

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA

SHAHEEN CYCLE SALES AND SERVICE, INC. : NO. 08-00984
: :
: :
v. : :
: CIVIL ACTION - LAW
NASHVILLE POWERSPORT AUCTION, LLC :
RODNEY M. SETTLES, LEON McGREGOR, :
STEPHANIE FOWLER and BRETT APPLETON :

OPINION

This matter comes before the Court by way of Defendant's Preliminary Objections to Plaintiff's Amended Complaint. On February 29, 2008, Plaintiff filed its initial Complaint in this matter. The Complaint alleges Breach of Contract/Implied Covenant of Good Faith and Fair Dealings, Fraudulent Misrepresentation and Breach of Oral and Written Contract including a claim for fees and costs.

On or about April 18, 2008, Defense counsel filed an appearance for Nashville Powersport Auction, LLC. On April 29, 2008, Defendant's, through their attorney, filed Preliminary Objections on behalf of all Defendants. A brief was filed in support thereof on July 3, 2008. Plaintiff thereafter filed an Amended Complaint on or about July 24, 2008. Preliminary Objections were again filed on or about August 18, 2008 and a Brief filed simultaneously therewith. Oral argument on Defendant's Preliminary Objections to Plaintiff's Amended Complaint was held on October 28, 2008.

DISCUSSION

Defendants first argue that this Court lacks personal jurisdiction over the Defendants.

The Defendants all reside in the State of Tennessee and their principle places of business are also located in Tennessee. The Supreme Court of the United States has provided a framework for the lower courts to determine personal jurisdiction. The defendant must have purposely availed itself of the privilege of acting within the forum state thus invoking the benefits and protections of its laws. Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228 (1958). “Certain minimum contacts” must exist between the non-resident defendant and the forum “such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945).

“Minimum contacts” revolve around the relationship between the defendant, the forum and the litigation. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). Specifically, a court should look at whether the Defendant’s contacts were instrumental in either the formation of the contract (when speaking of a breach of contract matter) or its breach. General Electric v. Deutz AG., 270 F.3d 144, 150 (3rd Cir. 2001). In determining personal jurisdiction the Court must accept as true the allegations of the complaint and Plaintiff is entitled to every favorable inference which can be drawn from the pleadings, affidavits and exhibits. Melo-Sonics Corp. v. Cropp, 342 F.2d 856, 858-859 (3d Cir. 1965).

The Plaintiff alleges that the Defendant, Nashville Powersport Auction (hereinafter “NPA”), sent an informational brochure to Plaintiff via postal mail from the State of Tennessee into the State of Pennsylvania. Defendant sent out a large number of these mailings into Pennsylvania seeking to procure business and establish relationships with businesses in Pennsylvania.

Plaintiff further alleges that Defendant, Rodney M. Settles, owner and auctioneer of NPA, assured Plaintiff that his merchandise would be auctioned for comparable or higher retail

value typical of that type of merchandise.

Plaintiff further alleges that Defendant, Leon McGregor, sales manager for NPA, had communications with Plaintiff, via fax and telephone on November 19, 2007. The topic of said conversation was that Defendant McGregor would sell nine motorcycles belonging to Plaintiff at NPA. Defendant McGregor assured Plaintiff that the motorcycles would be auctioned for comparable or higher retail value typical of that merchandise. Defendant McGregor affirmed that the auction was highly successful in bringing large amounts of money to sellers. Defendant McGregor further instructed Plaintiff to contact Defendant Appleton as a reference. Defendant McGregor then told Plaintiff that if he felt the numbers requested for the motorcycles was too high he would not accept them at his auction. After receiving the list of motorcycles, Defendant McGregor told Plaintiff he would receive well above the stated monetary figures suggested by Plaintiff. All of these assertions occurred via many phone conversations between Plaintiff and Defendant McGregor.

Plaintiff alleged that Defendant, Stephanie Fowler, sales representative for NPA, made follow up phone calls to Plaintiff regarding the informational brochure. Defendant Fowler further assured Plaintiff that his merchandise would be auctioned for comparable or higher retail value typical of that type of merchandise. Ms. Fowler affirmed that merchandise at the auction went for high prices and stated that “it was the only retail auction in the country of its kind” and “why go anywhere else.” Defendant Fowler told Plaintiff to refer to Defendant, NPA’s website. Plaintiff and Defendant Fowler had many phone conversations.

Plaintiff further alleged that Defendant, Brett Appleton, owner of Appleton Harley Davidson, assured Plaintiff that his merchandise would be auctioned for comparable or higher retail value typical of that type of merchandise. Mr. Appleton told Plaintiff that he couldn’t

afford to purchase motorcycles at the auction. The Plaintiff and Defendant Appleton also had many phone conversations.

When all the facts are taken in conjunction, it is clear to this Court that NPA is subject to the jurisdiction of the Courts of the Commonwealth of Pennsylvania. As the Court mentioned above, NPA reached out to the Commonwealth with a number of advertisements. Its agents made follow-up phone calls to businesses in the state of Pennsylvania, its agents negotiated a contract with the Plaintiff via phone calls and fax transmissions into Pennsylvania and its agents allegedly made certain assertions and promises through telephone and fax transmissions that Plaintiff claims formed the basis of the contract.

The Court further finds that named Defendant's Rodney M. Settles, Leon McGregor and Stephanie Fowler were agents of Defendant NPA, that their individual acts as agents of NPA contributed to this Court's finding of personal jurisdiction over Defendant NPA and that they have not established, in an individual capacity, the minimum contacts with the Commonwealth of Pennsylvania necessary to subject them to suit here. As Plaintiff cites in his brief, "Specifically a court should look at whether the Defendant's contacts were instrumental in either the formation of the contract (when speaking of a breach of contract matter) or its breach." 270 F.3d at 150. The Defendant's alleged actions were all for the benefit of NPA. While each of the above named Defendant's actions were allegedly "instrumental" in the formation of the contract, the contract was executed between Plaintiff and Defendant, NPA and was not binding on any other Defendant.

This Court finds that Defendant, Brett Appleton, did not establish the minimum contacts with this forum necessary to subject him to suit here. Plaintiff fails to state how Mr. Appleton benefited from his alleged statements and phone conversations to Plaintiff. Plaintiff

has alleged no specific benefit to Defendant, Brett Appleton and Plaintiff's simple averment that Mr. Appleton made statements to "obtain the benefit of the tortious activity for himself as well" is insufficient. Mr. Appleton did not enter or attempt to enter into any sort of business relationship with the Plaintiff, nor has Plaintiff asserted that any agreement between Defendant, NPA and Defendant Appleton was made. It appears that Defendant Appleton merely provided a reference for Defendant NPA and nothing more. Therefore Mr. Appleton's actions do not satisfy the requirement that a defendant purposely avail himself of the benefits of the forum state. 357 U.S. at 253. Nor has Mr. Appleton established the minimum contacts necessary to establish jurisdiction over him by the Courts of this Commonwealth.

In short, the Court finds that it has jurisdiction over Defendant, NPA, based on the allegations of the complaint. The remaining individual Defendants did not avail themselves of the benefits of the Commonwealth. They were agents of Defendant NPA at most.

Assuming jurisdiction over Defendant NPA, Defendant argues that Pennsylvania does not recognize a cause of action for Breach of Implied Covenant of Good Faith and Fair Dealing. The Courts of this Commonwealth are in agreement that a claim for Breach of the Covenant of Good Faith is subsumed in a Breach of Contract claim. LSI Title Agency, Inc. v. Evaluation Services, Inc., 951 A.2d 384 (Pa. Super. 2008); JHE, Inc. v. SEPTA, 2002 Phila. Ct. Com. Pl. LEXIS 78 (2002). A party is generally precluded from maintaining a claim for the Breach of the Implied Duty of Good Faith and Fair Dealing separate and distinct from the underlying Breach of Contract claim. Id. Pennsylvania law would not recognize a claim for Breach of a Covenant of Good Faith and Fair Dealing as an independent cause of action separate from the Breach of Contract claim since the actions forming the basis of the Breach of Contract claim are essentially the same as the actions forming the basis of the bad faith claim.

McHale v. NuEnergy Group, 2002 U.S. Dist. LEXIS 3307 (E.D. Pa. 2002).

The case law is clear and this Court finds that there is no separate cause of action for breach of a covenant of good faith and fair dealings. The Court finds that Plaintiff's Amended Complaint Count III for breach of contract would normally include the implied breach of a covenant for good faith and fair dealing. However, the duty of good faith will not be implied in a breach of contract action where such implied duty would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid. Department of Transportation v. E-Z Parks, Inc. 153 Pa. Commw. 258, 620 A.2d 712 (Pa. Cmwlt. 1993, appeal denied, 534 Pa. 651, 627 A.2d 181 (1993); USX Corp. v. Prime Leasing, Inc., 988 F.2d 433 (3rd Cir. 1993); Allstate Transportation Co. v. Southeastern Pennsylvania Transportation Authority, --F.Supp.-- 2000 U.S. Dist. LEXIS 3831 (E.D. Pa., No. Civ. A. 97-1482, 2000).

The decision in Agrecycle v. City of Pittsburgh, 783 A.2d 863, 2001 Pa. Commw. LEXIS 649 (Pa. Cmwlt. 2001) is relevant to this discussion. In that case, the Defendant, in its bid specifications, stated that while the estimated amount of the compostable materials to be delivered would be 20,000 to 30,000 tons a year, it would not guarantee or warrant the actual quantity. The parties signed a written agreement that stated that the city made no guarantees about the quantity of materials delivered. The plaintiff filed suit, alleging Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealings. The court stated, "To impose a duty on the City to deliver the amount of compostable materials estimated in the bid specifications... would be in total disregard of the unambiguous language in the Agreement rejecting such duty and would result in defeating the intention of the parties expressed in the Agreement." The court went on to say, "The City specifically contracted to avoid such duty in

the agreement. Hence, the implied covenant of good faith and fair dealing relied on by Agrecycle is inapplicable to the facts in this matter.” Id. at 867-68. Therefore Count I must fail.

Assuming jurisdiction over Defendant NPA, Defendant next contends that Plaintiff’s claim for Fraudulent Misrepresentation was legally insufficient. Plaintiff’s amended complaint asserts in summary that Defendant engaged in deceptive practices by leading Plaintiff to believe his motorcycles would sell for more than they actually did.

For purposes of reviewing preliminary objections based upon legal insufficiency, “all well-pleaded material, factual averments and all inferences fairly deducible therefrom” are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938 (Pa. Super. 2000). When presented with preliminary objections whose end result would be the dismissal of a cause of action, a court should sustain the objections where “it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish its right to relief.” Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. 2000). A claim of Fraud or Fraudulent Misrepresentation consists of anything calculated to deceive whether by single act or combination, or by suppression of truth, or suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture. Delahanty v. First Pennsylvania Bank, NA, 464 A.2d 1243, 1251 (Pa. Super. 1983). It is also true that the “breach of a promise to do something in the future is not actionable in fraud.” Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa. Super. 1997). However, a statement of present intention made at the time of contracting, which is false when uttered may constitute a fraudulent misrepresentation of fact. Brentwater Homes, Inc. v. Weibley, 369 A.2d 1172, 1175 (Pa. 1977).

To establish a cause of action for fraudulent misrepresentation, the plaintiff must allege the following elements: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499 (1999).

Plaintiff asserts that Defendants engaged in deceptive practices that led the Plaintiff to believe his motorcycles would bring higher sales prices than Defendants were actually going to sell them for. Plaintiff further asserts that the statements of Defendants were intended to cause Plaintiff to believe he was going to receive higher monetary compensation and as a result of that belief Plaintiff was convinced to enter into an agreement with Defendants.

The Court finds that the only elements for Fraudulent Misrepresentation in question are whether Plaintiff justifiably relied on the misrepresentation and whether the resulting injury was proximately caused by the reliance. In finding whether element number (5) is satisfied, the Court must determine whether a reasonable person would have relied to their detriment on the alleged verbal assertions by Defendant. The Court finds that the Defendant's aggressive salesmanship and questionable "puffery" may have misled Plaintiff into believing that he would get a better price for his motorcycles than reality would dictate. However, there is nothing extra legal about salesmanship or puffing, no matter how misleading or fraudulent, that doesn't result in injury to one of the parties.

In the case at bar, Plaintiff was not injured by Defendant's verbal assertions. Plaintiff's only cognizable injury occurred after he entered into a written contract with Defendant. Plaintiff alleges no duress or coercion in the entering into of a contract therefore this Court

must assume Plaintiff freely entered in to the agreement. Further, “Where . . . the language of the contract is clear and unambiguous, a court is required to give effect to that language. *See Pennsylvania Manufacturers' Ass'n Insurance Co. v. Aetna Casualty & Surety Insurance Co.*, 426 Pa. 453, 233 A.2d 548 (1967). Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains. *See Standard Venetian Blind Co. v. American Empire Insurance Co.*, 503 Pa. 300, 305, 469 A.2d 563, 566 (1983) (failure to read a contract does not warrant avoidance or nullification of its provisions).

Provision (5) of Plaintiff and Defendant’s agreement states: “The property is to be sold on the following terms. Absolute no reserve.” Provision (16) of the agreement states: “Seller acknowledges that they have not relied upon any statements made by Auctioneer or Auctioneer’s Associates relating to the value or selling price of any property”. The very nature of an auction with no reserve is that seller takes the risk that a buyer who is willing to pay seller’s top price does not exist. If the Defendant could guarantee a price for Plaintiff’s bikes, there would be no need for an auction in the first place. When Plaintiff had the opportunity to read and then signed the agreement, it is presumed by the Court that the contract is the sole source of assertions upon which Plaintiff could justifiably rely. Therefore this Court concludes that as a matter of law a reasonable person could not have relied on any verbal assertions that occurred prior to signing the agreement when the terms of the agreement were in direct contradiction to the alleged oral assertions. Therefore Count II fails.

Assuming jurisdiction over Defendant NPA, Defendant next argues that Plaintiff’s claim for Breach of Contract is legally insufficient because the written contract specifically refutes any claim that Plaintiff relied on oral representations. In Plaintiff’s Amended

Complaint Count III, he asserts breach of both an oral and written contract, albeit without specificity. In Plaintiff's brief in opposition to Defendant's preliminary objections, he asserts that both the written contract and the oral contract should be integrated as one. Plaintiff asserts that the written contract is incomplete and parol evidence is required to explain and complete the agreement.

"In a written contract the intent of the parties is the writing itself and when the words are clear and unambiguous the intent is to be determined only from the express language of the agreement." Robert F. Felte, Inc. v. White, 451 Pa. 137, 143, 302 A. 2d 347, 351 (1973). It is also true, however, that "[i]n order to exclude parol evidence the writing must be a complete contract, importing a full legal obligation with no uncertainty as to the terms of the agreement. . . . If the writing does not fully state the entire agreement among the parties, the parol evidence rule has no application. . . ." Rosenfeld v. Rosenfeld, 390 Pa. 39, 49, 133 A. 2d 829, 834 (1957). "[P]arol evidence is admissible to explain and supplement a written agreement where such evidence *clearly* shows that the writing in question was not intended to and did not properly state the entire agreement between the parties." (Emphasis in original.) Dunn v. Orloff, 420 Pa. 492, 496, 218 A. 2d 314, 316 (1966). See Coal Operators Casualty Co. v. Charles T. Easterby & Co., Inc., 440 Pa. 218, 269 A. 2d 671 (1970). "Where a written contract admittedly does not contain the full and exact agreement of the parties, parol evidence is admissible to establish the terms of the agreement." Levy v. Leaseway System, Inc., supra, 190 Pa. Superior Ct. at 488, 154 A. 2d at 317. "Where a written contract is ambiguous or conflicting, or its meaning is doubtful or obscure, parol evidence is admissible to clarify the ambiguity and to resolve the doubts, in order to ascertain and determine the intention of the parties. . . ." Foulke v. Miller, 381 Pa. 587, 593, 112 A. 2d 124, 127 (1955).

In the case at bar, there is only one possible ambiguity in the Agreement, namely the lack of specificity regarding which motorcycles were to be auctioned off. This is not a material dispute. There is, however, no ambiguity regarding provision (16) of the agreement, which states: “Seller acknowledges that they have not relied upon any statements made by Auctioneer or Auctioneer’s Associates relating to the value or selling price of any property”. This provision is clear even to a layperson. Therefore no extrinsic evidence is needed to explain or supplement this term or the intention of the parties regarding this term. The contract is clear and unambiguous as it relates to the above mentioned term. *See Agrycycle* at 867-68. Therefore Count III must fail.

ORDER

AND NOW, this ___ day of November, 2008, Defendant's objections to personal jurisdiction are SUSTAINED as to all but Nashville Powersport Auction, LLC. Objection as to jurisdiction over Nashville Powersport Auction, LLC is OVERRULED. The remaining preliminary objections are GRANTED . Counts I through III of the Amended Complaint are DISMISSED.

By the Court,

Richard A. Gray, Judge

Cc: Matthew Zeigler, Esq.
Gary Weber, Esq