that he seeks to recover $8,049.51 in excess of the purchase price, the plaintiff has failed to submit any proof to establish his entitlement to that amount. Accordingly, the plaintiff's damages are limited to the Contract price of $59,988.00. See Parker v Hoppe, supra.

Further, although, in the complaint, the plaintiff also seeks damages for $2,392.00 in taxes, he does not provide any proof of how or why he incurred such taxes anywhere in his complaint or moving papers. The plaintiff's claim for damages for taxes is accordingly dismissed. See Yonkers Ave. Dodge, Inc. v BZ Results, LLC, 95 AD3d 774 (1st Dept. 2012).

In sum, defendant Alpha is liable to the plaintiff in the amount of $59,988.00, with statutory interest from April 6, 2016, the date of breach. See CPLR 5001(a), (b).

1. *Summary Judgment Dismissing the Counterclaim*

The plaintiff also seeks summary judgment in its favor on Alpha's counterclaim for storage fees allegedly incurred due to the plaintiff's refusal to accept the motorcycle. In opposition, Alpha relies upon a single photograph of a sign allegedly displayed in the "shop where the motorcycle was built" at the time of this transaction which states "storage – $40 per day per bike." This portion of the motion is granted and the counterclaim is dismissed. Even

assuming that the sign was actually displayed and entitled Alpha to storage fees under any circumstances, it does not establish entitlement here. Further, while the UCC permits a seller to recover "any commercially reasonable charges, expenses or commissions incurred … in the … care and custody of goods after the buyer's breach" (UCC § 2-710), there was no breach by the plaintiff. As stated, the plaintiff properly rejected the non-conforming motorcycle (UCC § 2-601).

2. *Dismissal of Affirmative Defenses*

The plaintiff also seeks dismissal of the eight affirmative defenses asserted by Alpha in its answer, as set forth above. Alpha's opposition does not address this portion of the plaintiff's motion. This portion of the motion is granted.

CPLR 3018(b) defines affirmative defenses as "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a proper pleading, such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in Article 14A [contribution], discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds or statute of limitations." CPLR 3013 requires that all statements in a pleading be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transaction or occurrences, intended to be proved and the material elements of each cause of action or defense."

CPLR 3211(b) provides that a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." In moving to dismiss an affirmative defense, the plaintiff bears the burden of showing that "the defense is without merit as a matter of law." Granite State Ins. Co. v Transatlantic Reins. Co., 32 AD3d 479, 481 (1st Dept. 2015); 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 541 (1st Dept. 2011). However, on such a motion, "[t]he allegations set forth in the answer must be viewed in the light most favorable to the defendant." Granite State Ins. Co. v Transatlantic Reins. Co., supra; 182 Fifth Ave. v Design Dev. Concepts, 300 AD2d 198, 199 (1st Dept. 2002). The plaintiff has met its burden as to all eight affirmative defenses.

First, all eight affirmative defenses are improperly asserted in a conclusory manner without any detail or factual allegations. See Commissioners of State Ins. Fund v Ramos, 63

AD3d 453 (1st Dept. 2009); Manufacturers Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). They are subject to dismissal for additional reasons.

As previously stated, in a prior motion defendant Alpha unsuccessfully sought dismissal of the complaint as against Alpha upon the grounds, *inter alia*, failure to state a cause of action (CPLR 3211[a][7]) and statute of limitations (CPLR 3211[a][5]). Having denied the motion as it concerned the breach of contract claims against Alpha, the first two affirmative defenses are not viable. A second motion to dismiss based on those grounds would be barred by the single motion rule. See CPLR 3211(f); Held v Kaufman, 91 NY2d 425 (1998); Sampson v Roberts, 212 AD3d 545 (1st Dept. 2023); Simon v Francinvest, 192 AD3d 565 (1st Dept. 2021). Furthermore, an affirmative defense based on CPLR 3211(a)(7) may be dismissed where, as here, "all the other affirmative defenses are found to be legally insufficient." Tribbs v 326-338 E 100th LLC, 215 AD3d 480, 482 (1st Dept 2023).

As to the fourth affirmative defense, stating only that "consequential damages were not within the contemplation of the parties", the court has already made this finding in precluding any consequential damages. As to the fifth, sixth and seventh affirmative defenses, "(5) Alpha has fully performed", "(6) the plaintiff should be estopped due to [sic]" and "(7) the plaintiff refused to accept delivery, these are not, in fact, defenses but are more in the nature of partial allegations or segments of arguments, improperly pleaded as affirmative defenses. See CPLR 3018(b); CPLR 3211(b); Charnis v Shohet, 195 Misc 2d 188 (App Term, 2nd Dept. 2002).

In regard to the eighth affirmative defense, as Alpha concedes, the CPLR does not require a complaint to be verified. See CPLR 3020(a). Although a verified complaint may be used as the affidavit of facts, that is not necessary here as there is other proof in admissible form to support the plaintiff's motion, as well as a Statement of Material Facts.

Therefore, all eight affirmative defenses are accordingly dismissed.

IV. CONCLUSION

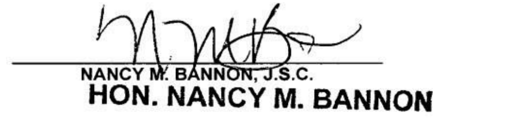
Accordingly, upon the foregoing papers, it is

ORDERED that the defendant Alpha's motion for partial summary judgment is granted, and so much of the plaintiff's two causes of action for breach of contract as seek compensatory and incidental damages are dismissed such that neither compensatory nor incidental damages are recoverable, and it is further

ORDERED that the plaintiff's motion for summary judgment on its two causes of action for breach of contract and dismissal of the defendants' affirmative defenses and counterclaim is granted, the plaintiff is awarded a money judgment in the sum of $59,988.00, plus costs and statutory interest, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, Grimur Helguson, and against defendant AlphaPerformance USA, LLC, in the sum of $59,988.00, plus costs and statutory interest from April 6, 2016.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/5/202
DATE

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER