IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FLOYD KYES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 06-2353**
	)	
BASKIN AUTO TRUCK & TRACTOR, INC. and DONALD BASKIN, SR., Individually,	)	
	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Floyd Kyes brings this action against Defendants Baskin Auto Truck & Tractor, Inc. ("BATT") of Covington, Tennessee, and Donald Baskin, Sr., the owner and manager of BATT. Plaintiff alleges fraudulent and negligent misrepresentation, breach of contract, detrimental reliance, right of rescission, and violation of the Federal Odometer Act, 49 U.S.C. §§ 32701, et seq.

By order entered June 25, 2007, this court granted summary judgment for Defendants on Plaintiff's claim under the Federal Odometer Act. Before the court is Defendants' August 2, 2007, motion for summary judgment on the remaining claims. Plaintiff responded to the motion on August 28, 2007. Defendants filed a supplemental memorandum in support of their motion on October 5,

2007. Plaintiff responded to Defendants' supplemental memorandum on November 5, 2007.

For the following reasons, Defendants' motion for summary judgment is GRANTED.

I. BACKGROUND

Plaintiff, Floyd Kyes, is a resident of Locke, New York, and owns F.W. Kyes Transportation, a trucking business. (Defs.' Undisputed Material Facts ¶ 1.) Plaintiff is also a collector of vintage trucks. (Id. ¶ 2.) In 2004, Plaintiff began looking for a "vintage" Mack Superliner truck similar to that he used to drive. (Id. ¶ 3.) By the fall of 2004, Plaintiff had responded to several ads for Mack Superliners without reaching a deal. (Id. ¶ 5.)

In October 2004, Plaintiff saw an online advertisement for a 1988 Mack Superliner (the "truck") for sale at BATT. (Id. ¶ 6.) The ad included an entry for "odometer" of 237,603 miles. (Id.) The ad made no representations about the truck's condition or the completeness of its title document and did not state that the odometer reading was the actual mileage. (Id. ¶ 13.) Although the ad did not state that the odometer reading was the actual mileage, Plaintiff points out that it did not contain any language suggesting that the odometer reading was inaccurate. (Pl.'s Stmt. of Disputed Facts ¶ 13.)

Plaintiff responded to the ad and spoke with BATT employee Jeff McPeak over the telephone, asking him if the mileage were true. (Defs.' Undisputed Material Facts ¶¶ 8-9.) McPeak responded that he was unsure of the actual mileage because the truck was a bank "repo," but he stated that the truck looked "too good" to have many more miles on it than that. (Id. ¶¶ 10-11.) Beyond the general statement about its looks, McPeak tried to make Plaintiff understand that because the truck was a "repo," "he didn't know a lot about the details of it." (Kyes Depo. at 51.) Given Plaintiff's interest, McPeak forwarded eight photographs of the truck to him. (Defs.' Undisputed Material Facts ¶ 12.)

Plaintiff stated that he would drive his International roll-back car carrier truck to BATT to make a trade-in deal for the Mack truck on sale. (Id. ¶ 14.) McPeak responded that if Plaintiff came to BATT to purchase the truck, BATT would change the oil and check the truck over to make sure it was ready for the drive from Tennessee to New York. (Id.) Plaintiff and McPeak therefore reached a tentative agreement for the truck over the telephone. (Id. ¶ 15.)

Plaintiff arrived at BATT on December 30, 2004. (Kyes Aff. ¶ 16.) On his arrival, Plaintiff found that the truck was not ready as promised and instead needed several repairs. (Id.) Despite this fact, Plaintiff remained willing to buy the truck

if certain repairs were made and it was capable of being driven back to New York. (Kyes Depo. at 78-80.) For the next two days, BATT employees made the requested repairs. (Kyes Aff. ¶ 18.)

On January 1, 2005, the repairs were completed and Defendants deemed the truck "road ready." (Id. ¶ 19.) Plaintiff then took the truck for a 10-15 minute test drive along with a BATT employee, after which Plaintiff personally inspected the truck. (Kyes Depo. at 98-101.) After the test drive and personal inspection, Plaintiff concurred with Defendants that the truck was road ready. (Id. at 108.) He then decided to buy the truck. (Id. at 104.) Plaintiff asserts that his decision was based on the representation of McPeak that the truck would make it back to New York, although Plaintiff concedes that the representation was more an "opinion than a conclusion." (Id. at 104-05.)

To consummate the deal, Plaintiff was given documents to sign and the truck's paperwork, including its title. (Kyes Aff. ¶ 19.) The odometer reading on the title is 7,202,771, and the document also states "NOT ACTUAL MILEAGE" and "REBUILT VEHICLE." (Title, Exh. 3 to Defs.' Mot in Supp. of Mot. for Summ. J.) (emphasis in original).

After completing the paperwork, Plaintiff began the drive from Tennessee to New York. Along the way, Plaintiff stopped

regularly to check on the truck's oil and coolant levels, determining each time that everything appeared to be in working order. (Kyes Aff. ¶ 20.) While driving in Northern Virginia, about 780 miles into the 1200 mile trip to New York, the truck's engine began to knock loudly, and Plaintiff drove the truck to the nearest exit. (Id. ¶ 21.)

Once stopped, Plaintiff tried unsuccessfully to reach McPeak by phone, but was able to reach BATT's owner, Donald Baskin, Sr. (Id. ¶¶ 22-23.) Baskin expressed surprise that the truck was having problems and stated that it must have run out of oil. (Id. ¶ 23.) Plaintiff contacted a road service repairman to document the oil level and noise from the engine. (Id. ¶ 24.) The truck was then towed the remainder of the distance to New York. (Id. ¶ 26.) In New York, Plaintiff was unable to title the truck because its title had been obtained in Kentucky and had not been properly notarized. (Id. ¶ 38.)

Although he concedes that the title is an important document to review, Plaintiff states that he did not actually review it until he encountered problems with the truck during his drive back to New York. (Kyes Depo. at 116-17.) Only then did he discover that the truck was rebuilt. (Id. at 134.) Notwithstanding Plaintiff's surprise, he states that he never asked if the truck or engine had been rebuilt, much less that he was told they had not been. (Id. at 140-41.)

II. JURISDICTION AND CHOICE OF LAW

Plaintiff, Floyd Kyes, resides in New York. Defendant BATT is a Tennessee Corporation. Defendant Donald M. Baskin, Sr., is the owner and manager of BATT and resides in Tennessee. Because the amount in controversy exceeds $75,000, the court has diversity jurisdiction under 28 U.S.C. § 1332.

As a diversity action, the substantive law governing this case is state rather than federal law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). A federal court sitting in diversity must apply the substantive law of the forum state, including conflict of law rules. Id. The general conflicts rule in Tennessee governing contracts is that the law of the state in which the contract was made governs unless the parties express the intent that another state's law applies. Boatland, Inc. v. Brunswick Corp., 558 F.2d 818, 821 (6th Cir. 1977). Here, the contract was made in Tennessee and the parties are in agreement that Tennessee law governs this dispute.

III. Standard of Review on Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment may be granted if the pleadings and evidence on file show that there is no genuine issue as to any material fact. LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir. 1993). The party moving for summary judgment "bears the burden of clearly and convincingly establishing the

nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986). The moving party can meet this burden by pointing out that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of its case. See Street v. J.T. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts establishing that there is a genuine issue for trial by showing that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Id. The party opposing the motion must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Instead, the nonmoving party must present "concrete evidence supporting

its claims." Cloverdale Equip. Co. v. Simon Aerials, Inc., 869 F.2d 934, 937 (6th Cir. 1989). The district court does not have the duty to search the record for that evidence. See InterRoyal Corp. v. Sponseller, 889 F.2d 108, 110–11 (6th Cir. 1989). The non-moving party has the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in his favor. See id.

IV. ANALYSIS

A. Fraudulent Misrepresentation and Negligent Misrepresentation

To state a cause of action for fraudulent misrepresentation in Tennessee, a plaintiff must demonstrate that:

> 1) [T]he defendant made a representation of an existing or past fact; 2) the representation was false when made; 3) the representation was in regard to a material fact; 4) the false representation was made either knowingly or without belief in its truth or recklessly; 5) plaintiff reasonably relied on the misrepresented material fact; and 6) plaintiff suffered damage as a result of the misrepresentation.

Metro. Gov't of Nashville and Davidson County v. McKinney, 852 S.W.2d 233, 237 (Tenn. App 1992). Negligent misrepresentation requires a showing that:

> [T]he defendant supplied information to the plaintiff; the information was false; the defendant did not exercise reasonable care in obtaining or communicating the information and the plaintiffs justifiably relied on the information.

Williams v. Berube & Assocs., 26 S.W.3d 640, 644-45 (Tenn. App. 2000). Because both claims require proof of reliance, neither can survive in the face of a valid exculpatory clause. See Ingram v. Cedant Mobility Fin. Corp., 215 S.W.3d 367, 372 (Tenn. App. 2006) (holding that a valid exculpatory clause "negates the reliance element of both fraudulent and negligent misrepresentation.").

In pertinent part, the Bill of Sale signed by Plaintiff reads as follows:

> Buyer agrees and acknowledges that no representations have been made by seller, it's [sic] agents, or employees to the buyer, or his agents or employees, of any type including but not limited to any representations as to age, quality, condition, mileage, damage history or as to the property's fitness for any particular use and/or purpose. Buyer acknowledges and agrees that seller has made no representations or statements or taken any action to induce buyer to purchase the above described property and that buyer's purchase of the above property is a result of buyer, his agents or employees, inspection and investigation of the property.

(Bill of Sale, Exh. 4 to Defs.' Mem. in Support of Mot. to Dismiss) (emphasis in original).

Defendants argue that claims of fraudulent and negligent misrepresentation cannot be supported because the plain meaning of the preceding language from the Bill of Sale negates Plaintiff's reliance on any alleged promises McPeak made about the truck's ability to make the drive to New York, an essential

element of those claims. See Ouzts v. Womack, 160 S.W.3d 883 (Tenn. App. 2004).[1]

In response, Plaintiff cites E.B. Harvey & Co., Inc. v. Protective Systems, Inc. which holds that, "limitations against liability for negligence or breach of contract have generally been upheld in this state in the absence of fraud or overreaching." 1989 WL 9546, at *3 (Tenn. App. 1989). Although Plaintiff concedes the existence of the exculpatory clause, he argues that it may not be upheld where fraud is present. Arguing by analogy, Plaintiff also cites Pitz v. Woodruff which held that an "as-is" clause was not enforceable where sellers knowingly withheld material information about a defect. 2004 WL 2951979 (Tenn. App. 2004).

Plaintiff never alleges that the Defendants expressed an opinion about whether the truck had been rebuilt, nor does he allege that Defendants ever stated that the odometer reflected actual mileage. (Defs.' Undisputed Material Facts ¶¶ 10-11, Kyes Depo at 140.) When confronted with direct questions by Plaintiff, Defendants' most frequent response was to express a lack of knowledge because the truck was a "repo." (Id.)

Although McPeak speculated that the truck could not have too many miles because it appeared to be in good condition, that

[1] Defendants offer several alternative arguments which this court does not reach because it accepts the primary arguments based on the exculpatory clause in the Bill of Sale.

overtly speculative statement is not of the deceptive and fraudulent sort that induced the courts in E.B. Harvey and Pitz to ignore explicit exculpatory clauses in contracts. McPeak's statement that the truck would make it back to New York, while ultimately incorrect, is insufficient to nullify the express contractual language because the statement was clearly an expression of opinion (albeit incorrect) and not a statement of fact that might constitute fraud or deception. See Harrison v. Avalon Properties, LLC, 2007 WL 2416099, at *14 (Tenn. App. 2007), Ladd v. Honda Motor Co., Ltd., 939 S.W.2d 83, 97 (Tenn. App. 1996). Indeed, despite his professed reliance on it, Plaintiff himself conceded that McPeak's statement was more of an "opinion than a conclusion." (Id. at 104-05.)

Plaintiff's own actions argue against ignoring the exculpatory clause. Had Plaintiff read the title before purchasing the truck, he would have discovered that the truck had been rebuilt and that its mileage was likely greater[2] than the odometer's reading. Given these facts, even without the exculpatory clause, Plaintiff's reliance would have been unreasonable because "a party dealing on equal terms with another is not justified in relying upon representations where

[2] The title states mileage in excess of seven million but also has a disclaimer that reads "NOT ACTUAL MILEAGE." It is unclear whether the disclaimer refers to the reading on the truck's odometer, the figure on the title, or both.

the means of knowledge are readily within his reach." McKinney, 852 S.W.2d at 239.

Given the unambiguous exculpatory clause in the Bill of Sale and the absence of fraudulent conduct by the Defendants, Plaintiff cannot establish reliance and his claims for fraudulent and negligent misrepresentation fail. Summary judgment for the Defendants on these claims is GRANTED.

B. Breach of Contract and Warranty

The Bill of Sale reads in pertinent part:

> The above described vehicle, equipment or property is being sold "AS IS AND WITH ALL FAULTS." Buyer acknowledges, understands and agrees seller disclaims any and all warranties and that no warranties are being given either express or implied, including but not limited to warranties and [sic] [of] merchantability or fitness for any particular purpose.

(Bill of Sale, Exh. 4 to Defs.' Mem. in Support of Mot. to Dismiss) (emphasis in original). This language is unambiguous. The as-is clause is therefore enforceable "in the absence of fraudulent misrepresentation and concealment." Ingram, 215 S.W.2d at 374. Because Plaintiff's fraudulent and negligent misrepresentation claims have failed, the as-is clause is enforceable and his breach of contract and warranty claims necessarily fail as result. See id. (holding that because Defendant "successfully negated the Plaintiffs' claims of fraudulent misrepresentation and concealment…the 'as-is' clause

is enforceable."). Defendant's motion for summary judgment on Plaintiff's claim of breach of contract and warranty is GRANTED.

C. Detrimental Reliance (Promissory Estoppel)

Detrimental reliance, also referred to as promissory estoppel, is defined as "a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance." Chavez v. Broadway Elec. Serv. Corp., 2007 WL 1836888, at *6 (Tenn. App. 2007) (quoting Alden v. Presley, 637 S.W.2d 862, 864 (Tenn. 1982)). Such a promise "is binding if injustice can be avoided only by enforcement of the promise." Id. To succeed on a claim of promissory estoppel Plaintiff must show that: (1) Defendants made a promise, (2) the promise was unambiguous and not unenforceably vague, and (3) Plaintiff reasonably relied on the promise to his detriment. Rice v. NN, Inc. Ball & Roller Div., 210 S.W.3d 536, 544 (Tenn. App. 2006).

Promissory estoppel is not liberally applied in Tennessee. Chavez, 2007 WL 1836888, at *8. Generally its application is limited to exceptional cases where an agreement would otherwise be void for failure to comply with the statute of frauds. See, e.g., Baliles v. Cities Serv., 578 S.W. 2d 621 (Tenn. 1979), Shedd v. Gaylord Entertainment Co., 118 S.W.3d 695, 700 (Tenn.

App. 2003), GRW Enters., Inc. v. Davis, 797 S.W.2d 606 (Tenn. App. 1990).

In addition to arguing that promissory estoppel is not applied in cases, such as this, where a valid contract did exist and a party advances claims based on extra-contractual statements, Defendants argue that promissory estoppel is inapplicable on its merits.

First, Defendants contend that McPeak's statement about the truck's ability to make it to New York was a mechanical opinion and not an unambiguous promise. Second, they contend that Plaintiff's reliance on any alleged promises was unreasonable given the Bill of Sale's exculpatory language and Plaintiff's failure to consult readily available information such as the title. Seemingly conceding these points to Defendants, Plaintiff does not address the promissory estoppel claim in any of his reply memoranda to this court.

As previously stated, despite his contention that he relied on it in buying the truck, Plaintiff admitted that McPeak's statement was more of an "opinion than a conclusion." (Kyes Depo. at 104-05.) Given this admission, it is difficult to conceive of McPeak's statement as a promise, much less as one sufficient to invoke the doctrine of promissory estoppel. This court has already found that, given the Bill of Sale's unambiguously limiting contractual language, Plaintiff cannot

establish the reliance necessary for a claim of fraudulent or negligent misrepresentation. For that reason, reliance becomes unreasonable here, and the claim for promissory estoppel is without merit. Osceoloa Invs., Inc. v. Union Planters Nat'l Bank of Memphis, 1990 WL 4338, at *2-*3 (Tenn. App. 1990) (summarily finding reliance unreasonable based on earlier finding that plaintiff's reliance was insufficient to support claim of negligent misrepresentation); see also Alden v. Presley, 637 S.W.2d 862, 864 (Tenn. 1982) ("No injustice results in refusal to enforce a gratuitous promise…where the promisee's action in reliance was unreasonable").

Defendant's motion for summary judgment on Plaintiff's claim for detrimental reliance is GRANTED.

D. Rescission

Rescission is an equitable remedy and is therefore not enforceable as of right, but instead in the sound discretion of the court. True v. Deeds & Son, 271 S.W. 41 (1924). It is an extraordinary remedy which is "available only under the most demanding circumstances." Richards v. Taylor, 926 S.W.2d 569, 571 (Tenn. App. 1996). The application of rescission by a court depends largely on the facts of the case and, although it is purely discretionary, "the court should exercise that discretion sparingly." Vakil v. Idnani, 748 S.W.2d 196, 199 (Tenn. App. 1987).

Under Tennessee law rescission is available on various grounds including, but not limited to, illegality of contract, fraud, misrepresentation, mutual mistake, and duress. See 22 T.J., Rescission, Cancellation and Reformation, §§ 4-9. Plaintiff asserts that rescission is appropriate in this case "due to the fraudulent conduct of the Defendants," namely their "false representations with respect to mileage, condition, and title of the [truck]." (Pl.'s Mem. in Resp. to Defs.' Supplemental Mem. at 1, 12.)

Rescission of a contract may be justified because of misrepresentation where the evidence demonstrates that:

> (1) [T]here is an assertion that is not in accord with facts, (2) the assertion [is] either fraudulent or material, (3) the assertion [is] relied upon by the recipient in manifesting assent, and (4) the reliance of the recipient [is] justified.

Silva v. Crossman, 1996 WL 631492, at *2 (Tenn. App. 1996) (citing Scruggs v. Roach, 1993 WL 93362, at *4 (Tenn. App. 1993).

Under the prevailing standard in Tennessee, rescission would be inappropriate in this case. The requirement that there be an assertion as to an existing fact cannot be met. Plaintiff does not allege that Defendants ever made any definite assertions about the truck's mileage, but only that they opined that it could not be too high because the truck appeared in good condition. Plaintiff himself admits that McPeak's statement

about the truck's ability to make it to New York was an opinion, not a conclusion. Finally, Plaintiff nowhere alleges that Defendants made any representations about his ability to title the truck upon his return to New York.

Beyond the absence of a definite assertion, the court finds that Plaintiff's reliance is also in doubt. Simply put, Plaintiff had no basis to rely when the truth about many of the operative facts he claims were misrepresented was readily observable had he looked at the truck's title. Instead, Plaintiff neglected to review the title until after he had begun experiencing problems with the truck, after he had signed the transfer papers and the deal had been consummated.

For these reasons, the present facts do not meet the standard for rescission, and the court should not exercise its discretion to grant that remedy. Therefore, Defendants' motion for summary judgment on Plaintiff's claim for rescission is GRANTED.

V. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED.[3]

So ordered this 12th day of December, 2007.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

[3] In addition to moving for summary judgment on each of Plaintiff's individual claims, Defendants' memorandum makes an alternative argument that summary judgment should, at a minimum, be granted on Plaintiff's claims against Defendant Donald Baskin, Sr. Because the court awards summary judgment for both Defendants on each claim, the alternative argument about Baskin need not be addressed.