

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

KEVIN SYKES,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 07-01-076
)	
JOS. C. O'NEAL & SONS)	
AUCTIONEERS AND)	
APPRAISERS)	
)	
Defendant)	
Third Party Plaintiff)	
)	
v.)	
)	
WOODROW WHALEY)	
)	
Third Party Defendant.)	

Submitted: June 10, 2009
Decided: August 11, 2009

Paul Enterline, Esquire, counsel for Plaintiff.
Bruce Rogers, Esquire, counsel for Defendant Third Party Plaintiff.
Patrick E. Vanderslice, Esquire, counsel for Third Party Defendant.

DECISION AFTER TRIAL

In this action the Court is called upon to determine whether Defendant Jos. C. O'Neal & Sons Auctioneers and Appraisers committed consumer fraud, negligent misrepresentation and/or common law fraud when it advertised and auctioned a model 4240 John Deere tractor owned by Third Party Defendant Woodrow Whaley, and purchased by Plaintiff Kevin Sykes. If Defendant Jos. C. O'Neal & Sons Auctioneers and Appraisers is liable, the Court is also called upon to determine whether indemnification from Third Party Defendant Woodrow Whaley is required. Trial was

held on June 10, 2009. For the following reasons, the Court finds for the Plaintiff and for Third Party Plaintiff Jos. C. O'Neal & Sons Auctioneers and Appraisers for partial indemnification.

BACKGROUND AND PROCEDURAL HISTORY

Third Party Defendant Woodrow Whaley (hereinafter "Whaley") contracted with Defendant Jos. C. O'Neal & Sons Auctioneers and Appraisers, Inc. (hereinafter "Auction House") to auction several items Whaley had previously used to farm his land, including a model 4240 John Deere tractor. The Auction House printed an advertisement in *Lancaster Farming* on March 4, 2006 stating that the tractor had 658 "original hours" on it and was "super clean." Upon reading the advertisement Plaintiff Kevin Sykes (hereinafter "Sykes") contacted the Auction House and consulted its website to learn more information about the tractor. Sykes spoke to Joseph O'Neal, the founder of the Auction House. After the conversation, Sykes decided to place a maximum bid between \$30,000 and \$32,500. He did not personally attend the auction but left his bid with the Auction House. Sykes was successful in his bid and won the tractor on March 13, 2006 for \$30,000. When the tractor arrived at Sykes's farm it had substantially more wear than he anticipated. After several conversations with both Joseph O'Neal and Whaley, Sykes brought this action against the Auction House on January 17, 2007 alleging consumer fraud, negligent misrepresentation and common law fraud.

FACTS

Sykes is a resident of Morrisville, New York where he has been a farmer of cash crops such as hay and corn on a 1,200 acre farm since 1996. He has farmed all his life and has exclusively used John Deere tractors to till, mow and harvest land. He became a

collector of John Deere tractors and began to purchase low hour, low production models for the purpose of using them on his farm and for his personal collection. He is particularly interested in Generation Two John Deere tractors built between 1969 and 1992, which he testified to be the most collectible generation. He currently has twenty-five tractors in his collection. In addition to buying and collecting for himself, he also assists others in buying John Deere tractors, charging a consulting fee for the service. In this trial Sykes testified as an expert witness and therefore the Court will consider his bias and objectivity.

Since 1996 Sykes has attended thousands of auctions in approximately twenty states and has bid on thousands of John Deere tractors. From these auctions, as well as research from websites such as tractorhouse.com and review of the ten monthly publications to which he is a subscriber including Lancaster Farmer, Sykes determines the value of particular models of John Deere tractors. He then uses these estimates to decide the amount to bid on tractors for himself and also to advise clients on bid amounts.

Sykes is unable to personally attend all auctions and often bids by phone or proxy. Bidding by phone involves being on the phone with an employee of the auctioning company while the auction is taking place and instructing the employee whether to continue bidding. When bidding by proxy the bidder leaves his maximum bid with the auctioning company, which will then bid up to that amount at the auction. Sykes testified he uses the proxy method 30%-40% of the time. Aside from this case, Sykes has only had difficulty with this method on one other occasion. Joseph O'Neal also testified that phone and proxy bidding are common methods of bidding and has never had any problems with either method.

Sykes testified that he first saw the model 4240 John Deere tractor at issue in an advertisement in Lancaster Farming.¹ The advertisement described the tractor as “super clean” and with “only 658 original hours” on it. Sykes explained that tractors have an engine clock that reaches 9,999 hours. When the engine reaches 10,000 hours, the clock “rolls over” and begins at zero again. The first 9,999 hours are called “original hours.” Sykes explained that 10,000 hours on a tractor is the equivalent to 200,000 miles on a car. Therefore, 658 hours on tractor is approximately 12,000 miles on a car. Sykes described that a model 4240 with so few hours was a “gem” and extremely rare with only one to three like it in the world.

After seeing the advertisement Sykes contacted the Auction House by telephone to learn more information about the tractor and spoke to Joseph O’Neal. Joseph O’Neal has been in the auctioning business since 1971 and founded the Auction House in 2002. He was raised on a farm and was a farmer himself until 1999. While he was a farmer he used John Deere tractors and he testified that he therefore, “knows what to look for” on a tractor. The Auction House often contracts to sell farm equipment as part of its business and O’Neal holds himself out as having solid knowledge of this commodity through his personal experience as a farmer and through his auctioneering business.

When Sykes contacted him, Joseph O’Neal described the tractor in more detail than was stated in the advertisement explaining that it was in excellent condition and came from a small farm where it was well maintained. He expressed no concerns about the tractor to Sykes. Sykes testified that his conversation with Joseph O’Neal led him to believe that the previous owner, Whaley, had purchased the tractor new. Joseph O’Neal

¹ Sykes’s Exhibit A

conversely testifies that he informed Sykes that Whaley purchased the tractor from a hay farmer in Maryland and has no recollection of claiming Whaley was the original owner. Sykes and Joseph O'Neal also discussed the "original" hours of the tractor. Sykes testified Joseph O'Neal "responded in a positive manner," when asked if the hours on the tractor were original and Joseph O'Neal asserts that he told Sykes that the clock "looked like it had not been tampered with."

During this conversation Joseph O'Neal also stated the tractor was a 1982 model. Sykes testified that 1982 was the final year model 4240's were made and therefore made the tractor even more collectible. The tractor being a 1982 model was a factor in Sykes's decision to bid and the maximum amount he would submit. Sykes testified that after talking to Joseph O'Neal "everything sounded right" about the tractor and nothing he had said raised any "red flags."

Joseph O'Neal advised Sykes to research the tractor more fully on its website and also invited him to inspect the tractor in person. Sykes visited the website where he saw two pictures of the tractor and a repeated advertisement that the tractor had 658 hours and was "super clean,"² but did not personally visit the Auction House and inspect it.

After speaking to Joseph O'Neal and examining the tractor on the Auction House's website, Sykes decided to bid between \$30,000 and \$32,500 by proxy. On March 13, 2006 Sykes won the tractor for \$30,000. When the tractor arrived at Sykes's farm in New York, along with another tractor he had won, Sykes testified that he immediately noticed that the 4240 at issue was "rough."

² Defendant's Exhibit 2.

Upon inspecting the tractor he found it to be worn and heavily used. Pictures of the tractor taken by the Sykes's brother a year after its arrival showed extreme wear on several parts of the tractor which Sykes testified would not be possible on a 4240 with 658 original hours on it.³ Sykes testified that the pictures showed wear and not damage and were a fair representation of the tractor when it arrived at his farm. In addition to the noticeable wear on the tractor, Sykes learned that it was not a 1982 by way of entering the serial number into a database.

After viewing the condition of the tractor Sykes contacted Joseph O'Neal to discuss the perceived disparities between the advertisements and the tractor itself. Sykes told Joseph O'Neal on the telephone that he believed the wrong tractor was delivered. Joseph O'Neal explained that it was the 4240 he won at auction, but that he had not yet paid Whaley and would have a discussion with him about the tractor. After several telephone conversations, Sykes was under the impression that there was going to be an adjustment in the price, but no figure had been discussed. After these initial talks Sykes found it increasingly difficult to speak with Joseph O'Neal and left several messages. The price change never occurred and further discussions did not lead to an amicable resolution. Sykes also contacted Whaley several times in an attempt to settle the matter outside of court, but Whaley refused testifying that he "contracted with Joe O'Neal; I started with him and I am going to finish with him." These discussions took place in the span of several months, during which time Sykes used the tractor on his farm, adding approximately 100 hours to the tractor's clock. After realizing he would not be

³ Examples of wear include: a leaking hydraulic pump and radiator, which is a sign of wear, not abuse or neglect; exposed primer on the floor of the left access to the cab where operators enter and exit the tractor, indicating the tractor had been used thousands of times; a worn pivot pin; and a severely worn arm rest. (Sykes's Exhibit H)

reimbursed, Sykes made cosmetic repairs on the tractor and resold it for \$17,000 in August 2007.⁴

DISCUSSION

Sykes's complaint sets forth three counts; consumer fraud, negligent misrepresentation and common law fraud. Each of these causes of action is founded upon the same factual allegation that the Auction House negligently breached its duties of care to Sykes by negligently misrepresenting the engine hours of the tractor and its model year. Joseph O'Neal denies any negligence and that the information conveyed to Sykes was based on his observations and representations made by Whaley.

Failure to Investigate the Engine Hours

Sykes alleges that the 658 hours on the tractor were not original hours. Testimony regarding Joseph O'Neal's knowledge about the hours is varied. Joseph O'Neal testified that he and his son examined the tractor and other items set for auction in February 2006. He entered the tractor and took notice of the hours and asked his son Andrew O'Neal to verify that he was reading the numbers correctly. He then asked Whaley whether the hours were correct and worded his advertisement based on his observations and Whaley's statements. Joseph O'Neal testified that 658 hours on an older model John Deere tractor was low, but not uncommon. Andrew O'Neal's testimony differs as he explained that that he entered the tractor before his father. He testified that the tractor had approximately 700 hours and it did not seem that there was any tampering with the engine clock. Andrew O'Neal agreed that the hours were low and that it is

⁴ Sykes's Exhibit I.

standard practice to note the number of hours on a tractor. He continued by explaining that he overheard his father and Whaley discuss the hours while he inspected the tractor. He testified that he heard Whaley state that he “believed” the hours to be original hours. Whaley testified that he bought the tractor with 450 hours in 2002 from a hay farmer in Maryland for \$18,000. He owned the tractor for four years, during which time he added 250 hours.

Testimony regarding Whaley’s knowledge and representations about the hours also vary. Joseph O’Neal testified during cross-examination that Whaley said that when he bought the tractor he was told it was an “original tractor.” Sykes’s counsel then asked for clarification if that meant that “those hours were original hours” and Joseph O’Neal responded, “yes.” Andrew O’Neal testified that he heard Whaley tell his father that he “believed” them to be original hours. Whaley throughout his testimony said that he did not know whether they were original hours stating, “I do not know, I did not ask. I took the reading as I saw it,” when he purchased the tractor. When asked on cross-examination whether he believed the hours to be original he replied, “I didn’t think it was so because the warranty had 450 hours, but I didn’t know that.” Whaley’s statements in court directly contradict his statements in a sworn affidavit dated April 26, 2006 and reaffirmed in court.⁵ In the affidavit he states that he “represented to the auction house that the tractor had 658 original hours of operation” and that the Maryland farmer he bought the tractor from represented to him that the 400 hours, were original hours. The affidavit continues by Whaley stating that he “truly believed the actual hours on the tractor to be 658” when he authorized Joseph O’Neal to sell it at auction.

⁵ Defendant’s Exhibit 3

This Court gives more credence to Whaley's in-court testimony that he never asked whether the hours were original when he bought the tractor, but the Court cannot ignore his contradictory statements given under oath and in the 2006 affidavit. The Court finds that Whaley never represented with certainty to Joseph O'Neal that the hours were original.

Whaley's uncertainty should have put Joseph O'Neal on notice that the hours may not have been original. He therefore had a duty to investigate the matter further so that he might ascertain the facts before placing the advertisement Sykes relied upon. *Brandywine Volkswagen* 312 A.2d 632, 634 (Del. 1973).

Failure to Correct the Year

Sykes alleges that Joseph O'Neal represented to him that the tractor was a 1982 when he called after seeing the advertisement for the tractor. Joseph O'Neal testified that he told Sykes that the tractor "could be" a 1982. There was no testimony stating that Whaley represented to Joseph O'Neal the year of the tractor. According to Joseph O'Neal several prospective bidders had questions about the tractor so he personally obtained the serial number off the tractor four or five days before the auction. He learned that the tractor was not a 1982, but an earlier year. He did not contact Sykes to correct his earlier statement. Joseph O'Neal testified that he gave the serial number to Sykes before the auction and he could therefore ascertain the year himself. Sykes contends that he did not receive the serial number until the tractor was delivered several weeks after the auction. The Court does not find Joseph O'Neal's testimony convincing and instead finds that Sykes did not have the serial number until after he received the tractor. Sykes

testified that he did not ask for the serial number because Joseph O’Neal was an excellent salesperson and Sykes was comfortable with his representations.

The Superior Court in *Lock v. Schreppler*, 426 A.2d 856, 862. (Del. Super 1981) ruled that there is generally no duty to speak, but if a person “undertakes to speak, he then has a duty to make a full and fair disclosure as to the matters to which he assumes to speak.” Here, Joseph O’Neal took it upon himself to tell Sykes the tractor was a 1982. This statement created a duty for Joseph O’Neal to inform Sykes if he learned the tractor was not a 1982, which he did not do.

Consumer Fraud

Sykes alleges the Auction House committed consumer fraud by misrepresenting the tractor’s condition. Consumer fraud is governed by the Consumer Fraud Act in 6 Del. C. § 2513. The pertinent part of the statute states,

“The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.” 6 Del. C., §2513(a).

The Supreme Court of Delaware ruled in *Brandywine Volkswagen Ltd. v. State*, 312 A.2d 632, 634 (Del. 1973) that “an obvious objective of the law is to raise the standards which the public has a right to expect from all business enterprises,” and reiterated the General Assembly’s intent that the statute be liberally construed.

Brandywine Volkswagen Ltd. v. State, 306 A.2d 24, 27 (Del. Super 1973) first set the standard for resolving a cause of action under the Consumer Fraud Act stating, “the

common thread which runs through... actions under 6 Del. C. § 2513 is the making of a false or misleading statement or the concealment, suppression or omission of information, thereby creating a condition of falseness.” *Brandywine Volkswagen Ltd*, 306 A.2d. 24, 27. Put simply, “the person making the false statement must know that it is untrue or must make it with reckless indifference to the truth of the matters and without knowledge of their truth.” *Ayers v. Quillen*, 2004 WL 1043728, 6 (Del. Super 2004). The mere fact that the defendant may not have intended to make an untrue statement is not a valid defense. *Id.*

The statute further requires that the person making the statement intend for others to rely on the promise, false statement or misrepresentation. However, the consumer claiming consumer fraud need not prove personal reliance upon the false statement, only that the defendant made the statement with the intent that someone would rely upon it. *Ayers*, 2004 WL 1043728 at 7 citing *S&R Associates, Inc. v. Shel Oil Co.*, 725 A.2d 431, 440 (Del. Super. 1998). The misleading statement must be made in connection with a sale, lease or advertisement. Post sale representations do not constitute consumer fraud under the Act. *Ayers*, 2004 WL 1043728 at 7 citing *Norman Gershman’s Things to Wear, Inc. v. Mercedes-Benz of North America, Inc.*, 558 A.2d 1066, 1074 (Del. Super. 1989). In the present case, it is undisputed that the alleged misleading statements were made in connection of the sale of the tractor.

Sykes relied on Joseph O’Neal’s representation that the tractor was a 1982. By not informing Sykes it was not a 1982 when he learned that fact, Joseph O’Neal effectively made a misrepresentation to Sykes and created a condition of falseness. Joseph O’Neal, through his conversation with Sykes, knew that Sykes was a John Deere

tractor collector. He also knew through his experience with tractors and as an auctioneer, that the year of a tractor is an important attribute to collectors and that 1982 was a particularly desirable year. Concealing the actual year after learning the tractor was not a 1982 makes the Auction House liable for consumer fraud.

In addition to misrepresenting the year of the tractor, the Auction House did not know definitively whether the hours on the tractor were original but advertised them as such not only in *Lancaster Farming*, but on its website. Joseph O'Neal admits he is knowledgeable about John Deere tractors due to his upbringing on a farm. He has also been auctioning since 1971 and understands the business. He had the option of not putting "original" in his advertisements, but knowing that much like miles on a car, the lower the hours, the more valuable the tractor, he advertised they were original. This advertisement constitutes a false or misleading statement as required by *Brandywine Volkswagon Ltd*, 306 A.2d. 24, 27. His reliance on Whaley's statements that it was "believed" the hours were original was reckless when paired with the overall condition of the tractor. He advertised the tractor as having low original hours with the intent for others to rely upon it and therefore bid on the tractor. Sykes testified that he would not have bid on the tractor had he known the hours were not original, and admitted that had he personally seen the tractor prior the auction he would observed its extensive wear and would not have bid on it.

The Auction House argues that Sykes was invited to inspect the tractor to decide whether to bid and by not doing so Sykes was not a duly diligent consumer. Sykes did not inspect the tractor but instead relied on Joseph O'Neal's representations as both an experienced auctioneer and a person familiar with tractors. Both Defendants are correct

in stating that the purpose of the Consumer Fraud Act is not to protect unwise purchases or provide footing in court for consumers with buyers' remorse. However, that is not the case here. The Auction House created a condition of falseness by advertising the hours as original when it did not know definitively the accuracy of that statement, and also representing to Sykes that the tractor was a 1982 and not informing Sykes when it learned otherwise. The Consumer Fraud Act of 6 Del. C. § 2513 was created to protect consumers from such misrepresentations and omissions.

By falsely representing the hours and year of the tractor, Jos. C. O'Neal & Sons Auctioneers and Appraisers is liable for consumer fraud. The misrepresentations regarding the hours and year of the tractor fulfill the requirements of the Consumer Fraud Act of 6 Del. C. § 2513, and the Court therefore finds no need to discuss the other claims of Consumer Fraud Sykes alleges, such as whether the tractor was "super clean," or the extent of the wear.

The Court is awarding \$13,000 in damages to the Sykes, which represents the difference between the amount Sykes paid for the tractor (\$30,000) and the amount for which he sold it (\$17,000). Both the year of the tractor and its number of hours were misrepresented to Sykes and both were equally important to Sykes in making his bidding decisions on the tractor. Whaley never stated the year of the tractor to Joseph O'Neal or Sykes. He therefore has no legal obligation to indemnify the Auction House for the damages owed to Sykes for this misrepresentation. Testimony regarding Whaley's knowledge of the hours on the tractor is both varied and contradictory. In Court Whaley reaffirmed his Affidavit stating that he believed the hours to be original, directly after testifying to the contrary. As previously stated, the Court gives more credence to

Whaley's in-court testimony but his contradictory statements in the affidavit under oath make him liable to some degree for the misrepresented tractor hours. The Auction House is also liable for the misrepresented hours for reasons explained above. Whaley will indemnify the Auction House \$3,250. Additionally, all three parties requested attorney's fees. No evidence or argument was submitted at trial supporting any party's right to such fees. The Court deems the fee request abandoned.

CONCLUSION

For the foregoing reasons, judgment is entered in favor of the Plaintiff Kevin Sykes against Defendant Jos. C. O'Neal & Sons Auctioneers and Appraisers for violation of the Consumer Fraud Act of 6 Del. C. § 2513. Sykes is hereby granted damages in the amount of \$13,000 plus costs and post-judgment interest. Jos. C. O'Neal & Sons Auctioneers and Appraisers will be indemnified by Woodrow Whaley in the amount of \$3,250 and any post-judgment interest accrued on that amount, plus costs.

IT IS SO ORDERED, this _____ day of August, 2009.

Judge Rosemary Betts Beauregard