MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 12

---

x

PHONE CARD AMERICA, INC.

INDEX NO. 21832/09

MOTION SEQ. NO. 2

-against-

BY: BUTLER, J.

QUALITY DISCOUNT EQUIPMENT SELLERS, LLC

DATED: APRIL 20, 2010

---

x

Defendant Quality Discount Equipment Sellers, LLC has moved for summary judgment dismissing the complaint against it and for summary judgment on its counterclaims.

Plaintiff Phone Card America, Inc. sells prepaid phone cards, and defendant Quality sells printing equipment and related products. The plaintiff, intending to print the phone cards which it sold, discussed its needs with Matt McCabe, an employee of the defendant. In or about October 2008, McCabe recommended the purchase of a used printing press known as a Mark Andy 2200. According to Mohamedali Lakhani, the plaintiff's president, McCabe stated that several of defendant Quality's customers had used the Mark Andy 2200 to successfully print phone cards and that the machine would print at the rate of 400 feet per minute and in a combination of eight colors. The plaintiff procured a report from the defendant concerning the condition of the press for the purpose of financing

the purchase, and the defendant stated therein that the "equipment has been reconditioned, tested, and confirmed to be complete and operational."

On or about December 18, 2008, the parties executed a contract pursuant to which the defendant sold a Mark Andy 2200 and accessories to the plaintiff at a price of $158,631. The plaintiff made a down payment of $118,631 and agreed to pay the balance in monthly installments beginning February 15, 2009. The contract also provided: "Buyer further releases [Quality] and Seller from any and all liability associated with down time and lost production/sales due to any delays caused by *** mechanical and/or electrical operation of said machine. [Quality] makes no guarantee, warranty, or representation, expressed or implied, as to the quantity, kind, character, quality, condition *** of any materials, its merchantability, its fitness for any use or purpose or otherwise."

In or around February 2009, Lakhani went to the defendant's warehouse where he was shown two Mark Andy 2200 printing presses. The first, which had been made with English language instrumentation, could be operated on 220 volts (standard in North America), and it had approximately 15,000 hours of use on it. The second, which had been made with Italian language instrumentation, could be operated on 480 volts (standard in Europe), and it had 26,000 hours of use on it. The defendant allegedly operated the English language press for the plaintiff and promised to ship that machine to it. However, after the plaintiff executed an addendum to the contract on February 24, 2009 revising the payment schedule, the defendant informed the plaintiff that it would deliver a machine that

would operate at 480 volts, not the 220 volts standard in North America. According to the plaintiff, the defendant orally promised to ship a transformer with the printing press, but allegedly never did so. While the defendant denies promising to supply a transformer with the printing press, the plaintiff alleges that it received an e-mail from the defendant which reads in relevant part: "The following are the various transformers we have available. Please ask your electrician to review these to see if they can work for your application as I know nothing about electrical."

On March 11, 2009, the defendant delivered the press, but its technician encountered problems when he attempted to install and operate it. Although he promised to return with parts for the press, he never did so. The defendant never delivered a transformer, and the plaintiff eventually purchased one from a third party.

From March 11, 2009 to April 16, 2009, the plaintiff ran several tests on the machine with the help of a press professional recommended by the defendant, but the tests resulted in failure. The professional allegedly informed the plaintiff that the press had been manufactured for printing labels and had not been properly altered for printing telephone cards. Two other press professionals recommended by the defendant allegedly also advised the plaintiff that the press would not print telephone cards. Lakhani informed McCabe that he wished to return the press. McCabe allegedly replied that the press required "video inspection equipment" to operate normally, and the plaintiff purchased a system for $2,700 from the defendant. When the printing press still failed to print telephone cards after the

installation of the video inspection equipment, Lakhani informed McCabe of his intention to rescind the contract. Nevertheless, the plaintiff continued to make payments to the defendant in April 2009 and May 2009 upon the latter's promise to put the machine in working condition.

In June 2009, the plaintiff hired Flexo-Mechanic, a company that specializes in printing presses, and, after inspecting the Mark Andy 2200, Flexo-Mechanic allegedly informed the plaintiff that (1) the motor starter did not work, (2) the web guide did not work, (3) several shafts on the unwind and rewind components had been bent and required replacement, (4) gears on the rollers and aniloxes were worn out, (5) the tension nip at the end of the sheeting station was missing, and (6) various small parts needed replacement.

On June 29, 2009, the defendant allegedly promised to correct all problems if the plaintiff would sign a new payment schedule. Instead, on August 14, 2009, the plaintiff brought the instant action which asserts claims for, inter alia, rescission and damages accruing from breach of contract. The defendant counterclaimed for, inter alia, replevin and breach of contract.

That branch of the defendant's motion which is for summary judgment dismissing the plaintiff's first cause of action is granted. The first cause of action is for breach of the implied warranty of fitness for a particular purpose. UCC 2-315, "Implied Warranty: Fitness for Particular Purpose," provides: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and

that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." (*See*, *Butler v Interlake Corp.*, 244 AD2d 913; *Emerald Painting, Inc. v PPG Industries, Inc.*, 99 AD2d 891.) UCC 2-316, "Exclusion or Modification of Warranties," provides several methods by which implied warranties may be excluded from a sales contract, including by, for example, a "conspicuous" written disclaimer. (*See*, *Brennan v Shapiro*, 12 AD3d 547.) In the case at bar, the contract between the parties stated in capital letters: "[Quality] makes no guarantee, warranty, or representation, expressed or implied, as to the quantity, kind, character, quality, condition *** of any materials, its merchantability, *its fitness for any use or purpose* or otherwise." (Italics added.) In view of this disclaimer, the plaintiff has no cause of action for breach of warranty. (*See*, *Brennan v Shapiro*, *supra*; *Pioneer Ins. Co. v Griffith Oil Co., Inc.*, 267 AD2d 945; *Sky Acres Aviation Services, Inc. v Styles Aviation, Inc.*, 210 AD2d 393.)

That branch of the defendant's motion which is for summary judgment dismissing the plaintiff's second cause of action, which is for rescission, is denied. "To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury ***." (*Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 70.) The elements of a cause of action or defense alleging fraud in the

inducement are representation of a material existing fact, falsity, scienter, reliance, and injury. (*See*, *Urstadt Biddle Properties, Inc. v Excelsior Realty Corp.*, 65 AD3d 1135; *Chopp v Welbourne & Purdy Agency, Inc.*, 135 AD2d 958.) Where there has been fraud in the inducement of a contract, rescission can be a proper remedy. (*See*, CPLR 3002[e]; *Sabo v Delman*, 3 NY2d 155; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273; *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, *supra*.) In the case at bar, the general disclaimer clause in the contract relied upon by the defendant does not preclude a cause of action based on fraud in the inducement. (*See*, *George v Lumbrazo*, 184 AD2d 1050; *Chopp v Welbourne & Purdy Agency, Inc.*, *supra*.)

That branch of the defendant's motion which is for summary judgment dismissing the plaintiff's third cause of action, which seeks to recover lost profits, is denied. Although the contract between the parties contains a clause releasing the defendant from "down time and lost production/sales," fraud in the inducement renders the entire contract void ab initio and unenforceable by the culpable party. (*See*, *Matter of Liquidation of Union Indem. Ins. Co. of New York*, 89 NY2d 94; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, *supra*.) The plaintiff may seek lost profits as an element of damages flowing from the defendant's alleged fraud. Where there is fraud in the inducement, the plaintiff may seek rescission and "damages to which he is entitled because of such fraud or misrepresentation." (*See*, *Gulf Ins. Co. v Transatlantic Reinsurance Co.*, 13 AD3d 278.)

That branch of the defendant's motion which is for summary judgment dismissing the plaintiff's fourth cause of action, which is for breach of the sales contract, is denied. UCC 2-606, "What Constitutes Acceptance of Goods," provides in relevant part: "(1) Acceptance of goods occurs when the buyer *** (b) fails to make an effective rejection ***." UCC 2-602, "Manner and Effect of Rightful Rejection," provides in relevant part: "(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." In the case at bar, the defendant alleges that the plaintiff failed to effectively reject the press delivered to it as non-conforming with the parties' contract, but the defendant did not demonstrate that, under all of the circumstances of this case, it is entitled to judgment as a matter of law. (*See*, *Barrett Paving Materials, Inc. v U.S. Fidelity and Guar. Co.*, 118 AD2d 1039.) Moreover, even if an acceptance occurred, under all the facts and circumstances of this case, the defendant seller would not be entitled to summary judgment dismissing the cause of action for breach of the sales contract. First, UCC 2-608, "Revocation of Acceptance in Whole or in Part," provides in relevant part: "(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured ***." (*See*, *Hooper Handling, Inc. v Jonmark Corp.*, 267 AD2d 1075.) In the case at bar, there is an issue of fact pertaining to whether the plaintiff buyer may revoke its acceptance of the printing press pursuant to UCC 2-608(1)(a),

if it accepted the machine at all. Second, "[w]hile the buyer may no longer reject goods after acceptance occurs, all other Code remedies for breach and non-conformity are available." (4A NY Prac, Com. Litig. in New York State Courts § 65:21 [2d ed]; UCC 2-607[2]; *see*, *Cliffstar Corp. v Elmar Industries, Inc.*, 254 AD2d 723.)

That branch of the motion which is for summary judgment dismissing the fifth cause of action is denied. The fifth cause of action alleges that the defendant seller breached the sales contract by failing to deliver a transformer and other accessories to the printing press. The defendant contends that the alleged oral promise to supply a transformer having a value in excess of $500 required a writing to satisfy UCC 2-201, the statute of frauds applicable to sales contracts. UCC 2-209, "Modification, Rescission and Waiver," provides in relevant part: "(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions." (*See*, *S & S Textiles Intl. v Steve Weave, Inc.*, 2002 WL 1837999; 93 NY Jur 2d, Sales § 29) "[W]here an original agreement comes within provisions of the statute of frauds requiring certain agreements to be in writing, the statute of frauds renders invalid and ineffectual a subsequent oral agreement changing the terms of the written contract, no matter how slight the attempted variation or by whom it was made, even if the written contract does not contain an express prohibition against oral modifications. Because an oral modification is invalid, it cannot form the basis of an action." (61 NY Jur 2d, Frauds, Statute of § 141; *see*, *Lincolnshire Management, Inc. v Les Gantiers Holdings B.V.*, 303 AD2d 180; *Satra Ltd. v*

Coca-Cola Co., 247 AD2d 248.) In the case at bar, the plaintiff produced an e-mail from the defendant which amounts to a "writing" sufficient to satisfy UCC 2-201. (*See*, *Bazak Intl. Corp. v Tarrant Apparel Group*, 378 F Supp 2d 377 [applying New York law].) Although the e-mail is not detailed, the Official Comment to UCC 2-201 states: "1. The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction." (*See*, *Iandoli v Asiatic Petroleum Corp.*, 57 AD2d 815; *Apex Oil Co. v Vanguard Oil & Service Co. Inc.*, 76 F2d 417 [applying New York law].)

That branch of the defendant's motion which is for summary judgment on its counterclaims is denied. (*See*, *Alvarez v Prospect Hospital*, 68 NY2d 320.) There are issues of fact pertaining to, inter alia, whether the printing press that the defendant sold to the plaintiff conformed to the contract. (*See*, *Hooper Handling, Inc. v Jonmark Corp.*, 267 AD2d 1075; *B/R Sales Co., Inc. v Krantor Corp.*, 226 AD2d 328; *Flick Lumber Co., Inc. v Breton Industries, Inc.*, 223 AD2d 779.)

Short form order signed herewith.

J.S.C.