

Novas v Raimondo Motor Cars, Inc.
2011 NY Slip Op 31170(U)
April 29, 2011
Supreme Court, Queens County
Docket Number: 28135/2007
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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BEATO NOVAS	Index No.: 28135/2007
Plaintiff,	Motion Date: 02/03/2011
- against -	Motion No.: 41
RAIMONDO MOTOR CARS, INC. a/k/a	Motion Seq.: 2
SILVER STAR MOTORS, INC. and SILVER	
STAR AUTO RESOURCES, LLC,	

Defendants.

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The following papers numbered 1 to 12 were read on this motion by defendant Silver Star Auto Resources, LLC d/b/a Silver Star Motors ("Silver Star Auto") for an order pursuant to CPLR 3211 and 3212 dismissing the plaintiff's complaint against defendant, Silver Star Auto, only:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 10
Reply Affirmation.....	11 - 12

This is an action by the purchaser of an automobile against the automobile dealer from whom he purchased the automobile and the subsequent buyer of the dealership. The plaintiff, Beato Novas, purchased a 2002 Mercedes-Benz, model CL55 AMG automobile on November 26, 2001 from Raimondo Motor Cars, Inc., a/k/a Silver

Star Motors, Inc., located at 36-11 Northern Boulevard, Long Island City, New York. The purchase price was \$121,956.01. In July 2002, eight months after Novas purchased his vehicle, movant Silver Star Auto Resources, LLC purchased the dealership from defendant Raimondo Motor Cars, Inc. a/k/a Silver Star Motors, Inc., ("Raimondo").

In his complaint, filed on November 13, 2007, plaintiff seeks monetary damages from Raimondo and Silver Star Auto on the ground that Raimondo fraudulently and knowingly misrepresented that plaintiff was purchasing a brand new automobile when in fact the vehicle was not brand new. Plaintiff contends that he relied on the dealer's representations that the vehicle was new. The basis of the plaintiff's claim is that he had to replace the vehicle's tires in 2006 after 14,000 miles whereas he contends that the tires on a new vehicle should normally last at least 60,000 miles. The plaintiff alleges a second cause of action against Silver Star Auto on the ground that they are the successor in interest of defendant Raimondo and as such is liable for the torts of defendant Raimondo.

Issue was joined by the service of an answer by Silver Star Auto dated March 25, 2008. Defendant Raimondo served its answer on March 20, 2008. In August 2009, prior to the completion of discovery, Silver Star Auto moved for summary judgment dismissing the plaintiff's complaint on the ground that although they

purchased the assets of Raimondo, they were not the successor in interest to Raimondo, and as such are not liable to the plaintiff.

By order dated November 5, 2009, this Court denied the motion as premature without prejudice to renew following the completion of discovery, including examinations before trial. The EBTs were completed in June, 2010. In December, 2010, Silver Star Auto filed the instant motion for an order pursuant to CPLR 3211 and 3212 for summary judgment dismissing the complaint on the grounds that there are no issues of fact regarding the liability of Silver Star Auto.

In support of the instant motion, defendant's counsel John E. Gray, Esq., submits an affirmation in which he states that Silver Star Auto is not liable for damages to the plaintiff because they purchased the dealership in July 2002, eight months after the plaintiff purchased the vehicle from the prior dealership, Raimondo Motor Cars, Inc. a/k/a Silver Star Motors, Inc. a completely separate legal entity. Defendant submits a copy of the "Asset Purchase Agreement" dated April 8, 2002 which states that Michael Cohen was the purchaser of the assets of Silver Star Motors Inc. which included the customer lists, fixtures, new vehicle inventory, employee vehicles, parts inventory, all real property and leases, pending contracts and all other assets held by the seller. Paragraph 1.3 of the

agreement entitled, "liabilities" states as follows:

"the purchaser shall not be liable for, nor does purchaser assume any of Seller's debts, liabilities or obligations of any kind of nature, whether now existing or arising hereafter, including without limitation any liabilities, obligations, taxes imposed upon or incurred by Seller relating to the ongoing operations of Seller, the assets purchased or the transactions contemplated by this agreement, other than those expressly assumed by this agreement as specified on Schedule 1.3."

The agreement was signed by Michael Cohen as purchaser and Raymond Rivardo on behalf of Silver Star Inc., as seller. Schedule 1.3 lists various liabilities, which were service contracts which the buyer assumed as they were necessary to keep the business on going such as service agreements with Verizon-Yellow Pages, West Sanitation, Ragonese Brother Carting Corp. Pitney Bowes Credit Corporation, Magic Exterminating, etc. There were no liabilities listed which were associated with customer sales contracts.

Counsel also submits a copy of the transcript of the deposition testimony of the plaintiff, Mr. Novas and the deposition of the owner of Silver Star Auto, Michael Cohen as well as affidavits from Mr. Cohen and from Raymond Rivardo. In his deposition taken on January 21, 2010, Novas testified that he purchased the 2002 Mercedes Benz CL 55 AMG from Silver Star Motors, Inc. in November 2001 for \$126,000. The car came with a four year warranty that expired in November 2005. Novas testified that when he purchased the vehicle there were zero miles on the

odometer. He did not inspect the car when he purchased it. When asked if it was a new vehicle when he purchased it he stated, "I thought it was new. It looked new, but it wasn't." The vehicle came with Bridgestone tires. During the time the car was under warranty he took it to Sovereign Mercedes-Benz Dealership for maintenance. He stated that he was involved in two accidents with the vehicle, one in October 2003 and the other within a year or two after that. He testified that his claim that the vehicle he purchased was not new was based upon the fact that in January 2006 he had to replace the two front tires after 14,000 miles. He stated that the person who sold him the new tires at the Garcia Tire Shop in Brooklyn told him that the tires must have been used because they should last 60,000 miles. He testified that he replaced the rear tires in June 2007. When asked if the tires looked used when he first purchased the vehicle he stated, "I didn't look at the tires" nor did he inspect them up until he had to replace them in 2006.

Novas testified that he never contacted Mercedes Benz at the time he replaced the tires to tell them he believed the tires that came with the car were not new. He did go back to Silver Star on numerous occasions and told Mr. Cohen the new owner of Silver Star and the service manager, Mr. Talchov, that he believed he had been sold a used car but they only offered to sell him a new car and take the old one as a trade-in. He never

put his claim in writing and he never had an expert examine the vehicle.

Michael Cohen, the owner of Silver Star Auto was deposed on June 21, 2010. He testified that he purchased the dealership individually from Silver Star Motors, Inc. pursuant to an Asset Purchase Agreement dated April 8, 2002. He later assigned the contract to a corporation he controlled, to wit, Silver Star Auto Resources, LLC. The closing took place on July 1, 2002 and Cohen immediately commenced operations on that date. He stated that he had no prior financial interest in the seller, Silver Star Motors, Inc. He brought in a few new managers including the office manager and sales manager but retained the service manager and parts manager. Cohen stated that he had no relationship with the sellers prior to or after the sale. He stated that he purchased the assets of the dealership and some of the liabilities as set forth in Schedule 1.3. Cohen testified that those liabilities were contracts he assumed that had been entered into prior to purchasing the dealership and were necessary for the ongoing conduct of the business. He stated that he met Novas on numerous occasions at the dealership. Novas explained to Cohen that he wanted a new car to replace the car he purchased from the prior owners. Cohen told him that he could purchase a new vehicle and they would accept a trade in on his old vehicle. He complained to Cohen that the car he purchased was not new. Cohen

looked up the history of the vehicle and determined that Novas purchased a brand new vehicle. In his affidavits dated August 3, 2007, filed in conjunction with the prior motion, and in his affidavit dated April 10, 2009 filed in conjunction with this motion, Cohen states that on April 8, 2002, he entered into an Asset Purchase Agreement with Raymond Rivardo to purchase the assets but not any of the debts, liabilities, or obligations of Silver Star Motors, Inc. Cohen states that Silver Star Auto is not in any way related or affiliated, consolidated or merged with Silver Star Motors, Inc. Further, Cohen states that Silver Star Auto did not enter into any sales contracts or any agreements of any nature with the Novas. In a separate affidavit dated July 21, 2009 Cohen states that there is no continuity of ownership between his dealership and the seller. He states that the owners of Raimondo Motor Cars did not, at any time, obtain, or acquire any ownership interest in Silver Star Auto Resources LLC.

The defendant also submits the affidavit of the seller Raymond Rivardo supporting the motion for summary judgment and stating that after the sale he retired and did not open another auto dealership. He states that he has never been a shareholder or partner with the principals of Silver Star Auto Resources, LLC.

The defendant also submits a copy of the Certificate of Origin showing that the vehicle in question was new when it was

transferred to the dealership in November 2001.

In support of the motion defendant contends that the plaintiff's claim contained in the complaint that the dealership misrepresented that the vehicle was new based upon his claim that the tires had to be replaced after 14,000 miles is insufficient to support the claim of fraudulent misrepresentation. Further counsel contends that Novas' conceded that the vehicle's odometer had zero miles on it at the time of the purchase, and, in addition Novas never made a complaint to Mercedes-Benz that the vehicle was not new when he bought it. His tires were first replaced five years after he purchased the vehicle. Moreover, Cohen contends that his dealership is not liable to the plaintiff for damages because he did not sell the vehicle to the plaintiff and when he purchased the assets only. The only liabilities he assumed were the outstanding service contract listed in Schedule 1.3. In addition counsel contends that the affidavits of Cohen and Rivardo demonstrate that Silver Star Auto is a separate legal entity from Raimondo Motor Cars. Citing Schumacher v Richards Shear Co., Inc. 59 NY2d 239 [1983] which states that except under certain circumstances a corporation which purchases the assets of another corporation is not liable for its predecessor's debts and liabilities unless it expressly or impliedly assumed the predecessor's tort liability. Also see Ward v. Lithibar-Matik, Inc., 6 AD3d 424 [2d Dept. 2004]; Rivera v Anderson United Co.,

283 AD2d 563 [2d Dept. 2001]). A corporation may, however, have successor liability if, (1) the successor corporation expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction was entered into fraudulently to escape such obligations (see Jelvakov v AHL Processing Equip. Co., 3 AD3d 519 [2d Dept. 2004]; Drexler v Highlift, Inc., 277 AD2d 196 [2000]). Counsel contends that the affidavits submitted by the buyer and seller of the dealership are sufficient to demonstrate, prima facie that none of the exceptions apply herein.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the insufficiency of the opposing papers (see Sheppard-Mobley v King, 10 AD3d 70[2d Dept. 2004]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v New York, 49 NY2d 557[1980]).

This court finds that the evidence submitted by defendant

Silver Star Auto Resources, LLC including the deposition testimony and affidavits of Michael Cohen, the affidavit of the seller Raymond Rivardo, the Asset Purchase Agreement including Schedule 1.3 thereof, to demonstrate prima facie that it is entitled to summary judgment on the ground that it did not sell the vehicle in question to the plaintiff in November 2001 and that defendant is not a successor in interest to the actual seller who was Raimondo Motor Cars. Contrary to the plaintiff's contention, the evidence presented by Silver Star Auto established as a matter of law that its acquisition of the Mercedes dealership from Raimondo pursuant to the asset purchase agreement was a sale and not a merger or de facto merger.

In addition, the defendant provided prima facie evidence that the car was new when purchased by Mr. Novas. The certificate of origin together with Mr. Novas' admission that the car had zero miles on the odometer when he purchased it was sufficient to show prima facie that a new vehicle was delivered to him. The sole allegation that the plaintiff had to replace the tires after five years and 14,000 miles is insufficient to show, without any expert affidavit to support the plaintiff's contention, that the car was not new.

Counsel has also failed to raise a question of fact as to whether the dealership misrepresented that the car was new. Counsel Stephen A. Harrison, Esq. concedes in his affirmation in

opposition that the car was new in the sense that it was recently made, however counsel alleges that the car was used extensively in that it was driven 12,000-16,000 miles from the time it transferred to the dealership until it was picked up by the defendant. Thus counsel states that the issue in this case is not who had title to the car, or when, but how much it had been used at the time it was delivered to the plaintiff. However, counsel has not submitted any expert testimony with respect to the tires or the vehicle in question to raise a question of fact that the car had been driven 12-16,000 miles prior to being delivered to Novas. The allegations of counsel were speculative and unsupported by the evidence in the record. The fact that the certificate of title showed twelve miles on the odometer at the time of delivery is not sufficient to raise a question of facts as to the prior use of the vehicle.

Lastly the plaintiff has failed to raise a question of fact to demonstrate that the defendant was a successor in interest to Raimondo Motor cars. The plaintiff has failed to provide any evidence to raise a question of fact that Silver Star Auto impliedly assumed Raimondo's tort liability; that a consolidation or merger of the seller and the buyer occurred; that Silver Star was a mere continuation of Raimondo; that there was a defacto merger, or that the transaction was fraudulently entered into between the parties (see Schumacher v Richards Shear Co., 59 NY2d

239[1983]). Here there was no showing that the parties to the transaction "become owners together of what formerly belonged to each" (Van Nocker v. A.W. Chesteron, Co. (In re N.Y. City Asbestos Litig.), 15 AD3d 254 [1st Dept. 2005]; Jelvakov v. AHL Processing Equip. Co., 3 AD3d 519 [2d Dept. 2004]; Subramani v. Bruno Mach. Corp., 289 AD2d 167 [1st Dept. 2001]).

Therefore, the plaintiff, in opposition, has failed to raise a triable issue of fact to warrant the denial of the motion for summary judgment.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the motion of Silver Star Auto Resources, LLC for summary judgment is granted and the plaintiff's complaint and all cross claims and counterclaims are dismissed as against said defendant only.

Dated: April 29, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.