SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

BANK OF AMERICA, N.A.,

Plaintiff,

- against -

HEMPSTEAD AUTO CO., INC. d/b/a
JAGUAR OF GREAT NECK/ROSLYN,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 5454/11
Motion Seq. No.: 01
Motion Date: 03/22/12

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavits and Exhibits	1
Affidavit in Opposition and Exhibits and Memorandum of Law	2
Reply Affirmation and Exhibits	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order dismissing the first through ninth affirmative defenses of defendant and granting summary judgment in its favor against defendant in the sum of $94,188.99 and other expenses associated with the action including attorney fees, costs, and disbursements. Defendant opposes the motion.

The instant motion arises from an underlying breach of contract action commenced by plaintiff by the filing of a Summons and Complaint on or about April 11, 2011. *See* Plaintiff's Affirmation in Support Exhibit G. Defendant, in its Answer, asserted the following affirmative

defenses: that the Complaint fails to state a cause of action; that the Complaint fails to state a claim for breach of the retail agreement as against defendant; that defendant has acted in good faith and in accordance with reasonable commercial standards applicable to its business; that the Complaint is barred, in whole or in part, under principles of waiver, laches and/or estoppel; that the allegations in the Complaint concerning specific warranties and representations made by defendant in the retail agreement that were breached were not sufficiently particular to give notice of the alleged occurrences to be proven or the material elements of the allegations in the Complaint; that plaintiff has failed to reasonably mitigate or seek to mitigate its damages; that any damages or injuries sustained by plaintiff were, in whole or in part, the result of the conduct, actions or inactions of non-parties Clean Corp., NY Co. and/or Randy A. Spencer, and not defendant; and that any damages or injuries sustained by plaintiff were, in whole or in part, the result of the carelessness, recklessness, and negligence of plaintiff, Clean Corp. NY Co. and Randy A. Spencer and not of defendant. *See* Plaintiff's Affirmation in Support Exhibit J.

In February 2009, plaintiff and defendant entered into an agreement where plaintiff would purchase retail installment contracts regarding the purchases of defendant's motor vehicles. The agreement at issue contained certain provisions which are set forth herein in relevant part:

> "4. Representation and Warranties.
> ...
> (5) All information by the Dealer concerning the Buyer *is true and accurate and the credit application completed by the Buyer is true, complete and accurate to the best of Dealer's knowledge*;
> ...
> (7) The Contract is valid and enforceable according to its terms,....*evidences a bonafide sale of the Unit, and Buyer did not induce Dealer to enter into the Contract by any fraudulent scheme...*;

(8) The Unit covered by the Contract has been delivered to the Buyer named in the Contract and all necessary steps have been taken to ensure that Bank will have a properly perfected security interest in such Unit....
(14) *The Buyer is who he, she or it purports to be*;
(15)The Buyer has not fraudulently used the identity of another person to purchase the Unit...
...
7. Repurchase of Contracts. Bank may provide Dealer written notice to repurchase any assigned Contract with respect to any assigned Contract if
(1) *Bank reasonably determines that there is a breach of any of Dealer's representations of warranties with respect to the Contract, the Unit or the Contract Agreement*...(emphasis added)" *See* Plaintiff's Affirmation in Support Exhibit H.

In July 2009, defendant entered into a retail installment contract with non-parties Clean Corp., NY Co. and Randy A. Spencer, regarding the purchase and finance of a new 2010 Jaguar XFR. *See* Plaintiff's Affirmation in Support Exhibit A. Pursuant to said agreement, defendant sold and assigned the contract to plaintiff. The amount financed was $105,937.82 and the vehicle was registered and titled under the name of non-party Clean Corp., NY Co. Plaintiff was listed on the title as a lienholder.

As non-parties Clean Corp., NY Co. and Randy A. Spencer defaulted in making the monthly installment payments required under the contract, plaintiff attempted to exercise its rights regarding its secured interest in and its lien on the vehicle.

During such attempt, plaintiff uncovered that the parties engaged in fraudulent activity that resulted in depriving plaintiff of the collateral securing the contract. Specifically, non-party Clean Corp., NY Co. allegedly engaged in identity theft in that it alleged that non-party Randy A. Spencer was the principal and CEO of its business entity. The application also reported that non-party Randy A. Spencer resided in Jericho, New York. Upon plaintiff's investigation, it discovered that the actual Randy A. Spencer was not affiliated with non-party Clean Corp., NY

Co., that he did not live in Jericho, New York but rather in Westhampton, New York and that, after a long illness, Randy A. Spencer died on September 8, 2009.

The subject vehicle was eventually located at a dealer in Florida; however, plaintiff's name was no longer on the title since non-party Clean Corp., NY Co. allegedly had it removed by submitting fraudulent documentation to the New York State Department of Motor Vehicles. As of August 2010, plaintiff contends that the sum of $96,788.76 was due and owing to it, with interest continuing to accrue. Plaintiff issued its written demand to repurchase to defendant, who, in response, refused to do so.

Plaintiff argues that the information submitted by defendant was not true and accurate, that non-party Randy A. Spencer did not execute the contract, the subject vehicle was not delivered to non-party Randy A. Spencer and non-party Randy A. Spencer's identity was fraudulently used to facilitate the purchase. Additionally, defendant failed to verify non-party Randy A. Spencer's identity and did it record the registration number of the vehicle. As such, the Clean Corp., NY Co. and Randy A. Spencer transaction was not a bonafide sale and plaintiff is entitled to the remedy of repurchase by defendant.

In addition to the pleadings, plaintiff submits, as supporting evidence, a copy of the Retail Dealer Agreement between itself and defendant, copies of New York State Department of Motor Vehicles documentation regarding the subject motor vehicle, an Affidavit of Jean Spencer, non-party Randy A. Spencer's widow, attesting that non-party Randy A. Spencer's signature was fraudulent, that he had been ill for five years and that he did not own the subject vehicle, a letter dated February 14, 2011 from plaintiff demanding repurchase of the Clean Corp., NY Co./Randy A. Spencer contract, the pleadings and Orders from various Supreme Courts in New York State, with plaintiff as the named plaintiff in actions seeking similar relief

as in the instant case and evincing similar facts and circumstances, including an Order of the Queens Supreme Court by Hon. Orin R. Ortiz, in the matter captioned *Bank of America, N.A., v. Hillside Cycles, Inc. d/b/a/ Hillside Honda*, Index No. 27617/09, and a copy of the decision of the Appellate Division of the Second Department, modifying that Court's Order, an Order of the Nassau County Supreme Court, issued by Hon. Anthony Parga, in the matter captioned *Bank of America, N.A. v. J. P. T. Automotive, Inc., d/b/a Victory Toyota of Five Towns,* Index No. 13104/08, and an Order of the Supreme Court of the County of Westchester, issued by Hon. Mary M. Smith in the matter captioned *Bank of America v. Biltmore Motors, Inc.*, Index No. 15751/08, a Carfax report indicating ownership of the vehicle and attorney billing records.

In its Reply Affirmation, plaintiff submits, as further supporting evidence, a copy of a Social Security Death Index indicating the last four digits of non-party Randy A. Spencer's Social Security number and his date of death as September 8, 2009, a registration record expansion record indicating that the subject car was registered to non-party Randy A. Spencer, a copy of non-party Randy A. Spencer's drivers license, a payment history summary indicating that the installment payments were made by Paymode and the New York State Department of State web page entries indicating that North Shore Motor Group, Inc. accepts service at the same address where Clean Corp., NY Co. listed its address.

In opposition, defendant argues that the evidence in the record is insufficient to indicate identity theft in that plaintiff kept a running log of direct communication between it and the borrowers/purchasers regarding late payments, that plaintiff and its witness, Ms. Spencer, failed to provide documentation indicating Randy A. Spencer's actual signature and/or photo identification and that there is motivation for Ms. Spencer to allege that her deceased husband was the victim of identity theft.

It is well settled that "[o]n a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *David v. Bryon*, 56 A.D.3d 413, 867 N.Y.S.2d 136 (2d Dept. 2008); *Barrera v. MTA Long Island Bus*, 52 A.D.3d 446, 859 N.Y.S.2d 483 (2d Dept. 2008); *Breland v. Karnak Corp.*, 50 A.D.3d 613, 854 N.Y.S.2d 765 (2d Dept. 2008).

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 Hospital, supra* at 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference

The elements of a breach of contract are: the existence of a contract, plaintiff's performance under the contract, defendants' breach of that contract and resulting damages. *See Furia v. Furia,* 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dept. 1986). Pursuant to plaintiff's agreement with defendant and defendant's retail installment contract with the alleged purchasers, defendant is obligated to repurchase the contract at plaintiff's request if, *inter alia*, plaintiff *reasonably determines that there is a breach of any of Dealer's representations of warranties with respect to the Contract, the Unit or the Contract Agreement* (emphasis added). *See* Plaintiff's Affirmation in Support Exhibit H ¶ 7.

The record indicates that plaintiff exercised due diligence in uncovering facts and circumstances giving rise to identity theft and in reasonably concluding, *inter alia*, that the Buyer was not who it purported to be. Under the agreement, there are no triable issues of material fact as to plaintiff's entitlement to defendant's repurchase of the retail installment contract. *See North Fork Bank v. Guo*, 2002 WL 1539533, N.Y.Sup.App.Term, 2002, Not Reported in N.Y.S.2d; *Bank of America, N.A. v. Hillside Cycles, Inc.*, 89 A.D.3d 653, 932 N.Y.S.2d 128 (2d Dept. 2011).

Defendant's opposition is replete with speculation and does not refute the facts as set forth in the instant motion. Moreover, implicit in defendant's arguments is that it is plaintiff's responsibility to identify the fraudulent purchaser; however, the retail dealer agreement clearly places this responsibility on defendant based on the wording of the agreement's provisions. *See Bank of America, N.A. v. J.P.T. Automotive, Inc.*, 52 A.D.3d 553, 861 N.Y.S.2d 681 (2d Dept. 2008).

The first and second affirmative defenses which state respectively that the Complaint fails to state a cause of action and the Complaint fails to state a cause of action for breach of the retail agreement as against defendant must be **dismissed**. Plaintiff demonstrated its *prima facie* entitlement to judgment as a matter of law by alleging causes of action to recover for breach of contract and seeking recovery based on the breach of the agreement, both of which allege cognizable causes of action. In opposition, defendant failed to raise a triable issue of fact. *See Stim & Warmuth, P.C. v. Hayes*, 72 A.D.3d 795, 898 N.Y.S.2d 653 (2d Dept. 2010). Further, the reason for the breach of the underlying retail agreement between the purchaser and defendant forms the basis for the breach of the agreement between defendant and plaintiff.

In light of the foregoing, the affirmative defense that the allegations in the Complaint concerning specific warranties and representations made by defendant in the retail agreement

that were breached were not sufficiently particular to give notice of the alleged occurrences to be proven or the material elements of the allegations in the Complaint, plaintiff also established entitlement to **dismissal** of the affirmative defense. The Complaint is plead with sufficient particularity and such defense is similar to the first and second affirmative defense.

As to the affirmative defense that the defendant acted in good faith, such conduct is not at issue. Defendant's good faith actions or lack thereof are not required to invoke the provisions under the agreement. All plaintiff has to do, under ¶ 8 of the agreement, is to indicate that it made a reasonable determination that there was breach of the representations under the contract. Based on the evidence in the record, it is reasonable to determine that the party purchasing the vehicle was not Randy A. Spencer. Such determination does not rely on whether the defendant acted in good faith.

The branch of plaintiff's motion which seeks summary judgment dismissing the fourth affirmative defense is **granted** as these equitable defenses are not applicable to this action. Said another way, laches, estoppel and waiver are doctrines peculiarly applicable to suits in equity; it does not operate to bar actions at law. Thus, the equitable defenses are no defense to an action at law commenced within the period fixed by the statute of limitations. *See Blum v. Good Humor Corp.*, 57 A.D.2d 911, 394 N.Y.S.2d 894 (2d Dept. 1977); *Fade v. Pugliani/Fade,* 8 A.D.3d 612, 568 N.Y.S.2d 568 (2d Dept. 2004).

The fifth affirmative defense that specific warranties and representations made by defendant in the retail agreement were not sufficiently particular to give notice of the alleged occurrences to be proven or the material elements of the Complaint is also without merit. To the contrary, the Complaint is rather detailed. It is noted that the Court can properly regard this affirmative defense as one that should be set forth in a Motion to Dismiss under CPLR § 3211.

Notwithstanding, the basic requirement of a Complaint is that the pleading be sufficiently particular to give 'notice' to the other side of the transactions or occurrences as seen by the pleader. As long as the pleading may be said to give such notice, in whatever terminology it chooses, and that the material elements are somewhere verbalized within the four corners of the Complaint, plaintiff has met the requirements of a sufficiently pleaded Complaint. *See Gershon v. Goldberg*, 30 A.D.3d 372, 817 N.Y.S.2d 322 (2d Dept. 2006); CPLR § 3013.

As to the branch of plaintiff's motion seeking summary judgment dismissing the sixth affirmative defense that plaintiff failed to mitigate its damages, plaintiff investigated and ultimately located the vehicle, but was, however, barred from securing it as its name was removed from the title. Defendant's unsubstantiated and speculative assertion that plaintiff could have done something more to mitigate damages is insufficient to rebut plaintiff's *prima facie* showing of entitlement to **dismissal** of the affirmative defenses of failure to mitigate damages and failure to locate and safeguard the vehicle. *See Bank of America, N.A. v. J.P.T. Automotive, Inc., supra.*

Defendant's remaining affirmative defenses are unavailing in that there is no factual evidence to support these apparent boilerplate and specious assertions. Accordingly, plaintiff's motion to for summary judgment as to the seventh, eighth and ninth affirmative defenses is also hereby **granted.**

In sum, the agreement between plaintiff and defendant contains two relevant warranty provisions, " ...[t]he Buyer is who he, she or it purports to be...[and] [t]he Buyer has not fraudulently used the identity of another person to purchase the Unit..." Nowhere in the agreement does it require that plaintiff resolve that issue. Plaintiff's investigation uncovered that the owners are not who and what they purported to be and defendant has only disputed the

findings with speculative scenarios. The evidence in the record overwhelmingly supports the reasonableness of plaintiff's determination and that is all that is required for defendant to repurchase the contract.

Finally, plaintiff established its *prima facie* entitlement to judgment as a matter of law on the cause of action to recover damages for breach of contract, offering sufficient evidence to demonstrate the absence of any material issue of fact as to whether there was a bonafide sale of the vehicle, whether the purchasers were who they represented they were at the time of the sale, and whether defendant complied with its contractual obligation to verify the identity of the purchaser of the vehicle and repurchase the security contract upon the plaintiff's demand. In opposition, defendant's unsubstantiated and speculative allegations are insufficient to defeat summary judgment. *See Bank of America, N.A. v. J.P.T. Automotive, Inc., supra.*

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for an order dismissing the first through ninth affirmative defenses of defendant and granting summary judgment in its favor against defendant is hereby **GRANTED**. The issue of damages is respectfully referred to the Calendar Control Part (CCP) for an Inquest.

The matter is hereby set down for an Inquest, for an assessment of damages, to be held before the Calendar Control Part (CCP) on the 30th day of July, 2012, at 9:30 a.m.

Plaintiff shall file a Note of Issue on or before July 14, 2012. A copy of this Order shall be served upon the County Clerk when the Note of Issue is filed. Failure to file a Note of Issue or appear as directed shall be deemed an abandonment of the claim giving rise to the Inquest. A copy of this Order shall be served upon the defendant by July 14, 2012.

The directive with respect to an Inquest is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
June 1, 2012