

Tichner v Goldens Bridge Inc.
2018 NY Slip Op 31488(U)
July 2, 2018
Supreme Court, New York County
Docket Number: 651517/13
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

-----X
BARBARA TICHNER,

Plaintiff,

Index No. 651517/13

-against-

GOLDENS BRIDGE INC. d/b/a HERITAGE FARM,
PATRICIA GRIFFITH and CHRISTOPHER B.
MILLER, DVM. P.C.,

MOT SEQ 010

DECISION & ORDER

Defendants.

-----X

Nancy M. Bannon, J.S.C.:

I. INTRODUCTION

This is an action commenced by the plaintiff, Barbara Tichner, to recover for fraud, negligent misrepresentation, breach of contract, and professional malpractice in connection with the purchase of a horse. By order dated December 18, 2013, the Supreme Court (Scarpulla, J.) dismissed the causes of action seeking to recover for violation of General Business Law § 349, breach of express warranty, breach of implied warranty of merchantability, and breach of warranty of fitness for a particular purpose.

The defendant Christopher Miller, DVM, P.C. (Miller), now moves pursuant to CPLR 3212 for summary judgment dismissing the remaining causes of action against him. The defendants Goldens

Bridge Inc., d/b/a Heritage Farm, and Patricia Griffith (together the Heritage Farm defendants) purportedly cross-move for summary judgment dismissing the remaining causes of action against them.

The motion of the Heritage Farm defendants was not a proper cross motion because it did not seek relief against a moving party. See CPLR 2215; Guzetti v City of New York, 32 AD3d 234 (1st Dept. 2006); Gaines v Shell-Mar Foods, Inc., 21 AD3d 986 (2nd Dept. 2005); Sheehan v Marshall, 9 AD3d 403 (2nd Dept. 2004). Nonetheless, "[t]he failure to comply with CPLR 2215 or 2214 may be excused in the absence of prejudice." Walker v Metro-North Commuter R.R., 11 AD3d 339, 340 (1st Dept. 2004). "Although [a] cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party, a technical defect of this nature may be disregarded where, as here, there is no prejudice, and the opposing parties had ample opportunity to be heard on the merits of the relief sought." Daramboukas v Samlidis, 84 AD3d 719, 721 (2nd Dept. 2011); see Sheehan v Marshall, *supra*; Kleeberg v City of New York, 305 AD2d 549 (2nd Dept. 2003); Volpe v Canfield, 237 AD2d 282 (2nd Dept. 1997).

Since the Heritage Farm defendants made their motion on 33 days notice, and the plaintiff does not challenge their request for relief on that ground, the court concludes that the notice provided to the plaintiff was sufficient, and there is no showing

of prejudice to her. Hence, the court will consider the merits of the relief sought despite the mislabeling of the motion. See Daramboukas v Samlidis, supra; see also Sweney v County of Niagara, 122 AD3d 1432 (4th Dept. 2014).

II. BACKGROUND

The facts of this case are set forth in detail in the court's decision of December 18, 2013.

Briefly, as alleged in the complaint, Tichner sought to purchase a horse for her daughter to use in beginner horse competitions. In March 2012, Tichner contacted the Heritage Farm defendants to find a suitable horse to be used for competitions and for potential resale at a later time. The complaint asserts that the Heritage Farm defendants eventually found a horse named Sports Talk, who was "the perfect horse" for Tichner's needs, and "an incredible jumper." Tichner then requested that the Heritage Farm defendants obtain a pre-purchase medical exam of the horse, and they arranged such an exam with Miller, a veterinary practice. Miller conducted the pre-purchase examination of Sports Talk, including radiography, and the Heritage Farm defendants advised Tichner that Sports Talk was "sound, healthy, possessed no physical defects, was fit for competitive jumping and was a good investment pony."

Tichner purchased Sports Talk from non-party Lane Change Farms for \$175,000, and Tichner's daughter began riding Sports Talk in competitions. In November 2012, Sports Talk was moved to Florida, where a new trainer, Richard Cunkle, allegedly informed Tichner that something was wrong with the horse, and asked to see the pre-purchase examination report and radiographs. Tichner alleges that the radiographs that had been examined by Miller revealed physical defects in the horse's feet that resulted in Sports Talk's inability to compete.

Tichner commenced this action in April 2013. The gravamen of the complaint is that the defendants concealed the negative information about Sports Talk's physical health in order to induce Tichner to purchase the horse.

The complaint asserted causes of action to recover for fraudulent misrepresentation, negligent misrepresentation, breach of contract, professional malpractice, violation of the deceptive business practices provisions of General Business Law § 349, breach of express warranty, breach of implied warranty of merchantability, and breach of warranty of fitness for a particular purpose. Only the fraudulent misrepresentation, negligent misrepresentation, breach of contract, professional malpractice causes of action remain

III. DISCUSSION

A. Miller's Motion for Summary Judgment

As relevant here, Miller moves for summary judgment dismissing the causes of action alleging fraudulent misrepresentation (first cause of action), negligent misrepresentation (second cause of action), and professional malpractice (third cause of action) against it. The plaintiff opposes the motion. The motion is granted in part.

1. Misrepresentation

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007). To establish a prima facie claim of fraudulent misrepresentation, a claimant must establish a misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance, and resulting injury. See IKB Intl. S.A. v Morgan Stanley, 142 AD3d 447 (1st Dept. 2016); Dembeck v 220 Cent. Park S., LLC, 33 AD3d 491 (1st Dept.

2006).

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). The party opposing the motion must then raise a factual issue requiring a trial of the action. See Zuckerman v City of New York, 49 NY2d 557 (1980). Miller established its prima facie entitlement to judgment as a matter of law dismissing the negligent misrepresentation and fraudulent misrepresentation causes of action against it with the affidavit of Christopher B. Miller, in which he asserts that he properly rendered an opinion based on his veterinary expertise, and that he made no misleading statements to the plaintiff. The plaintiff does not oppose or address these arguments. Since the plaintiff thus did not raise a triable issue of fact in opposition to Miller's showing in this regard, Miller is entitled to summary judgment dismissing those causes of action against it.

2. Veterinary Malpractice

In order to establish a case of veterinary malpractice, a plaintiff is required to show a deviation or departure from accepted veterinary practice, and that such departure was a

proximate cause of the injury. See Kenny v Lesser, 281 AD2d 853 (3rd Dept. 2001).

In support of its motion for summary judgment, Miller submits an expert affidavit from Dr. James Orsini, who is, among other things, a board certified veterinary surgeon and the Director of the Laminitis Institute at the University of Pennsylvania School of Veterinary Medicine. Orsini's detailed affidavit concludes that Miller's examination of Sports Talk was conducted in accordance with the appropriate standard of care. Orsini further opines that nothing in Miller's report was false or misleading. He states that nothing in the radiography or other parts of the examination indicate that Sports Talk was unsound or suffered from any abnormalities at the time of the examination. Miller thus makes a prima facie demonstration of entitlement to judgment as a matter of law.

In opposition, the plaintiff submits an affidavit from Dr. Thomas Griffith, who is a doctor of veterinary medicine with a practice focused on horses. Dr. Griffith states that he reviewed the radiography at issue, and opines that Miller deviated from acceptable medical practice by not informing Tichner, as a prospective purchaser, of certain findings in the radiography. Specifically, he states that the x-rays revealed certain findings that might suggest the presence of inflammation or laminitis. As

such, he states that Dr. Miller should have notified Tichner of these findings, and that further medical consideration of Sports Talk's condition was warranted.

Although Dr. Griffith concedes that the positive radiographic indicators to which he refers are not unusual in horses, and do not necessarily indicate the presence of lameness or soreness, his affidavit is sufficient to raise a triable issue of fact as to whether Miller deviated from good practice and whether such deviation proximately caused the horse to develop lameness and soreness in the course of competitions, which he opines would not likely have occurred had the plaintiff been informed of the full extent of the radiographic results.

B. Heritage Farm Defendants' Cross Motion for Summary Judgment

As relevant here, the Heritage Farm defendants purportedly cross-move for summary judgment dismissing the causes of action to recover for fraudulent and negligent misrepresentation and for breach of contract as against them. These causes of action arise from Tichner's assertions that defendants failed to provide her with a horse that was suitable both for use by her daughter in competition and for future resale, and that the Heritage Farm defendants failed to inform her that the horse suffered from defects in its feet, including the possibility of laminitis.

The Heritage Farm defendants contend that they delivered to Tichner precisely what she bargained for, and that their representations concerning the suitability of Sports Talk for competition and for resale were based, in large part, on the report from Miller that the horse was sound and not suffering from any physical disabilities. They submit an affidavit from Patricia Griffith, in which she asserts that she relied on Miller's report to the same extent as Tichner. They also submit evidence demonstrating that Sports Talk successfully competed in jumping competitions, both before the sale to Tichner, and for an extended period of time after Tichner's daughter began riding the horse in competitions. They further rely on the deposition of Tichner's daughter, in which she testified that she had success in riding Sports Talk competitively, and did not believe that the horse was lame or unfit for competition. The Heritage Farms defendants further note that Tichner's daughter testified that she stopped riding Sports Talk because, as she got older, she needed a bigger horse. The Heritage Farms defendants have thus made a prima facie showing that they are entitled to judgment as a matter of law dismissing the remainder of the complaint against them.

In opposition, Tichner argues that a triable question of fact exists as to whether Sports Talk was suitable for

competition and for resale, and whether the Heritage Farms defendants concealed that the horse suffered from physical defects. Tichner, however, does not submit any evidence that the Heritage Farms defendants were themselves informed by Miller of the radiographic indicia that she contends Miller should have explained to her. Nor does she submit any evidence that the Heritage Farms defendants breached any contractual obligation, since neither her affidavit nor that of her retained expert rebuts the showing made by the Heritage Farms defendants that, when the horse was sold, it was and would be able to compete in jumping exercises and competitions.

Although Tichner alleges that her trainer in Florida indicated that the horse might have physical problems, the trainer has submitted an affidavit in this action in which he states that Sports Talk did not exhibit any physical defects while under his care, and he knew of no reason why the horse could not be resold. Moreover, while Tichner states that, in November 2012, a Dr. Byron Reid took x-rays of Sports Talk, which showed rotation in the horse's feet, that exam was conducted after Sports Talk had competed in numerous competitions, and thus does not demonstrate that such a condition existed when the horse was examined and purchased in March 2012.

A certificate of conformity, which attests that an affidavit

executed outside of the State of New York conforms with the format for taking oaths and making affidavits within the relevant foreign state, is required to be annexed to affidavits executed and sworn to outside of New York. The court notes that the affidavits of Patricia Griffith and Richard Cunkle were executed and notarized in Florida, as was the affidavit of examining veterinarian Diane Shiereck, but do not include the certificate of conformity required by CPLR 2309. Nor does the affidavit of horse trainer Stacey Schaefer, which was executed and notarized in Maryland. Moreover, both the affidavit of Dr. Griffith, which was executed and notarized in Florida, and the affidavit of Dr. Orsini, which was executed and notarized in Pennsylvania, purport to include a certificate of conformity, but those "certificates" are merely mislabeled acknowledgments that the affiants were the persons who subscribed the affidavits. These defects, however, do not require the court to disregard these affidavits or deny relief to any party, as the defects may be cured by the submission of the proper certificate nunc pro tunc. See Bank of New York v Singh, 139 AD3d 486, 487 (1st Dept. 2016).

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of the defendant Christopher B.

Miller, DVM. P.C., is granted to the extent of dismissing the causes of action to recover for fraudulent misrepresentation (first cause of action) and negligent misrepresentation (second cause of action) against him, and the motion is otherwise denied; and it is further,

ORDERED that the cross motion of the defendants Goldens Bridge, Inc., d/b/a Heritage Farm, and Patricia Griffith is granted, and the remaining causes of action in the complaint are dismissed as against them.

This constitutes the Decision and Order of the court.

DATED: July 2, 2018

ENTER:



J.S.C.

HON. NANCY M. BANNON