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2013 JAN 11 PM 2:32

JUDITH A. PASCALE
SUFFOLK COUNTY CLERK

At the IAS Part 21 of the Supreme Court of
the State of New York, held in and for the
County of Suffolk, at the County
Courthouse thereof, located at One Court
Street, Riverhead, New York 11901 on

DEC 11 2012

PRESENT:

Hon. Jeffrey Arlen Spinner, Justice S.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

EMJ AUTO WASH, LLC,

Plaintiff

against

CARC, LLC, SPIFFY'S AUTO SPA and
TODD CHRISTMAN,

Defendants.

ERIN MURPHY,

Plaintiff,

-against-

NEW YORK BUSINESS EXCHANGE, GEORGE
SANTELLI and JEFF ENGLE,

Defendants.

ORDER

Index # 08-031913

Action I

MOTION SEQUENCE # 001-MG

RETURN DATE 5-05-2010

FINAL SUBMITTED DATE 7-18-2012

MOTION SEQUENCE # 002-MG

RETURN DATE 7-21-2010

FINAL SUBMITTED DATE 7-18-2012

Index No. 09-32310

Action II

MOTION SEQUENCE # 003-MG

RETURN DATE 5-25-2011

FINAL SUBMITTED DATE 7-18-2012

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A motion (Motion Sequence No. 1) having been made by Action II defendants NEW
YORK BUSINESS EXCHANGE, GEORGE SANTELLI and JEFF ENGLE (collectively,

“NYBE defendants”), pursuant to CPLR 601(a), for an Order consolidating the above-entitled actions, and on the reading and filing the affirmation of David S. Wilck, dated April 5, 2010, and the exhibits attached thereto, the Affirmation in Opposition of Action I defendants CARC, LLC, SPIFFY’S AUTO SPA and TODD CHRISTMAN (collectively, the “CARC defendants”), dated April 21, 2010, the Reply Affirmation dated May 4, 2010, and the Court hearing arguments on May 25, 2011; and

A further motion (Motion Sequence No. 2) having been made by the NYBE defendants for an Order, pursuant to CPLR 3025(b), granting defendants’ motion to amend their Answer, and on the reading and filing the affirmation of David S. Wilck, dated June 24, 2010, and the exhibits attached thereto, and said motion being unopposed, and the Court hearing arguments on May 25, 2011; and

A further motion (Motion Sequence No. 3) having been made by the NYBE defendants for an Order, pursuant to CPLR 3212, granting the NYBE defendants’ motion to for summary judgment and dismissing plaintiff’s complaint, and on reading and filing the affirmation of David S. Wilck, dated April 15, 2011, and all exhibits attached thereto, the Affirmation in Opposition of plaintiff ERIN MURPHY dated May 18, 2011, the Reply Affirmation dated May 24, 2011, and the Court hearing arguments on May 25, 2011,

NOW, THEREFORE, it is hereby

ORDERED that, the motion of the NYBE defendants for an Order pursuant to (a) CPLR 601 (a) consolidating the above entitled actions (Motion Sequence No. 1) is hereby granted. *See Viafax Corp. v. Citicorp Leasing, Inc.*, 54 A.D.3d 846, 850, 864 N.Y.S.2d 479, 482 (2d Dep’t 2008);

AND IT IS FURTHER ORDERED that, the motion of the NYBE defendants for an Order to amend their Answer pursuant to CPLR 3025(b) (Motion Sequence No. 2) is hereby granted as unopposed, and in light of the policy of the courts to liberally permit the amendment of pleadings, *see Lucido v. Mancuso*, 49 A.D.3d 220, 226-27, 851 N.Y.S.2d 238, 243 (2d Dep't 2008); *Sheldon Electric Co. v. Oriental Boulevard Corp.*, 56 A.D.2d 886, 887, 392 N.Y.S.2d 485, 486 (2d Dep't 1997);

AND IT IS FURTHER ORDERED that, the motion of the NYBE defendants for an Order pursuant to CPLR 3212 granting NYBE defendants' motion for summary judgment and dismissing plaintiff's Complaint, is hereby granted. The express disclaimers set forth in the Asset Purchase Agreement expressly bar plaintiff's claims. *See Rudnick v. Glendale Systems, Inc.*, 222 A.D.2d 572, 573, 635 N.Y.S.2d 657, 658 (2d Dep't 1995); *Mayer v. Rabinowitz*, 114 A.D.2d 357, 357, 493 N.Y.S.2d 877, 877-78 (2d Dep't 1985).

Moreover, plaintiff's reliance on the NYBE defendants' purported misrepresentations was not reasonable, as a matter of law. Plaintiff was on notice that the "term sheet" was not an accurate depiction of the gas station's sales before proceeding with the purchase, as evidenced by the fact that the gallons of gasoline sold, per month, was reduced by 45,000 gallons following discussions with defendants. Moreover, plaintiff attempted to verify the information contained in the term sheets by engaging in "car counting," by requesting various business records, and by seeking to observe the business and speak with employees. That plaintiff was told that no records were available because the business was a "cash business", and that plaintiff was not permitted to observe the business and speak to employees, should have reasonably raised a red flag that plaintiff could not blindly rely on the representations in the term sheet. Nevertheless, plaintiff proceeded with the purchase of the subject business. By so doing, she "willingly

assumed the business risk that the facts may not have been as represented." *Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc.*, 183 A.D.2d 742, 744, 583 N.Y.S.2d 478, 479 (2d Dep't 1992). See also *Orlando v. Kukielka*, 40 A.D.3d 829, 832, 836 N.Y.S.2d 252, 255 (2d Dep't 2007).

Finally, plaintiff is not entitled to rescission of the NYBE defendants' commission fee, as the NYBE defendants were not required to be licensed real estate brokers. *Wertlieb v. Greystone Partnerships Group, Inc.*, 165 A.D.2d 644, 647, 569 N.Y.S.2d 61, 63 (1st Dep't 1991).



ENTER

J.S.C.

JEFFREY ARLEN SPINNER

Handwritten signature of Jeffrey Arlen Spinner