State of New Hampshire

Supreme Court

Docket # 2009-0852

Saab Financial Services, LLC

v.

Stephen F. W. Ball & Elaine B. Ball

BRIEF OF THE PLAINTIFF/RESPONDENT

Rule 7 Mandatory Appeal from
Grafton County Superior Court

Counsel for the Plaintiff/Respondent Saab Financial Services, LLC

JACK S. WHITE, ESQUIRE
N. H. BAR # 2725
LISA A. BIRON, ESQUIRE
N. H. Bar # 18908
WELTS, WHITE & FONTAINE, P.C.
29 Factory Street
P.O. Box 507
Nashua, NH 03061
(603) 883-0797

Oral Argument Presented by:
LISA A. BIRON, ESQUIRE

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

QUESTIONS PRESENTED 1

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 6

ARGUMENT 10

I. There is no term in the parties' Leases that required DHM to provide service to the defendants' vehicles throughout the lease periods. The Leases unambiguously reflect the intended final expression (or total integration) of the parties' agreement, and DHM did not breach the Leases by closing its business and not servicing the defendants' leased vehicles. 10

A. The plain language of the Leases does not promise (or require) Saab-dealer-service at DHM 10

B. Because the Leases are a total integration of the parties' agreement, evidence of any alleged additional oral term is barred by the parol evidence rule 12

C. An "express warranty" must relate to the condition of the goods—the vehicles, and an alleged promise to provide Saab-dealer-service, does not relate to the condition of the vehicles and, therefore, could never be an express warranty 15

II. No DHM-employee knew that DHM was going to close until it closed. Alleged statements about DHM's willingness to provide service and maintenance to the defendants' leased vehicles were innocently made, not knowingly false, and, therefore, not fraud in the inducement, or negligent misrepresentation 16

A. The defendants have not offered evidence of a specific false statement of material fact upon which to base a claim of fraud or misrepresentation 18

B. DHM's employees did not commit fraud in the inducement of the Leases because the employees reasonably believed any and all alleged representations they may have made to the defendants 19

C. DHM's employees could not make negligent misrepresentations to the defendants because both DHM employees and the defendants were equally unaware that DHM would close, and both had access to the same limited information regarding DHM's financial condition in the local newspaper 20

D. A business does not commit fraud, or misrepresentation, by attempting to stay in business despite financial trouble; and to hold otherwise, violates sound public policy by potentially destroying the economic market 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Behrens v. S.P. Constr. Co., 153 N.H. 498 (2006) 9, 11, 12, 13

Close v. Fisette, 146 N.H. 480 (2001) 2, 3, 4

East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) 15

Fassi v. Auto Wholesalers of Hooksett, 145 N.H. 404 (2000) 14, 15

Proctor v. Bank of New Hampshire, N.A., 123 N.H. 395 (1983) 16, 17, 18

Snierson v. Scruton, 145 N.H. 73 (2000) 16, 18, 20

South Willow Props., LLC v. Burlington Coat Factory of N.H., LLC, No. 2008-706, 2009 N.H. LEXIS 143 (Dec. 16, 2009) 9

State v. Parker, 43 N.H. 83 (1861) 19

Van Der Stok v. Van Voorhees, 151 N.H. 679 (2005) 16, 19

Werner v. Montana, 117 N.H. 721 (1977) 11, 15

Wilko of Nashua v. Tap Realty, 117 N.H. 843 (1977) 16, 19

Statutes

N.H. R.S.A. §382-A:2A-202 ..... 11, 14

N.H. R.S.A. §382-A:2A-210 14

QUESTIONS PRESENTED

I. Dean Hill Motors' (DHM) (assignor of the plaintiff, Saab) salesmen allegedly made general statements about DHM's willingness to provide dealership service and maintenance to the vehicles it leased. There is no written term in the parties' Leases requiring DHM to provide service to the defendants' vehicles throughout the lease periods. Do the Leases reflect the intended final expression (or total integration) of the parties' agreement, or was there an express warranty or an extrinsic Lease term that DHM has breached by closing and not servicing the vehicles?

II. DHM was in financial trouble, but continued to advertise the dealership in newspaper circulars, do business, and its salesmen made general statements about DHM's willingness to provide service and maintenance to the vehicles it sold and leased. No one the defendants dealt with at DHM had any idea that it would close. Is this fraud in the inducement or negligent misrepresentation that would allow the defendants to rescind or cancel their leases?

* Plaintiff's Appendix is cited as "Pl.'s App. ___". The defendants did not submit a sufficient appendix of the record below, and, therefore, the plaintiff has borne the cost of submitting a comprehensive appendix.

STATEMENT OF THE CASE

This matter involves the default, repossession and commercially reasonable sale of two (2) Saab 2005 vehicles. These two vehicles were leased (Pl.'s App 1)[1] to the defendants, Stephen and Elaine Ball, by Dean Hill Motors (DHM), and the leases were assigned to the plaintiff, Saab Financial Services. The repossession of the leased vehicles and resulting sale created a deficiency balance of $26,737.41, and thousands of dollars in costs and attorneys' fees from this lawsuit that followed.

In February 2008, the plaintiff filed suit against the defendants to collect the debt owed, plus attorneys' fees and collection/repossession costs, as provided for in the Leases. Since that time, a virtual forest of motions; objections; responses to objections; and responses to responses to objections have been filed. The pleadings relevant to this appeal, and dispositive case history, are as follows.

On March 14, 2008, the defendants filed a Counterclaim[2] alleging that the plaintiff had deliberately damaged the defendants' credit by untrue and adverse credit reports, and listed the following as "defenses": "(1) The fraud and misrepresentation of Plaintiff's Dealer, [Dean Hill Motors]; (2) The fraud by the Lessor under the lease claimed upon; (3) The breach of contract by the Lessor under the lease claimed upon; (4) Latches; (5) Plaintiff as assignee is subject to all defenses against Lessor; (6) Lack of good faith." (Pl.'s App. 5.)

On November 4, 2008, the defendants filed a Motion for Summary Judgment, without any supporting affidavit. (Pl.'s App. 30.) The trial court denied the motion for lack of

---

[1] Both of the Leases are identical with the exception of the specific dates and pricing. Plaintiff has included a reduced-size lease due the difficulty in copying the actual-sized lease and has enlarged the pertinent parts. In addition, the relevant language is quoted throughout the plaintiff's brief. The actual size copy of the lease included with the defendants' brief contains only the front page of the Lease.

[2] The defendants' Counterclaim of deliberate damage to credit was dismissed summarily, in the trial court's Order of Apr. 16, 2009 (Pl.'s App. 140-42), as having no basis in law. The defendants have listed this issue in their Notice of Appeal, and as a Question Presented for Review in their brief, but have failed to raise the issue in their argument, and, thus, it is deemed waived on appeal. *See Close v. Fisette*, 146 N.H. 480, 484 (2001).

supporting affidavit (Pl.'s App. 53). On December 12, 2008, after apparently having read the arguments in the Plaintiff's Objection to Defendants' [first] Motion for Summary Judgment, the defendants filed a Renewed Motion for Summary Judgment (this time with attached affidavit), with a very different argument. (Pl.'s App. 54.) On January 21, 2009, the trial court denied the Defendants' Renewed Motion for Summary Judgment. (Pl.'s App. 92.)

On February 6, 2009, the plaintiff filed its first Motion for Summary Judgment (Pl.'s App. 96), which was granted in part. (Pl.'s App. 133.) Further discovery was conducted, in the form of a deposition of the defendants, and on July 12, 2009, the plaintiff filed Plaintiff's Second Motion for Summary Judgment (Pl.'s App. 143), which the court granted on August 18, 2009, awarding judgment to plaintiff. (Pl.'s App. 186.)

On September 23, 2009, the plaintiff filed its Motion for Attorneys' Fees,[3] as provided for under the Leases (Pl.'s App. 202) which the trial court granted. (Pl.'s App. 216.)

STATEMENT OF THE FACTS

On July 5, 2005 defendant, Stephen Ball, entered into a Lease Agreement-Monthly Payment ("Lease") with Dean Hill Motors ("DHM") for the lease of a new 2005 Saab 9-5 vehicle. And on November 16, 2005, both defendants, Stephen Ball and Elaine Ball, entered into a second lease with DHM for the lease of a new 2005 Saab 9-5 vehicle ("Second Lease" or collectively "Leases" [4]). (Pl.'s App. 1.) Upon execution of Lease and Second Lease, and evident on the face of the Leases, DHM's rights, titles and interests in the leases were assigned[5] to the plaintiff, Saab. (Pl.'s App. 1; Defs.' Br. 22.)

---

[3] The defendants listed this issue in their Notice of Appeal, and as a Question Presented for Review in their brief, but have failed to raise the issue in their argument, and, thus, it is deemed waived on appeal. *Id.*.

[4] Terms specific to each of the Leases may be found summarized in Plaintiff's Appendix, page 204, at footnotes 3 and 4.

[5] The Defendants, in their [First] Motion for Summary Judgment, and in their Renewed Motion for Summary Judgment alleged that the Plaintiff, Saab, was not a proper assignee of the Leases. (Pl.'s App. 32, ¶11; 65.) The trial court found that Saab appeared to be a proper assignee of the Leases. (Pl.'s App. 95.) The defendants listed

On October 14 2005,[6] after the first Lease was entered, and approximately one month before the Second Lease was entered, DHM voluntarily filed for Chapter 11 bankruptcy protection. Throughout October and November of 2005, the local area newspaper reported on the bankruptcy filing and the financial circumstances that led up to the filing. The paper reported that financial trouble with DHM's floor plan lender, Mascoma Savings Bank, led to the filing, but that a financial pact had been reached. (Pl.'s App. 109-110).[7] In fact, on November 14, 2005, DHM filed an assented-to motion to dismiss the bankruptcy action (Pl.'s App. 144, n.6). DHM ended up, however, closing its doors and going out of business in May 2006. (Id.) The closing was unanticipated, and a complete shock to all of the employees that the defendants had dealt with in entering the Leases. (Pl.'s App. 145-48, 153-57, 161-62, 165-68.)

The relevant parts of the Leases are as follows. In paragraph 25:

> MAINTENANCE, REPAIRS, OPERATING EXPENSES, AND DAMAGE. You will maintain and repair the vehicle to keep it in good condition. Replacement sheet metal must be new original equipment manufacturer parts. Other replacement parts must be original equipment manufacturer parts or parts of equal quality and design. (If insurance will pay for repairs, ask your insurance company to specify original equipment manufacturer sheet metal.) You will pay all maintenance, repair, and operating expenses, including gas and oil. If the odometer stops working, you must fix it immediately. You will service the vehicle as the manufacturer recommends. You will follow the manufacturer's instructions in any recall. If you don't do these things, we may do them. You will owe us our cost if we do. We may inspect the vehicle at any reasonable time and place.

(Pl.'s App. 2, 4.)

---

this issue in their Notice of Appeal, and as a Question Presented for Review in their brief, but have failed to raise the issue in their argument, and, thus, it is deemed waived on appeal. *See Close*, 146 N.H. at 484.

[6] The defendants have alleged that DHM was bankrupt in January 2005. (Pl.'s App. 119; Defs.' Br. 11.) This is false. The defendants have also alleged that DHM was out of trust with its floor plan lender because it committed fraudulent sales and leases of vehicles. (Pl.'s 68, 119-120.) There is absolutely no evidence to prove the defendants' allegations of fraud by DHM.

[7] These news stories were provided to the plaintiff by the defendants in the course of discovery.

The Leases also contain an integration clause, separately signed by the defendants that states:

> **THIS IS THE ENTIRE AGREEMENT.** This lease, including the front and back of this form, contains the entire agreement between you and us relating to the lease of the vehicle. Any change to the terms of this lease must be in writing and signed by you and us. No oral changes are binding.

(Pl.'s App. 1, 3.) In addition, just below the integration clause, the Leases state: "**NOTICE TO LESSEE. DO NOT SIGN THIS AGREEMENT BEFORE YOU READ IT.**" (Id.)

Paragraph 21, of the Leases, states that the standard manufacturer's warranty applies, and, conspicuously states: "**THERE ARE NO OTHER EXPRESS WARRANTIES ON THE VEHICLE. <u>WE MAKE NO IMPLIED WARRANTY OF MERCHANTABILITY. THERE IS NO WARRANTY THAT THE VEHICLE IS FIT FOR A PARTICULAR PURPOSE.</u>**" (Pl.'s App. 2, 4.)

Paragraph 22, entitled "Optional Service and Maintenance Contracts" is clearly marked not applicable. (Pl.'s App. 1, 3.)

Before the time of the first lease and until its closing, DHM continued to advertise its dealership in various local newspapers. Advertisements included these statements: "A heritage of service. An outlook of excellence," "Dean Hill . . . The Name You Know. The Name You Trust," "Everybody loves Saab," and "Cleared for take-off . . , Take Flight . . . Saab, Born From Jets." (Pl.'s App. 173-77.)

After the dealership closed, the defendants continued to make their lease payments. (Pl.'s App. 150, 159.) It was not until approximately four to five months after the DHM business closing, that, on the advice of counsel (Id.), the defendants defaulted on their leases, and claimed

a right to rescission or cancellation. Throughout this case, the defendants have vacillated[8] between the defensive theories of (1) fraud/misrepresentation in the inducement of the leases; (2) breach of contract; and (3) breach of express warranty.

The defendants maintain that they had a right to cancel and rescind their leases because DHM closed and did not continue in business, or continue to provide dealership service and maintenance to the leased vehicles. Specifically, Stephen Ball averred in his affidavit that:

> Dean Hill Motors (the *only* local Saab dealer . . .) represented to my wife and I that it was a reputable and creditworthy authorized Saab dealer, and expressly promised that it would provide the maintenance (as recommended by the manufacturer) and repairs required under the leases of the two Saab vehicles.

(Pl.'s App. 68.) The defendants allege, for the first time in their Brief, that DHM "instructed them that *service had to be provided by an authorized Saab dealer*[9] and assured them that Dean Hill Motors would provide that service." (Defs.' Br. 8.)

SUMMARY OF THE ARGUMENT

After DHM closed, the defendants defaulted on their Leases. The plaintiff repossessed and sold the vehicles at a loss. After attempts to collect the deficiency balances, costs and attorneys' fees (as provided under the Leases) failed, the plaintiff filed suit. In response, the defendants alleged that it was DHM that breached the parties' leases and committed fraud and misrepresentation.

As the basis of these allegations, the defendants allege that DHM made general representations to them that it was creditworthy, and would stay in business to provide necessary

[8] At one point in this litigation, the defendants conceded that there was no evidence of fraud, and proceeded to set forth new arguments, abandoning their claim of fraud, and, this time, claiming Dean Hill Motors made an express warranty that it would service the vehicles for the duration of the Leases. (Pl.'s App. 54-57; 57 ¶11.)

[9] Defendants, in their First Motion for Summary Judgment, claim that DHM advised them that "the manufacturer *recommended* that vehicle maintenance *should* be provided by a Saab dealer . . . ." (Pl.'s App. 31) (emphasis added.) In Defendants' Renewed Motion for Summary Judgment they allege that "the two leases required authorized Saab dealer maintenance." (Pl.'s App. 54.)

service to the vehicles for the period of the Leases. In addition, the defendants provided a slew of advertising circulars, apparently as further evidence of representations. The defendants further claimed that they relied on these alleged representations in entering the Leases due to the close proximity of DHM to the defendants' home. But DHM did not breach the Leases, nor did it commit fraud or misrepresentation.

DHM did not breach the parties' leases because DHM-dealership-service was not a term of the parties' Leases. The plain language of the Leases does not require (or promise) service at DHM. Also, under the parol evidence rule, as codified in the Uniform Commercial Code, evidence of alleged inconsistent, extrinsic terms is barred when the Leases reflect the intended final expression (or total integration) of the parties' agreement, and are unambiguous.

In this case, the Leases reflect the parties' final expression of their intended agreement. There is an integration clause that is separately signed by the defendants, which states that the Lease is the final agreement, and that no oral changes are binding. This Court has held such a clause to be evidence that a writing is intended to reflect the parties' final agreement. Further, the language of the leases, as the trial court found, is unambiguous, and, therefore, the parol evidence rule bars evidence of alleged extrinsic terms.

The defendants have argued, on appeal, that evidence of an extrinsic term promising Saab-dealership-service at DHM is a consistent term and should, therefore, be admitted. This alleged term, however, is not consistent with the Leases' terms, as the Leases clearly do not promise or require Saab-dealership-service at DHM.

In addition, the defendants claim that this alleged representation of service was an express warranty. Evidence of an alleged express warranty is, likewise, barred by the parol evidence rule. Even if it were not barred, however, a representation (if there was one) to provide

dealership-service at DHM cannot be an express warranty because express warranties relate to the quality and function of the goods—in this case the vehicles, and damage or malfunction to them.

In addition to alleging that DHM breach the terms of the Leases, the defendants have also alleged that DHM committed fraud, or misrepresentation, in the inducement of the leases. The defendant, Mr. Ball, alleged that DHM "represented to my wife and I that it was a reputable and creditworthy authorized Saab dealer, and expressly promised that it would provide the maintenance (as recommended by the manufacturer) and repairs required under the leases of the two Saab vehicles." The defendants have testified that the DHM employees were able to make these generalized statements because they had no idea that DHM would close. In addition, the defendants provided the plaintiff with DHM advertising circulars, apparently to show that DHM made representations that it would stay in business or was creditworthy.

In order to prove fraud, the defendants have to prove that a DHM employee knowingly made a false statement of material fact in order to induce the defendants to enter the Leases, and that the defendants justifiably relied on the statement in entering the Leases. The defendants have ascribed certain statements to DHM, as a whole, and advertising that may amount to puffing, but have not identified a false statement of material fact that could sustain a claim of fraud.

Even if the defendants had identified a false statement of material fact, the defendants have been adamant that DHM's employees had no knowledge of the impending business closing, and were being truthful at all times during the Lease transactions. Likewise, a claim of negligent misrepresentation fails because the parties had equal knowledge—no knowledge—that DHM would close.

In addition, the defendants appear to argue for a troubling expansion of the law of fraud in the inducement. They argue that DHM, as a company, committed fraud because, while having financial difficulties, it continued to advertise and sell and lease vehicles without telling the customers details of its financial struggles. But this is not fraud, only good business sense. Holding this situation to be fraud would impose a duty on a business to continually disclose its financial status to potential customers. This would, most likely, assure the business' failure.

Consequently, the defendants have no valid defense to their defaults on the Leases, and this Court should affirm the trial court's grant of summary judgment in favor of the plaintiff.

ARGUMENT

I. There is no term in the parties' Leases that required DHM to provide service to the defendants' vehicles throughout the lease periods. The Leases unambiguously reflect the intended final expression (or total integration) of the parties' agreement, and DHM did not breach the Leases by closing its business and not servicing the defendants' leased vehicles.

There is no term in the Leases, within the four corners of the documents, or otherwise, that promises DHM will remain in business and provide Saab-dealer-service to the leased vehicles throughout the terms of the Leases. Nor do the Leases require service at an "authorized Saab Dealer" as the defendants erroneously claim.

Interpreting a lease contract is a question of law that this Court will review *de novo*, applying the facts as found by the trial court. *South Willow Props., LLC v. Burlington Coat Factory of N.H., LLC*, No. 2008-706, 2009 N.H. LEXIS 143, at *12 (Dec. 16, 2009). "As with any contract, this Court will interpret a lease by giving its terms their reasonable meaning." *Id.* "Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the agreement." *Behrens v. S.P. Constr. Co.*, 153 N.H. 498, 503 (2006).

A. The plain language of the Leases does not promise (or require) Saab-dealer-service at DHM

In the parties' Leases, there is no term that promises or requires Saab-dealer-service at DHM. The plain language of the Leases, in paragraph 25, relevant to service or maintenance, states:

> MAINTENANCE, REPAIRS, OPERATING EXPENSES, AND DAMAGE. You will maintain and repair the vehicle to keep it in good condition. Replacement sheet metal must be new original equipment manufacturer parts. Other replacement parts must be original equipment manufacturer parts or parts of equal quality and design. (If insurance will pay for repairs, ask your insurance company to specify original equipment manufacturer sheet metal.)

> You will pay all maintenance, repair, and operating expenses, including gas and oil. If the odometer stops working, you must fix it immediately. You will service the vehicle as the manufacturer recommends. You will follow the manufacturer's instructions in any recall. If you don't do these things, we may do them. You will owe us our cost if we do. We may inspect the vehicle at any reasonable time and place.

(Pl.'s App. 2, 4.)

Nowhere in this paragraph do the words "authorized Saab Dealer" even appear. Nor is there a requirement that only a Saab Dealer perform service or maintenance. In fact, paragraph 22 of the Leases (marked "not applicable") clearly shows that there was no maintenance or service contract on the vehicles. (Pl.'s App. 1, 3.) The Defendants could have brought their vehicles anywhere for service. And if the defendants insisted on having a Saab dealership service the vehicles, after DHM had closed, they could have driven to Concord, New Hampshire or North Clarendon, Vermont for service.

As the trial court correctly found, "none of the language in this paragraph [25] could reasonably be construed as a promise that Dean Hill Motors would provide service. There is no language in any other provision of the lease that could be construed to obligate Dean Hill Motors to provide service." (Pl.'s App. 136.) Thus, according to the plain language in the Leases, DHM did not breach the Leases by failing to provide dealership-service to the defendants' vehicles. *See Behrens*, 153 N.H. at 503.

In sum, it is clear that no written term on the face of the Leases promised DHM-service to the vehicles. In addition, there is no extraneous term promising (or requiring) DHM-service to the leased vehicles.

B. Because the Leases are a total integration of the parties' agreement, evidence of any alleged additional oral term is barred by the parol evidence rule

As discussed above, there is no written term in the Leases that promised, or required, DHM to service the leased vehicles. The defendants claim, however, that DHM promised to provide this so-called required service.

Whether an oral or extraneous term existed that is not within the four corners of the Leases depends on the operation of the parol evidence rule as codified in the Uniform Commercial Code which states:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
> (a) by course of dealing or usage of trade or by course of performance; and
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

N.H. R.S.A. §382-A:2A-202. More simply stated, "RSA 382-A:2-202 excludes evidence of any additional oral agreement or terms when a written agreement is intended by the parties to be a final expression [or total integration] of their agreement." *Werner v. Montana*, 117 N.H. 721, 727 (1977).

i. *The Leases are Total Integrations*

"The first step in determining whether parol evidence is admissible is to consider whether the writing is a total integration and completely expresses the agreement of the parties." *Behrens*, 153 N.H. at 504. An integration clause provides evidence that the parties intended their written agreement to be a total integration. *Id.*

In the present case, the Leases are clearly intended to be the complete and exclusive

statement of parties' agreement. The Leases include an integration clause that is signed by the defendants and states:

> **THIS IS THE ENTIRE AGREEMENT.** This lease, including the front and back of this form, contains the entire agreement between you and us relating to the lease of the vehicle. Any change to the terms of this lease must be in writing and signed by you and us. No oral changes are binding.

(Pl.'s App. 1, 3.) In addition, just below the integration clause, the Leases state: "**NOTICE TO LESSEE. DO NOT SIGN THIS AGREEMENT BEFORE YOU READ IT.**" (Id.)

Further, it is clear by the defendant, Stephen Ball's, sworn deposition testimony that when DHM closed its doors, he saw it as an inconvenience and not as a breach of the Leases, and sought legal counsel as to how he could get out of the leases. (Pl.'s App. 159, 163.) In fact, Mr. Ball testified that once DHM closed he still felt ethically bound,[10] to his obligation under the Leases, and that he only stopped paying, and returned the vehicles, based on the advice of counsel. (Pl.'s App. 150, 159, 163.)

Clearly the parties intended the Leases to be the complete and final expression of the parties' agreement, thus barring evidence of any alleged extraneous or oral lease terms.

ii. *The Leases Terms are Unambiguous, Barring Parol Evidence*

Even when an agreement is completely integrated, "A trial court may use parol evidence to aid in interpreting an ambiguous term of a contract." *Behrens*, 153 N.H. at 501. "Whether a contract term is ambiguous, is ultimately a question of law for this [C]ourt to decide" and this Court will "review a trial court's interpretation of a contract *de novo*." *Id.* at 500.

In the present case, the contract is unambiguous. Paragraph 25, on maintenance and repairs, reprinted above, does not promise service at DHM. In fact, the Leases require the defendants to maintain and repair the vehicles, and to "service the vehicle[s] as the manufacturer

[10] It should be noted that Mr. Ball is a sophisticated business owner who is not unfamiliar with leases and contracts.

recommends." (Pl.'s App. 2, 4.) In addition, paragraph 22, entitled "Optional Service and Maintenance Contracts," is marked "NA" (not applicable), which is further evidence of the fact that service at DHM was not a term of the Leases. (Pl.'s App. 1, 3.)

The defendants argue that "the [trial court] wrongly ignored Mr. Ball's undisputed statement that Dean Hill Motors told the Balls that the manufacturer's recommendation required an 'authorized Saab Dealer' to perform maintenance . . . ." (Defs.' Br. 8.) They argue that such a statement would be evidence of a "consistent additional term" and, thus, admissible as parol evidence. This is incorrect.

First of all, the defendants have never, before this appeal, offered evidence of this alleged statement, and, therefore, the plaintiff and the trial court have not addressed it. Until this appeal, the defendants have not alleged that a DHM-employee stated to them that the "manufacturer's recommendation *required* an authorized Saab dealer to perform maintenance on the vehicles."

Second, an alleged statement by a DHM-employee that "authorized-Saab-dealer-service is *required*" is clearly inconsistent with the Lease term: "service the vehicle[s] as the manufacturer *recommends*." The defendants allege that DHM told them that "the manufacturer's *recommendation required* an 'authorized Saab Dealer' to perform maintenance . . . ." (Defs.' Br. 8 (emphasis added).) This alleged, and previously unmentioned, parol statement ("the manufacturer's *recommendation required* . . .") is incongruous and contradictory. If Saab-dealer-service were *required* under the terms of the Leases, it would certainly be stated in writing in the Leases. And even if Saab-dealer-service were required, which it plainly was not, it would not be required <u>only</u> at DHM. This alleged oral statement is an inconsistent term and is, therefore, barred by the parol evidence rule. *See* N.H. R.S.A. §382-A:2A-202.

Clearly, under the facts of this case, any evidence of an alleged extrinsic lease term is barred. The defendants have also claimed that DHM's alleged promise to provide dealership service was an express warranty. The parol evidence rule, of course, bars extrinsic evidence of this. Aside from the evidentiary bar, it is important to point out that the defendants' interpretation and application of express warranty-law, throughout their pleadings, and in their brief, is entirely incorrect.

C. An "express warranty" must relate to the condition of the goods—the vehicles, and an alleged promise to provide Saab-dealer-service, does not relate to the condition of the vehicles and, therefore, could never be an express warranty

Even if a DHM's employee had made a specific promise that DHM would provide dealership service to the vehicles throughout the term of the leases, and, even if the defendants could get around the exclusion of parol evidence, this "promise" would not be an express warranty, as defined by the Uniform Commercial Code, or by the common law.

"Under the Uniform Commercial Code, express warranties can be created by promises or affirmations of fact which *relate to the goods* and become part of the contractual bargain." *Fassi v. Auto Wholesalers of Hooksett*, 145 N.H. 404, 406 (2000) (emphasis added); N.H. R.S.A. §382-A:2A-210. An express warranty, that is not validly disclaimed, *attaches to the goods*. *Fassi*, 145 N.H. at 406 (interpreting the Uniform Commercial Code); *Werner v. Montana*, 117 N.H. 721, 728 (1977) (an express warranty relates to the condition of the goods). Under the common law, the U.S. Supreme Court has explained, "Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or in other words, that the customer has received 'insufficient product value'." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 (1986).

In the present case, the defendants' vehicles were covered by the standard manufacturer's warranty, as apparent in paragraph 21[11] of the leases. (Pl.'s App. 1, 3.) The standard manufacturer's warranty is indeed an express warranty; it relates, and is attached, to the *goods*—the vehicles—and damage or malfunction of them. *See Fassi*, 145 N.H. at 406. As the U.S. Supreme Court has explained, a warranty relates to damage to the product itself. *East River Steamship Corp.*, 476 U.S. at 872. An alleged statement, (assuming for the moment that there was one) that the defendants could bring their cars to DHM for service, cannot be an express warranty because it does not relate to the functionality or condition of the vehicles.

Cleary, the parties' Leases did not require that DHM provide Saab-dealer service to the leased vehicles throughout the lease period, and, therefore, DHM did not breach the parties' Leases by going out of business. Similarly, the defendants have not alleged any facts sufficient to prove their claim of fraud in the inducement or misrepresentation.

II. No DHM-employee knew that DHM was going to close until it closed. Alleged statements about DHM's willingness to provide service and maintenance to the defendants' leased vehicles were innocently made, not knowingly false, and, therefore, not fraud in the inducement, or negligent misrepresentation.

When the trial court granted (in part) Plaintiff's [First] Motion for Summary Judgment, it stated, correctly, that the defendants are entitled to present parol evidence on the issue of misrepresentation and/or fraud in the inducement.[12] The defendants have not provided evidence to sustain a claim of either.[13]

[11] In that same paragraph, however, all other express warranties are conspicuously excluded. (Pl.'s App. 1, 3.)
[12] The trial court noted that the defendants made no attempt to distinguish these claims from one another.
[13] In hindsight, the plaintiff's counsel could have moved to dismiss defendants' claim of fraud/misrepresentation for failure to state a claim.

Both fraud in the inducement, and negligent misrepresentation, require, at the very least, proof of a specific false statement of material fact.[14] *See Van Der Stok v. Van Voorhees*, 151 N.H. 679, 682 (2005); *Snierson v. Scruton*, 145 N.H. 73, 78 (2000). Moreover, to prove fraud in the inducement, the defendants must prove, by clear and convincing evidence, that a salesperson from DHM made a false representation to them that DHM had good credit and would stay in business to service the leased Saabs, *knowing* that that statement was false. *See Van Der Stok*, 151 N.H. at 682; *Wilko of Nashua v. Tap Realty*, 117 N.H. 843, 849 (1977). And the defendants must prove that a DHM-employee made that "fraudulent representation for the purpose or with the intention of causing [the defendants] to act upon it" in deciding to enter the leases. *See Proctor v. Bank of New Hampshire, N.A.*, 123 N.H. 395, 399 (1983). Further, the defendants must demonstrate that they justifiably relied on the statement. *See Van Der Stok*, 151 N.H. at 682; *Wilko of Nashua*, 117 N.H. at 849. The defendants "cannot allege fraud in general terms, but must specifically allege the essential details of the fraud and the facts of the defendants' fraudulent conduct." *Snierson*, 145 N.H. at 77 (2000). Fraud cannot be presumed or implied from doubtful circumstances. *Wilko of Nashua*, 117 N.H. at 849.

In *Proctor*, the plaintiff brought a claim of fraud alleging, in one count, that "the defendant misled the plaintiff into believing that a limited partnership, of which the plaintiff was a general partner, owned the [real estate at issue]." *Proctor*, 123 N.H. at 399. This Court dismissed the count, holding that the plaintiff "fails to allege the fraudulent representation made by the defendant or that the representation was made for the purpose of causing the plaintiff to act upon it." *Id.*

[14] Specifically, according to the trial court, the defendants had to show "that at least one salesperson explicitly promised service and represented that Dean Hill Motors would continue to do business in order to induce the defendants to enter into the leases." (Pl.'s App. 140.)

Likewise, the defendants have not identified any actionable representation made by DHM's employees.

A. The defendants have not offered evidence of a specific false statement of material fact upon which to base a claim of fraud or misrepresentation

The defendants have not provided evidence of any specific false statement or misrepresentation made by a DHM's employee that could possibly sustain a claim of fraud or negligent misrepresentation. The defendants have ascribed certain representations to "DHM" as a whole company, such as the one in Stephen Ball's affidavit:

> Dean Hill Motors (the *only* local Saab dealer . . .) represented to my wife and I that it was a reputable and creditworthy authorized Saab dealer, and expressly promised that it would provide the maintenance (as recommended by the manufacturer) and repairs required under the leases of the two Saab vehicles.

(Pl.'s App. 68.) And when the defendants were asked in interrogatories, to indicate, "What representations were made . . .," the defendants could not identify any statements made to them by anyone in particular. The defendants merely stated generally that "there is an absolute guarantee of service in every way," (Pl.'s App. 40, ¶27) and the defendants went on to state generally that "[t]he employees were able to make such guarantees as *they had no knowledge* of the impending closure and dishonest activities of the owner." (Id.)

Also, along with their interrogatory answers, the defendants provided a slew of advertising circulars, apparently to show representations made by DHM that included the statements: "A heritage of service. An outlook of excellence," "Dean Hill . . . The Name You Know. The Name You Trust," "Everybody loves Saab," and "Cleared for take-off . . , Take Flight . . . Saab, Born From Jets." (Pl.'s App. 173-77.)

Likewise, in the defendants' deposition testimony there was no specific false statement or misrepresentation identified. The defendants dealt with Rod Whipple and Lennie Veilleux when

entering the leases, and testified that these employees had no knowledge of DHM's financial instability. (Pl.'s App. 145-48, 153-57, 161-62, 165-68.) The defendants further testified that the salespeople were "blind-sided" and completely "in the dark" regarding the closing of DHM. (Id.)

Just as the vague alleged representations in *Proctor*—that the defendant "had misled the plaintiff"— evidence of DHM's vague and general "representations", even in a light most favorable to the defendants, lack the factual specificity needed to sustain a claim of fraud or misrepresentation. *See Proctor*, 123 N.H. at 399. Moreover, the DHM's employees did not make any representations that they knew to be false.

B. DHM's employees did not commit fraud in the inducement of the Leases because the employees reasonably believed any and all alleged representations they may have made to the defendants

Assume, *arguendo*, for the moment, that a sales person had made an explicit statement to the defendants, at the time they entered the Leases, that DHM had good credit, was not going to close, and would service the vehicles throughout the Leases. [15] The defendants' claim of fraud would still fail because all of the evidence, including the defendants' own sworn testimony, proves that no one the defendants dealt with at DHM had any idea that the dealership would close and go out of business. (Pl.'s App. 145-48, 153-57, 161-62, 165-68.) Thus, no knowingly false statement was made by anyone who intended to induce the defendants to enter the Leases. *See Van Der Stok*, 151 N.H. at 682; *Wilko of Nashua*, 117 N.H. at 849.

Similarly, the verbiage in the advertising circulars is not what any reasonable person would take as a representation of continuing service to be relied upon in entering a lease contract. These advertisements (Pl.'s App. 173-77) show vehicles and their prices, and include

[15] As explained above, in Section II, A, there is no evidence of any specific false statement, and the defendants' vague generalizations cannot sustain a claim of fraud. *See Snierson*, 145 N.H. at 77.

the statements: "A heritage of service. An outlook of excellence," "Dean Hill . . . The Name You Know. The Name You Trust," "Everybody loves Saab," and "Cleared for take-off . . , Take Flight . . . Saab, Born From Jets." To rely on the former statements as a representation that DHM would remain open to service their vehicles, is akin to taking the last advertising statement ("Cleared for take-off, Take Flight . . . Born From Jets") to mean the car can fly. Further, these advertising statements are clearly not false misrepresentations of material facts. No rational person could justifiably rely on these statements in entering a contract. These statements are simply "puffing," not fraud. *See State v. Parker*, 43 N.H. 83, 84-85 (1861) (mere puffing of quality or value of goods does not constitute fraud).

In sum, no DHM employee made a false statement that the defendants justifiably relied[16] upon in entering the Leases, and, therefore, DHM did not fraudulently induce the defendants to enter the Leases. Likewise, there was no negligent misrepresentation made.

C. <u>DHM's employees could not make negligent misrepresentations to the defendants because both DHM employees and the defendants were equally unaware that DHM would close, and both had access to the same limited information regarding DHM's financial condition in the local newspaper</u>

In the defendants' multiple and varied defenses, they have lumped "misrepresentation" together with their "fraud in the inducement" defense. The two are similar, but not the same.

To prove negligent misrepresentation, the defendants must show that a DHM salesperson made a negligent representation of a material fact, and that the defendants justifiably relied upon the representation in entering the Leases. *Snierson*, 145 N.H. at 78. Further, "It is the duty of one who volunteers information to another *not having equal knowledge*, with the intention that

[16] The plaintiff has not addressed the element of justifiable reliance in detail as the defendants' claim fails at the first element of fraud in the inducement (knowingly making a false statement), but it should be noted, as stated earlier, the financial troubles of DHM were regularly reported in the local news papers that the defendants themselves produced for the plaintiff, and were, arguably, common knowledge. This makes proving "justifiable reliance" by the defendants highly unlikely. *See Van Der Stok*, 151 N.H. at 682; *Wilko of Nashua*, 117 N.H. at 849.

he or she will act upon it, to exercise reasonable care to verify the truth of his statements before making them." *Id.* (emphasis added).

Assuming arguendo, as in the fraud analysis above, that the defendants had provided evidence of a false, factually specific statement; the negligent misrepresentation claim still fails because the parties had equal knowledge of DHM's financial condition. *See id.* According to the defendants' own sworn testimony, and their pleadings, the employees at DHM were completely blindsided by the closing. (Pl.'s App. 145-48, 153-57, 161-62, 165-68.) In any event, the defendants and DHM's employees had equal knowledge, via the newspaper, that there had been financial struggles at DHM. This equal knowledge of both parties is fatal to a claim of negligent misrepresentation. *See Snierson*, 145 N.H. at 78.

Further, even if the DHM's employees had tried to verify DHM's financial viability, the result is the same. This is so because no one—not even the owner of DHM himself—knew, at the time the parties entered the Leases, that the business would fail and close.

The next and final theory of the defendants, however, seeks this Court to expand its definition of fraud in the inducement, or misrepresentation, in a most troubling way.

D. <u>A business does not commit fraud, or misrepresentation, by attempting to stay in business despite financial trouble; and to hold otherwise, violates sound public policy by potentially destroying the economic market</u>

The defendants' latest theory[17] is that DHM, as a corporation, committed fraud. (Pl.'s App. 190-93.) The defendants' rationale appears to be that because DHM was having financial struggles (evidenced by filing for bankruptcy protection, and the local news stories) and yet continued to advertise its dealership, and sell and lease vehicles, that it committed fraud. This is

[17] This theory of DHM as a corporation committing fraud first appeared in Defendants' Brief Response to Plaintiff's Brief Response to Defendants' Objection to Plaintiff's Second Motion for Summary Judgment. (Pl.'s App. 182-83.)

not, however, fraud, or misrepresentation, under NH law; to hold it to be, is against public policy as it would have a devastating effect on the economic market.

All that the evidence has shown, as the trial court found, was a struggling car dealership, doing its best to recover financially and stabilize, and trying to continue selling and leasing vehicles, in the hope it could stay in business. (Id.) Imagine courts holding this scenario to be fraud. This would force any company that was trying to get out of financial trouble to announce these circumstances to both its employees and its potential customers—it would, in essence, impose a duty to continually and openly disclose one's financial affairs and status to all customers. This result would certainly assure a company's financial failure, through the loss of future sales, and the mass exodus of employees. It is simply good business sense not to broadcast details of financial struggles while trying to overcome them.

Further, to find DHM's actions to be fraud, or negligent misrepresentation, would have a devastating effect on the entire automobile market because no lease finance company would finance leases with the risk that the dealership would close before the end of the lease, allowing the lessee to simply rescind or cancel his lease. In fact, in these economic times, it is certain that thousands of lessees are in the same situation—they leased a vehicle from a dealership that assigned the lease to a lease finance company, and that dealership has now closed. This is not fraud or misrepresentation, and the lessees may not rescind their leases on that basis.

CONCLUSION

Throughout this lawsuit, the defendants have varied their theories of defenses.[18] The plaintiff has had to shoot at a moving target, and the defendants, at this point, have unveiled their very best evidence of any alleged wrongdoing on the part of DHM that might allow them legal ground upon which to cancel or rescind their Leases—there was none. No material facts are in dispute, and none of the defendants' theories are viable as a matter of law.

The plaintiffs, therefore, request this Honorable Court to AFFIRM the trial court's rulings that found the defendants liable for damages and attorneys' fees for defaulting on the two (2) Leases. The defendants have requested oral argument, not to exceed fifteen (15) minutes. (Defs.' Br. 21.) If oral argument is granted, the plaintiff-respondent requests the same. Lisa A. Biron, Esquire will argue on behalf of the plaintiff-respondent.

Respectfully submitted,
Saab Financial Services, LLC
By its attorneys,
WELTS, WHITE & FONTAINE, P.C.

Date: March 1, 2010

By: _____

Lisa A. Biron, Esq. #18908
Jack S. White, Esq. #2725
29 Factory Street/P.O. Box 507
Nashua, NH 03061-0507
(603) 883-0797

CERTIFICATE OF SERVICE

I certify that two (2) copies of the foregoing Brief of the Plaintiff-Respondent was this day sent via first class U.S. Mail, postage prepaid, to K. William Clauson.

Date: March 1, 2010

_____
Lisa A. Biron

[18] For an excellent recap and summary of the defense's evolving theories, please see the trial court's Order of Aug. 18, 2009. (Pl.'s App. 189-93.)