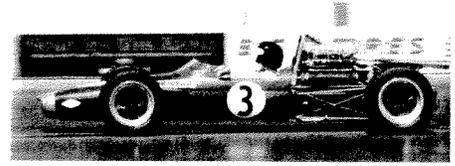


The Represented Repco

A Race to Litigation



Among the fusillades of wisdom (among other things) delivered by one Anthony “Tony” Soprano, Sr., a character of reputed high caliber, was the following: “A wrong decision is better than indecision.” To a degree, the law echoes such sentiment, as in statutes of limitation, requiring lawsuits be commenced within a certain time or the opportunity is lost. Similarly, the law does not favor asserting claims while taking actions and/or other positions arguably inconsistent with such claims. “Lights out,” Tony might say.

This brings us to *Dimmer v. Soprano*, decided on May 7, 2007 by the Supreme Court of New York, Westchester County (in New York the Supreme Court is the trial level court).

According to the Court, in 1999 plaintiff John Dimmer paid \$192,500 to defendant Ernest Topran for what Dimmer alleged was represented as an authentic 1967 Repco Brabham BT24-3, “a unique car with an interesting racing history.” Topran had earlier purchased the vehicle from defendant Nicola Soprano. Dimmer alleged that, prior to Dimmer’s purchase, Soprano had represented to him that the vehicle was built by Jack Brabham in 1967, fitted with a Repco engine, and sold in 1969 to internationally acclaimed race driver Silvio O. Moser.

Before the purchase, Dimmer attempted to verify the vehicle’s authenticity. After the purchase, a former Moser racing team mechanic told Dimmer he believed the vehicle was only a replica. Dimmer made further inquiries. He later agreed to sell the vehicle to another for \$395,000, and accepted a \$30,000 down payment. After investigating, the prospective purchaser did not go forward.

Dimmer sued the defendants, claiming fraudulent inducement, mutual mistake, and breach of fiduciary duty. Among other steps, the defendants moved for summary judgment, asking the Court to rule in their favor without a trial.

The Court ruled for the defendants. It did not make a determination as to the authenticity of the car.

With regard to Dimmer’s claim he had been fraudulently induced to purchase the car, the court noted that such a claim will fail “where the information is readily available to the plaintiff [such as where] the plaintiff had the means available by the exercise of reasonable care to further establish the accuracy or correctness of the representations.”

“[T]here is absolutely nothing in the record at bar demonstrating that Soprano knowingly had made misrepresentations to plaintiff as to the subject vehicle’s authenticity. . . .

[T]his Court must find as a matter of law that plaintiff had not reasonably relied upon Soprano’s representations, that he independently had tried to confirm the vehicle’s authenticity, . . . and that he ultimately had agreed to purchase the vehicle because he sufficiently had satisfied himself through his own investigative efforts that the vehicle was in fact a Brabham BT 24. . . . [Since] plaintiff clearly knew that his knowledge as to the vehicle’s authenticity was limited, and he nevertheless had proceeded with the purchase thereof, he has assumed the risk of his ‘conscious ignorance’ and mistake, if any”

As for Dimmer’s claim for rescission [undoing the deal] based on mutual mistake, “[w]here a party desires to rescind upon the ground of mistake or fraud, he must, upon discovery of the facts, at once renounce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. . . . [P]laintiff’s inordinate delay had resulted in his forfeiture of any viable rescission claim.”

Finally, with regard to Dimmer’s assertion of breach of fiduciary duty, “a plaintiff must first establish that there is an affirmative duty to disclose information based upon a fiduciary duty. . . . [T]his was an arm’s length transaction and . . . Soprano had provided plaintiff with all of the documentation in his possession regarding the vehicle’s authenticity.”

Defenses of waiver and ratification were further fatal to certain of Dimmer’s claims. “[P]laintiff in fact did nothing with respect to rescinding the contract . . . and instead had contracted to sell the subject vehicle to a third party. . . . [P]laintiff’s actions constitute a waiver of his right to seek rescission.

“Additionally, ‘[o]ne may confirm a transaction voidable for fraud . . . by exercising dominion over the subject-matter of a sale, or even by silence and inaction with knowledge of one’s rights.’ . . . [P]laintiff’s actions in 2002 of rebuilding the subject vehicle’s engine pursuant to a contract of sale for the vehicle and for which plaintiff kept \$30,000.00, at a time when he had knowledge of the facts upon which this action is based, properly should be construed as plaintiff’s ratification of his ownership of the vehicle.”

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As this month’s episode illustrates, if you believe you have a claim, assert it promptly and do not act or take positions contrary to it. Otherwise, your claim may end up “sleeping with the fishes.”

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