

1/24

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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TEACHERS FEDERAL CREDIT UNION,

Plaintiff,

-against-

DANNY OSTAD, WESTBURY JEEP CHRYSLER
DODGE, INC., a/k/a WESTBURY JEEP EAGLE, INC.,
RICK COHEN, a/k/a RICHARD ABRAHAM COHEN,
individually and d/b/a NORTH SHORE MOTOR
GROUP, INC., and NORTH SHORE MOTOR
GROUP, INC.,

Defendants.

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The following papers having been read on this motion:

- Notice of Motion.....1
- Notice of Cross Motion.....2
- Opposition.....3

TRIAL PART: 10

NASSAU COUNTY

INDEX NO:11156-11

MOTION SEQ NO.: 1, 2

SUBMIT DATE:05/01/12

Defendant Westbury Jeep Chrysler Dodge, Inc. (hereinafter referred to as "Westbury Jeep") moved for summary judgment pursuant to CPLR §3212. Plaintiff cross-moved for partial summary judgment pursuant to CPLR §3212 in relation to the third and fourth causes of action enumerated in its Amended Verified Complaint. Defendant's motion is denied in its entirety. Plaintiff's cross-motion is denied in part and granted in part for the reasons herein.

Plaintiff, Teachers Federal Credit Union, a financial institution, entered into an indirect lending agreement with defendant Westbury Jeep to provide financing for the sale of a motor vehicle to co-defendant Danny Ostad. Defendant Westbury Jeep submitted to Plaintiff for approval an application for financing naming Ostad as the prospective buyer of a 2008 Jeep. The application was approved and an agreement was executed on September 19, 2008. (Notice of Motion, Exhibit B). Ostad made continuous payments on the balloon loan from September 2008 until June 2010, when he ceased making payments. (Notice of Cross-Motion, Exhibit 9). Plaintiff instituted this action

against both defendant Westbury Jeep and defendant Ostad claiming first that Westbury Jeep breached its signed agreement because the “information contained in the Loan Contract was not accurate and did not reflect the complete agreement between the buyer of the motor vehicle and Westbury Jeep.” (Notice of Motion, Exhibit A). Second, Plaintiff claims Westbury Jeep breached its agreement with respect to its obligation to repurchase the instrument plus a stipulated balance in the event Plaintiff so demands. The complaint states that as a result of a claim by Ostad, which was not resolved in 30 days, Westbury Jeep will be obligated to pay \$20,312.41 together with attorney’s fees and costs to recoup Ostad’s failure to pay. A third cause of action set forth by Plaintiff against Westbury Jeep states that the car dealership must indemnify plaintiff credit union for any “fees and costs incurred in conjunction with any dispute by the buyer arising out of any Instrument or the underlying transaction.” (Notice of Motion, Exhibit A). Additionally Plaintiff asserts two causes of action against defendant Ostad, claiming he is responsible for paying the \$20,312.41 along with interest and late fees because he failed to tender the payments as “provided in said Loan contract.” (Notice of Motion, Exhibit A). Additionally the complaint asserts that Ostad must also pay “a sum for reasonable attorney’s fees and court costs from defendant Ostad to Plaintiff.” (Notice of Motion, Exhibit A).

Plaintiff filed a Summons and Verified Complaint on July 28, 2011 (Notice of Motion, Exhibit A). In this Summons and Verified Complaint Plaintiff sought relief for the aforementioned causes of action. Immediately following, defendant Westbury Jeep filed the instant motion to dismiss the verified complaint based on summary judgment.

Defendant Ostad served a Verified Answer upon plaintiff on December 28, 2011. (Notice of Cross-Motion, Exhibit 1). Ostad asserted, inter alia, that he did not in fact enter into a financing agreement with Westbury Jeep, but instead entered into a lease agreement with North Shore Motors. Additionally, Ostad claimed that he had been defrauded by North Shore Motors and Rick Cohen, an employee of North Shore Motors, and that the lease he believed he entered into was “cancelled contemporaneously” when he returned the vehicle to North Shore. (Notice of Motion, Exhibit 1).

Defendant Ostad denied both signing the Loan Contract and authorizing another party to execute the contract on his behalf. As a result, Ostad also claims that his identity was stolen.

In response, plaintiff filed an Amended Summons and Amended Verified Complaint on January 19, 2012 based on defendant Ostad's Verified Answer. (Notice of Cross-Motion, Exhibit 2). The amended complaint also added additional causes of action and two additional defendants, to wit: North Shore Motor Group and Rick Cohen. The five causes of action alleged in plaintiff's Amended Summons and Amended Verified Complaint against defendant Westbury Jeep include 1) breach of warranty by failing to abide by its obligation to ensure the agreement was complete and accurate; 2) breach of warranty by failing to guarantee the signature on the agreement was genuine; 3) repurchase of the instrument; 4) indemnification and 5) fraud.

Defendant Westbury Jeep's motion to dismiss will be considered as if it had been made with respect to the five causes of action included within the Amended Verified Complaint. Plaintiff now seeks summary judgment on the third and fourth causes of action stated in their amended complaint. 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 (*Winegrad v. New York Univ. Med. Center*, 64 N.Y. 2d 851, 853). Once plaintiff has met its burden, the burden of proof shifts to the defendants to rebut the inference of entitlement to summary judgment (*Zuckerman v. City of New York*, 49 N.Y. 2d 557).

Defendant Westbury Jeep did not demonstrate entitlement to summary judgment because there has been no documentary evidence presented that refutes the five claims set forth by Plaintiff. Specifically, Defendant must put forth evidence contradicting the claims that it breached warranties, failed to abide by the repurchase clause in the agreement, failed to indemnify plaintiff and that it committed fraud.

Within the agreement with plaintiff, defendant Westbury Jeep promised that all instruments submitted would be accurate and reflect the complete agreement between defendant Ostad and defendant Westbury Jeep. (Notice of Cross-Motion, Exhibit 3). It must first be determined whether

or not Ostad is credible in his claim that he did not in fact sign the agreement or loan papers before a decision on breach of warranties can be made. If the court finds that Ostad did sign the agreement, it will follow that Westbury Jeep clearly did not breach its warranty to submit instruments that were accurate and that reflected a complete agreement. On a motion for summary judgment the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine (*Jericho Realty Corp. v. AutoZone, Inc.*, 27 AD3d 447, 449). The truthfulness of Ostad's claims are a material issue of fact to be decided at trial which will then determine the issue of breach of warranty. Defendant's claim for summary judgment on the first cause of action for breach of warranty must be denied because there is a substantial and genuine issue of fact that turns on the credibility of defendant Ostad.

The second cause of action asserted by plaintiff claims that defendant Westbury Jeep breached its warranty ensuring that the signature on each instrument was genuine. The issue of whether or not Ostad's signature is genuine is a question of material fact. To date there has been no expert affidavit submitted by the movant in order to prove the authenticity of the signature on the instruments in question, and therefore there is no merit to this claim. The authenticity of the signature on the documents depends on expert testimony and therefore cannot be decided on summary judgment (*Schwartz v. Epstein*, 155 AD2d 524). Defendant Westbury Jeep seeks summary judgment on this cause of action, which is hereby denied.

The fifth cause of action asserts that defendant Westbury Jeep defrauded plaintiff. Plaintiff claims that Westbury Jeep falsely represented in its submission of documents to plaintiff that Ostad was dealing directly with the car dealership, and that the vehicle would be obtained directly from Westbury Jeep. Through the documents submitted to plaintiff bearing the logo and/or name of Westbury Jeep, plaintiff contends it was led to believe that Ostad and Westbury Jeep had been directly in contact with one another regarding the loan and purchase of the vehicle. The claim here is similar to the first and second causes of action because all three claims depend on the truth of Ostad's contentions. Whether or not Ostad did in fact deal with Westbury Jeep directly, as opposed

to his claims that he dealt with Rick Cohen and North Shore Motors, is an issue of genuine fact reserved for determination by a trier of fact, and cannot be decided on summary judgment. Defendant Westbury Jeep's motion for summary judgment on this cause of action is hereby denied.

Therefore, causes of action one, two and five are hereby denied because they all fall on the issue of the credibility of defendant, Ostad.

Plaintiff seeks summary judgment on its claim under the third cause of action that defendant Westbury Jeep failed to abide by its obligation to repurchase the loan from Plaintiff after defendant Ostad raised a claim. Paragraph 6 of the Dealer Agreement executed on February 27, 2002, sets forth the repurchase agreement made between Plaintiff and Westbury Jeep. The agreement states, in relevant portion, that "if the Company has breached any warranty or representation set for in the agreement... or is otherwise in default under the agreement, then, upon demand by the" plaintiff, Westbury Jeep should repurchase the instruments and pay the Credit Union the "amount unpaid plus 1% of the unpaid principal balance less unearned interest charges." (Notice of Cross-Motion, Exhibit 3). As aforementioned, the first and second causes of action based in breach of warranty cannot be determined without a trial. Because these are issues of genuine fact still to be determined the court does not yet reach Plaintiff's demand that defendant Westbury Jeep has the obligation to repurchase the loan. The plaintiff cannot demand repurchase until a breach of warranty has been proven, therefore this is a genuine issue of material fact to be decided by the court, and summary judgment is denied.

The fourth cause of action states that Westbury Jeep is obligated to indemnify plaintiff. The duty to indemnify is to be waived only if it is established as a matter of law that there is no possible factual or legal basis on which indemnification might be necessary. [*Rhodes v. Liberty Mut. Ins. Co.*, 67 AD3d 881, 883. (quoting *Allstate Ins. Co. v. Zuk*, 78 [N.Y.2d 41, 45]). Plaintiff seeks summary judgment on this issue of indemnification. In the third paragraph of the Dealer Agreement, Westbury Jeep promises to both "indemnify and hold harmless" plaintiff against any claim or legal action brought by any buyer in relation to an Instrument or other portion of the underlying transaction.

Westbury agreed to notify plaintiff within 30 days of the claim's institution. The clause within the agreement states that if there is any claim or legal action by buyer:

[N]ot resolved within 30 days after its institution Company agrees to repurchase the instrument from the Credit Union for the amount of the then unpaid balance, plus accrued but unpaid interest to the date of repurchase, plus the dealer 1% fee pro-rated to the unpaid balance. (Notice of Cross-Motion, Exhibit 3).

Ostad's complaint claiming forgery and identity theft was filed in his answer on December 28, 2011. Plaintiff filed for summary judgment regarding repurchase on March 30, 2012. It is clear from these dates that Ostad's claim had not been resolved within the stipulated 30-day period. As a result, summary judgment is hereby granted in favor of Plaintiff, whom must now be indemnified by Westbury Jeep for any future relief that is granted to Ostad.

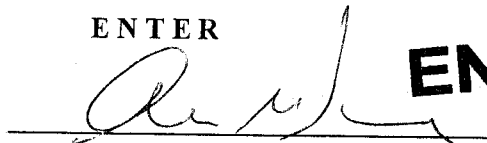
Accordingly, Westbury Jeeps' motion for summary judgment is dismissed in its entirety. Partial summary judgment is granted on defendant's cross motion on the fourth cause of action for indemnification but denied on the third cause of action with relation to the repurchase clause of the agreement.

Submit Judgment on Notice.

This constitutes the decision and order of this court.

DATED: June 21, 2012

ENTER



HON. ARTHUR M. DIAMOND

J. S.C.

ENTERED

JUN 26 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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