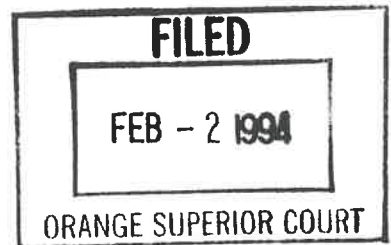


STATE OF VERMONT
ORANGE COUNTY, SS



David and Penny Russell

Orange Superior Court

v.

Tri-Nordic, Inc.
Tri-Nordic Toyota,
Toyota Motor Credit Corporation
and Henry J. Tunkel

Docket No. S 76-93 OeC

Decision and Order re:

Defendant's Motion for Summary Judgment

and Defendants' Motion to Amend Answer

Plaintiffs filed suit under the Vermont Consumer Fraud Act, alleging that the defendants misled them as to the terms and obligations of a lease arrangement for a 1993 Toyota pick-up truck. Specifically, plaintiffs argue that the defendants gave them the impression that the lease was terminable at the buyer's option, on a month-to month basis, without particular penalties, when, in fact, the lease was for a term of five years. Plaintiffs were ultimately unable to keep up with payments on the truck, which was subsequently repossessed and re-sold by defendants.

Defendants have moved for summary judgment. They advance several arguments in support of this motion. First, they claim that plaintiffs could not have credibly believed that the lease was offered to them on a month-to-month terminable basis. Second, defendants state that the plaintiffs' claims as to their understanding of the lease agreement are not reasonable and stand in direct conflict with the papers which were executed in connection with the transaction. Third, they claim that plaintiffs have failed to point to specific misrepresentations which were made by the defendants or their agents, in accordance with the specific pleading requirements for claims of fraud under V.R.C.P. 9. Defendants argue that the fact that the plaintiffs may have

misunderstood the terms of the lease does not, without more, establish that the defendants acted so as to deceive them.

Plaintiffs oppose summary judgment. They have submitted affidavits in which they state that defendant-salesman Tunkel, in response to their concerns about their future ability to make payments, told them that they could "just bring the truck back." Plaintiffs also argue that their understanding that they were being offered a terminable lease was reasonable, in that they had communicated to Mr. Tunkel facts which should have led him to understand that their income level was low and might drop further in the foreseeable future, and that, accordingly, they were concerned about undertaking long-term financial obligations. They direct the court's attention to portions of their affidavits and depositions which indicate that Mr. Tunkel acted in a manner which encouraged them to sign the documents to complete the transaction without reading the details of their obligations. Plaintiffs also note that defendants have objected to and failed to respond to many, perhaps a large majority, of their discovery requests. They argue that they have therefore not yet had the opportunity to develop facts which may be material to their case, and, therefore, a conclusion that there is no dispute as to any material fact is premature.

Defendants have also filed a motion to amend their answer to state a counterclaim against the plaintiffs for breach of the lease. Defendants repossessed the vehicle (on a date not readily evident in the record) after plaintiffs' cessation of payments, and later sold it, leaving a loss of \$5,368.67. Defendants' proposed counterclaim seeks damages in this amount for \$5,368.67. Plaintiff's cessation of payments was known to defendants at or before plaintiffs' initiation of this action, though re-sale of the vehicle by

the defendants did not take place until some months after plaintiffs filed their complaint.

Conclusions of Law

Plaintiffs' claims against defendants are based upon the Consumer Fraud Act. That Act "prohibits unfair or deceptive acts or practices in commerce." 9 V.S.A. §2453(a). "The Act provides 'a much broader right than common law fraud.'" Winey v. Dailey, 4 Vt. L.W. 288, 290 (11/5/93), quoting Poulin v. Ford Motor Co., 147 Vt. 120, 124 (1986). A plaintiff need only show (1) that a defendant made a misrepresentation which was likely to mislead plaintiff, (2) that the plaintiff interpreted it reasonably under the circumstances, and (3) that the misleading nature of the representation was likely to affect the plaintiff's conduct or decision. Winey, 4 Vt. L.W. at 290. Unlike in a case for common law fraud, a plaintiff in a consumer fraud case need not show that defendant possessed a particular intent to deceive. Poulin, 147 Vt. at 126; cf. Silva v. Stevens, 156 Vt. 94, 102 (1991) (action for common law fraud requires showing of intent to deceive). Actual damages are not necessary to recover for consumer fraud. Winey, 4 Vt. L.W. at 290. The foregoing authorities illustrate that the substantive elements of an action for consumer fraud are significantly different than the elements required for an action for common-law fraud.

As to the third basis advanced by defendants, the threshold issue before the court is whether a complaint for Consumer Fraud is governed by the strict pleading requirements of V.R.C.P. 9(b), which requires that "the circumstances constituting fraud... shall be stated with particularity." Defendants have not directed the court to any authority which would indicate that the Rule 9

standard of specific pleading for common-law fraud also applies to the substantively distinct area of consumer fraud.

The court has not found any authority directly addressing the issue of whether the Rule 9 standard of detailed pleading applies to consumer fraud cases. However, case law on analogous and more general issues under the Consumer Fraud Act strongly suggests that it does not. The Vermont Supreme Court has squarely rejected arguments that consumer fraud claims must be proven by the heightened standard of "clear and convincing proof" which applies in all actions for common law fraud:

"The mere fact that the word 'fraud' appears in the title of our consumer protection statute does not give rise to an inference that the legislature intended to require a higher degree of proof than that ordinarily required in civil cases." The purpose of our Consumer Fraud Act is to protect consumers by adding "a claim for relief that is easier to establish than common law fraud. To require the higher degree of proof would frustrate the legislative intent."
....

Poulin, supra, 147 Vt. at 125-26 (citations omitted). Similarly, the Court has indicated that the "misrepresentation" element of an action for consumer fraud may be inferred from the broad circumstances of the case. Poulin, 147 Vt. at 126 (explaining that only very general evidence which suggested that car maker had "flooded the market" with a car model which had been represented to a purchaser/ plaintiff as a rather unique "limited edition" was enough to "support a showing of misrepresentation" for purposes of consumer fraud).

In light of the foregoing significant distinctions between an action for consumer fraud and an action for common-law fraud, this court rejects defendants' assertion that plaintiffs' claims of consumer fraud require the heightened specificity of pleading required by V.R.C.P. 9(b). The court concludes that a requirement for formalistic pleading would "frustrate the legislative intent" that the Consumer Fraud Act is designed to create "a claim

for relief that is easier to establish than common law fraud." Poulin, 147 Vt. at 126.

Even if this court were to conclude that V.R.C.P. 9(b) applies to claims under the Consumer Fraud Act, this court concludes that the purposes of that Rule have been satisfied. In explaining the purpose behind the Rule 9(b) requirement of heightened specificity in pleading, the Vermont Supreme Court has stated that "V.R.C.P. 9(b) requires that allegations of fraud be 'stated with particularity.' This requires only that all of the elements be specifically pled, not that fraud be alleged by name." Cheever v. Albro, 138 Vt. 566, 570 (1980). The purpose of the heightened specificity of pleading required for claims of common-law fraud is to provide defendants with sufficient information to allow them to prepare a response. Silva, supra, 156 Vt. at 106.

Looking to plaintiffs' complaint, the court notes that it makes clear that plaintiffs are asserting: (1) that Mr. Tunkel made representations to the plaintiffs that they claim led them to believe that they were entering a month-to-month lease; (2) that this belief on their part was reasonable in light of the circumstances and their communications with Mr. Tunkel, and; (3) that plaintiffs acted on this misrepresentation. These are the basic elements of a claim for consumer fraud. See, e.g., Winey, supra, 4 Vt. L. W. at 290. Although the complaint may not state these elements in these exact terms or in exact order, the substance of the claims is nonetheless present. Even the heightened standard of Rule 9(b) does not require mantra-like recitation of specific language. Cheever, supra. The court concludes that, even if the heightened standard of Rule 9(b) did apply to claims for consumer fraud, the plaintiff's complaint adequately pleads the elements required under the

Consumer Fraud Act and is sufficiently detailed to allow the defendants to prepare a response. Thus, the purposes behind Rule 9(b) have been satisfied.

Defendants' other arguments in favor of summary judgment boil down to claims that the plaintiffs' purported understanding of the terms of the lease are either not reasonable or not credible. As previously noted, for purposes of a consumer fraud claim, the tendency of a representation to deceive, and the reasonableness of a plaintiff's understanding of that representation, must each be interpreted in the circumstances in which they occurred. Winey, supra, 4 Vt. L.W. at 290. Such circumstance-bound factual determinations are not at all suited for disposition upon a motion for summary judgment, as they hinge upon fine details of what actually occurred, as well as issues of credibility. A determination of whether plaintiffs' assertions are plausible or preposterous involves matters of fact which are within the province of a jury, not matters of clear-cut law suited for summary judgment by the court.

"[A] motion for summary judgment under V.R.C.P. 56 is not a trial of the underlying merits of the case on the basis of written affidavits." Martin v. Eaton, 140 Vt. 134, 136 (1981). Summary judgment is appropriate only where the moving party meets both parts of a stringent two-part test: (1) that there is no genuine issue of material fact and (2) that they are entitled to judgment as a matter of law. Murray v. White, 155 Vt. 621, 628 (1991).

The party against whom summary judgment is sought is entitled to the benefit of all reasonable doubts and inferences in determining whether or not a genuine issue of material fact exists.... The facts bearing on the issue must be clear, undisputed, or unrefuted.

Toys, Inc. v. F.M. Burlington Co., 155 Vt. 44, 49 (1990). This is the case "no matter what view the court may take of the relative weight of th[e] evidence." Environmental Board v. Chickering, 155 Vt. 308, 319 (1990).

The summary judgment procedure... pierces the pleadings to

separate form from substance in disputes before the court. This procedure helps to defeat delay and sham, and to relieve pressure upon court dockets. However, because of its severe consequences, ... summary judgment should be granted cautiously so that no one will be improperly deprived of a trial of disputed factual issues. Therefore, to preserve the parties' right to trial, the moving party must "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the nonmoving party has introduced no evidence whatsoever."

Marqison v. Spriggs, 146 Vt. 116, 118-19 (1985) (citations omitted). On account of these factors, a court possesses a substantial degree of discretion in regard to motions for summary judgment, and should err on the side of assuring parties the right to a trial on the merits. See Bingham v. Tenney, 154 Vt. 96, 101 (1990).

In the present matter, the defendants have not shown the requisite absence of disputed material facts regarding what representations were made by the defendants to the plaintiffs regarding the lease of the truck. Nor have they shown an absence of disputed material facts regarding the circumstances which would bear upon the reasonableness or unreasonableness of the plaintiffs' asserted impression that the lease that they undertook was flexible enough that they could "just bring the truck back."

The court also notes that defendants have objected to and failed to provide substantive responses to many of plaintiffs' discovery inquiries, and that there appears to be an ongoing and unresolved discovery dispute between the parties. While the court will not resolve this discovery dispute in the midst of a decision on a motion for summary judgment,¹ summary judgment is not appropriate when the discovery process is still underway and may lead to the

¹. If the discovery dispute remains unresolved, the plaintiffs should take the proper steps under V.R.C.P. 26 and V.R.C.P. 37, so that the issues are properly before the court on a formal motion to compel discovery.

discovery of evidence bearing upon the presence or absence of disputed material facts. See, e.g., Levy v. Town of St. Albans, 152 Vt. 139, 147 (1989).

Virtually by definition, it is impossible to conclude that there is an absence of disputed material facts when the parties remain locked in a unresolved discovery dispute.

The court next turns to the defendants' motion to amend their answer to include a counterclaim against the plaintiffs for a breach of the lease. As this counterclaim arises out of the same general facts as the plaintiff's action, it is a compulsory counterclaim, which would ordinarily be barred in circumstances such as these, where it was not timely asserted along with the defendants' answer. V.R.C.P. 13(a).

Defendants appear to argue that this counterclaim was not included in their answer because the defendants had not yet re-sold the truck at the time at which plaintiffs had instituted the action, and so defendants were unable to ascertain the scope of damages resulting from the breach. This strikes the court as a weak argument, in that plaintiffs had actually ceased payment to defendants some time before they instituted the consumer fraud action against defendants. Assuming, solely for purposes of analysis, that plaintiffs breached the lease by ceasing payments, that breach was well known to defendants at or before the point at which plaintiffs instituted this action, and did not arise only at the point at which defendants were able to calculate exact damages.

The amendment of answers to include counterclaims is governed by the generally liberal rules permitting amendment of pleadings in all circumstances except where the amendment is unreasonably delayed and will cause prejudice to the opposing party. Stratton v. Steele, 144 Vt. 31, 36 (1984). Defendant's

motion to amend comes rather perilously close to being unjustifiably late.

See, e.g., id (noting with approval decisions rejecting motions to amend to add counterclaims which were filed seven to twelve months after defendants had become aware of the underlying facts). However, this court must bear in mind that due process and related considerations weigh in favor of resolving disputes on the merits, rather than on the basis of procedural limitations and formalities. See, e.g. Lillicrap v. Martin, 156 Vt. 165, 170-71 (1989).

Amendment of pleadings is a matter committed to the discretion of the court.

Brown v. Whitcomb, 150 Vt. 106, 107 (1988). This court chooses to exercise its discretion in the direction of allowing determination of the counterclaim on the basis of whatever merits it may possess.

Order

Defendants' motion for summary judgment is hereby DENIED. Defendants' motion to amend their answer to include a counterclaim is hereby GRANTED.

Dated this 2nd day of February, 1994, at Chelsea, Vermont.

Mary Miles Teachout
Mary Miles Teachout
Presiding Judge