

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1427

CA 15-01023

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ.

STEVEN MUELLER MOTORS, INC.,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TONYA HICKEY AND FRED LAURY,
DEFENDANTS-RESPONDENTS.

COMARDO LAW FIRM, P.C., AUBURN (JUSTIN T. HUFFMAN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

FRANCIS E. MALONEY, JR., SYRACUSE, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 10, 2014. The order denied the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this lawsuit asserting causes of action for breach of contract and replevin arising from plaintiff's sale of a motor vehicle to defendants. Plaintiff moved for summary judgment seeking the relief demanded in its complaint as well as dismissal of defendants' counterclaim for fraud. Contrary to plaintiff's contention, Supreme Court properly denied the motion.

Initially, we conclude that plaintiff failed to meet its burden on that part of the motion seeking summary judgment dismissing the counterclaim for fraud. Defendants' counterclaim "allege[d] the basic facts to establish the elements" of a cause of action for fraud (*Sargiss v Magarelli*, 12 NY3d 527, 531 [internal quotation marks omitted]; see *Heckl v Walsh* [appeal No. 2], 122 AD3d 1252, 1255; see also *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178), and plaintiff's submissions on the motion failed to eliminate all triable issues of fact with respect thereto (see *Widewaters Herkimer Co., LLC v Aiello*, 28 AD3d 1107, 1108; cf. *MS Partnership v Wal-Mart Stores, Inc.*, 2 AD3d 1482, 1483). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Contrary to plaintiff's further contention, the court properly denied that part of the motion seeking the relief demanded in the complaint. Plaintiff failed to meet its burden on that part of the

motion concerning the replevin cause of action inasmuch as the evidence submitted in support of the motion failed to eliminate all "triable issues of fact . . . whether the plaintiff has a possessory right to the" vehicle at issue (*Bugarsky v Marcantonio*, 254 AD2d 384, 384; see generally *Winegrad*, 64 NY2d at 853). Furthermore, although plaintiff met its initial burden on that part of the motion concerning the breach of contract cause of action (see generally *Resetarits Const. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1455; *Polyfusion Electronics, Inc. v AirSep Corp.*, 30 AD3d 984, 985), defendants raised a triable issue of fact whether plaintiff violated Vehicle and Traffic Law § 417, which would entitle them to, inter alia, rescission of the contract of sale (see generally *Pinelli v De Paula Chevrolet*, 101 AD2d 643, 644; *Rayhn v Martin Nemer Volkswagen Corp.*, 77 AD2d 394, 396-397, appeal dismissed 53 NY2d 796).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court