

**DUANE MORRIS LLP**  
a Delaware Limited Liability Partnership  
By: Tracy Evans-Moyer, Esq.  
744 Broad Street, Ste. 1200  
Newark, New Jersey 07102  
(973) 424-2000

**RECEIVED**

OCT - 1 2003

SUPERIOR COURT OF NEW JERSEY  
COUNTY OF SUSSEX  
HONORABLE RONALD E. GRAVE, J.L.C.

**DUANE MORRIS LLP**  
a Delaware Limited Liability Partnership  
By: Eric J. Sinrod, Esq. (*Pro Hac Vice* Pending)  
One Market, Spear Tower, Suite 2000  
San Francisco, California 94105-1104  
Attorneys for Defendant,  
eBAY Inc.,  
improperly pleaded as E-Bay, Inc.

DONALD F. BERGRAFT; and HIDDEN VALLEY, INC.

Plaintiffs,

v.

E-BAY, INC. and DAVE\$JAMIE,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: SUSSEX COUNTY

Docket No. L-566-02

CIVIL ACTION

**ORDER**

THIS MATTER, been opened to the Court by Duane Morris, LLP, attorneys for eBay Inc., improperly pleaded as E-Bay, Inc. ("eBay") (Tracy Evans-Moyer, Esq. appearing) for an Order dismissing Plaintiffs' Complaint in its entirety as to eBay Inc., and Loalbo & Bassetti, LLC, attorneys for the Plaintiffs (John M. Loalbo, Esq. appearing); and it appearing that the Court has read and considered the pleadings, briefs and affidavits submitted by all parties; and ~~any~~ <sup>on 6/27/2003</sup> argument of counsel, ~~and for the reasons set forth upon the record~~ and good cause otherwise having been shown;

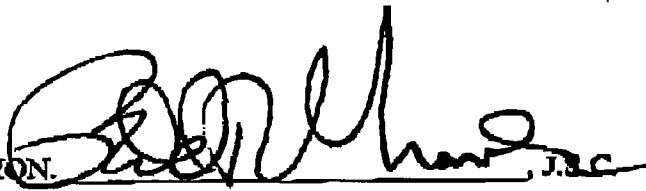
It is on this 15<sup>th</sup> day of October, 2003

NW00216.1

**ORDERED** that Defendant, eBay's motion to dismiss Plaintiffs' Complaint, as to eBay is **GRANTED**; and it is further

**ORDERED** that Plaintiffs' Complaint against eBay, in its entirety, is hereby **DISMISSED WITH PREJUDICE**; and it is further

**ORDERED** that a copy of this Order be served upon all parties within 7 days of the entry hereof.

HON.  J.C.  
ROMAN B. GRAVES, J.C.

Opposed  
 Unopposed

PLEASE SEE ATTACHED STATEMENT OF REASONS

**STATEMENT OF REASONS**

**BEGRAFT and HIDDEN VALLEY, INC.**

**v.**

**eBay, INC. and DAVESJAMIE**

**DOCKET NO. L-566-02**

Defendant, eBay, Inc. (eBay), has filed a notice of motion to dismiss plaintiff's complaint with prejudice for failure to state a claim pursuant to R. 4:6-2(e). Opposition has been filed.

When reviewing a motion to dismiss on the pleadings, the court must give the plaintiff the benefit of "every reasonable inference of fact" and read the complaint in the light most favorable to plaintiff. Printing Mart - Morristown v. Sharp Electronics, Inc., 116 N.J. 739, 746 (1989).

However, "if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate." Pressler, Current N.J. Court Rules, comment 4.1 on R. 4:6-2 (2004).

On July 26, 2002, plaintiffs filed a complaint seeking damages from defendants for consumer fraud, common law fraud, misrepresentation, breach of covenant of good faith and fair dealing and breach of contract. The facts as alleged in plaintiffs' complaint are as follows:

1. On or about February 2000, Plaintiffs placed on E-Bay's auction site its New Jersey ski/tennis resort, with golf potential.
2. The item was listed with a minimum bid of \$1,000,000.00 and an undisclosed reserve of \$3,900,000.00.
3. As of February 14, 2000 the following bids were recorded:
  - a. DAVESJAMIE - \$3,900,000
  - b. DAMNREBEL - \$2,500,300
  - c. SNOOPY9549 - \$2,500,200
  - d. RPHALKE@MSN.COM - \$2,500,00
4. The bidding at such time had surpassed Plaintiff's reserve.
5. On February 14, 2000 Defendant, DaveSJamie, retracted all its bids for the following reason: "just found out assessed value, Missed on page. Still interested."

6. At such time the \$3,900,000.00 reserve had been met, and therefore had been disclosed to all prior and future bidders.
7. In addition, since Dave\$Jamie's bid was removed, the high bid dropped to \$2,500,300.
8. Pursuant to E-Bay's User Agreement, which had to be accepted affirmatively by each Seller and Buyer on E-Bay in order to participate in an E-Bay auction, a bidder may only retract a bid for "legitimate" reasons. Legitimate reasons include, a Seller changing the description of the sale item or a bidder making an obvious error in the amount that was bid.
9. Defendant, Dave\$Jaime, did not retract its bid pursuant to E-Bay's rules.
10. E-Bay allowed such bid to be retracted in violation of its rules.
11. By allowing such retraction, Plaintiff's lost Dave\$Jamie's bid, in addition, the bidders were disclosed Plaintiff's reserve and the retraction caused a negative reaction to Plaintiff's auction item because no further bids were received on Plaintiff's item.

All six causes of action asserted by plaintiffs against eBay are premised on the alleged failure by eBay to prevent one of its users from improperly retracting a bid. eBay argues, "[a]ll six of plaintiffs' causes of action must be dismissed for failure to state a cause of action because, as is evident from the facts plaintiffs allege in the Complaint, eBay owed plaintiffs no such obligation."

There is no dispute that prior to listing the real estate item on eBay, plaintiffs accepted the "User Agreement," which is required of each seller and buyer before participating in an eBay auction. The User Agreement states:

By clicking "I agree" below, you agree:

1. that you have read, understand and agree to abide by this Agreement and the documents it incorporates by reference;
2. you intend to form a legally binding contract by clicking "I agree"; and
3. a print out of the Agreement and the documents it incorporates by reference will constitute "a writing" under any applicable law or regulation.

The User Agreement also states that:

### 3. eBay is Only a Venue.

**3.1 Overview.** Our site acts as the venue for sellers to list items (or, as appropriate, solicit offers to buy) and buyers to bid on items. We are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items advertised, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to buy items. We cannot ensure that a buyer or seller will actually complete a transaction.

\* \* \* \*

**3.3 Release.** Because we are not involved in the actual transaction between buyers and sellers, in the event that you have a dispute with one or more users, you Release eBay (and our officers, directors, agents, subsidiaries and employees) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with such disputes.

**3.4 Information Control.** We do not control the information provided by other users which is made available through our system. You may find other user's information to be offensive, harmful, inaccurate, or deceptive. Please use caution, common sense, and practice safe trading when using our site. Please note that there are also risks of dealing with foreign nationals, underage persons or people acting under false pretense.

There is also no dispute that the real estate listed by plaintiffs on the site was subject to eBay's "Non-Binding Bid" policy, which provides:

#### **Non-Binding Bid Policy**

Some types of items cannot be sold through the auction format on our site. Therefore, we have a separate policy for these types of items where placing a bid neither constitutes a legally binding contract, obligating the seller to sell the item, nor obligates the high bidder to purchase the item. If you list these types of items on eBay, the listing cannot result in a binding contract to buy and sell the item, but is merely a means of introducing interested potential sellers to interested potential buyers.

The following types of items must be listed in the appropriate "non-binding bid" category (if such category exists), and may only be listed to solicit indications of interest for the item:

Real Estate (e.g., homes, real property, time shares)  
Businesses (e.g., stock sale of businesses)

In addition, we recommend that when you list any of the types of items outlined above you seek legal counsel and the aid of an appropriate licensed professional. The purchase and sale of these types of items is complicated, and subject to a wide variety of laws, including those of the local jurisdiction and the country in which the item is located. If you list any of these types of items to solicit indications of interest you may, but are not obligated to, contact anyone who responds to your listing to discuss the sale of the item, subject to the terms of the Privacy Policy.

The existence of the Non-Binding Bid Policy and its applicability are also set forth in the following sections of the User Agreement.

#### 4. Bidding and Buying.

If you are the highest bidder at the end of an auction (meeting the applicable minimum bid or reserve requirements) and your bid is accepted by the seller, you are obligated to complete the transaction with the seller, unless the item is listed in a category under the Non-Binding Bid Policy (at <http://pages.ebay.com/help/community/pns-nbb.html>) or the transaction is prohibited by law or by this Agreement. By bidding on an item you agree to be bound by the conditions of sale included in the item's description (or linked to from the description) so long as those conditions of sale are not in violation of this Agreement or unlawful. Bids are not retractable except in exceptional circumstances such as when the seller materially changes the item's description after you bid, a clear typographical error is made, or you cannot authenticate the seller's identity.

#### 5. Listing and Selling

5.2 Binding bids, Except for items listed in a category under the Non-Binding Bid Policy, if you receive at least one bid at or above your stated minimum price (or in the case of reserve auctions, at or above the reserve price), you are obligated to complete the transaction with the highest bidder upon the auction's completion, unless there is an exceptional circumstance, such as: (a) the buyer fails to meet the terms of your listing (such as payment method), or (b) you cannot authenticate the buyer's identity.

Plaintiffs argue that since eBay's Non-Binding Bid Policy doesn't explicitly state that eBay's bid retraction policy doesn't apply to non-binding bids, it must therefore apply. Plaintiffs argue that "unless expressly excepted, all of E-Bay's [sic] rules regarding bidding apply to 'binding' as well as 'non-binding' bids." Plaintiff states that, contrary to what they perceive eBay to believe their position to be, they are not interested in enforcing the retracted bid against the bidder DAVESJAMIE. Rather, plaintiff argues that bid retractions "may impair the seller's ability to meet 'interested potential buyers', by casting a shadow over the Seller's auction item and creating a negative reaction from such 'interested potential buyers.'" Essentially, plaintiff's argue that allowing DAVESJAMIE to withdraw a bid prevented future buyers from being introduced to them. Plaintiffs contend that eBay, pursuant to their User Agreement, had an obligation to prevent or police such alleged improper bid retractions.

Defendant eBay argues convincingly that it is immune from liability "for causes of action arising out of the content posted by third-parties like DaveSJamie on eBay's web site" pursuant to the Communications Decency Act.

eBay has not undertaken any obligations to police or control any of the activities of its users, including preventing improper bid retractions, because it is not feasible for eBay to do so. Indeed, policing and preventing improper bid retractions would mean that in each instance where one of eBay's fifty million users wishes to retract a bid on one of the eleven million items up for bid on eBay each day, eBay would have to: (1) review the user's request; (2) determine whether the user's reason for retracting a bid is legitimate; (3) determine whether the user is being truthful as to its reason for retracting the bid; and (4) risk potential liability in case it erroneously refuses a bid retraction, obligating the user to complete the transaction. eBay would need to conduct this review almost instantaneously, so as not to interfere with the auction process or confuse potentially interested bidders. Such an obligation would be overly burdensome. As Congress recognized when passing the Communications Decency Act ("CDA"), 47 U.S.C. § 230, requiring an Internet service provider such as eBay to police the information put onto its website by users would be incredibly burdensome and detrimental to the free flow of information on the Internet.

Gentry v. eBay, Inc., 121 Cal.Rptr.2d 703, 712-716, 99 Cal. App. 4<sup>th</sup> 816, 828-832 (Cal. App. 4 Dist. 2002).

Furthermore, defendant's User Agreement has two separate policies: one for binding bids, and one for non-binding bids. The non-binding bid category includes real estate, the subject of this action. Section 4 of the User Agreement, which sets forth both the buyer's obligation to complete the sale once the bid is accepted and states the bid retraction policy excepts from it's scope items listed in categories under the Non-Binding Bid Policy. Section 5.2 of the User Agreement does the same thing with respect to the seller's obligations to complete the transaction.

The Non-Binding Bid Policy expressly states that it is a "separate policy" for items that "cannot be sold" through the on-line auction. While Plaintiff argues that the bid retraction policy must apply to non-binding bids because the Non-Binding Bid Policy doesn't explicitly state that eBay's bid retraction policy doesn't apply to non-binding bids, it also true that the non-binding bid policy contains no prohibition against bid retraction, unlike the policy for binding bids. In fact, the absence of a similar bid retraction policy strengthens the notion that bids on items that are in the non-binding category are simply a way to "introduc[e] interested potential sellers to interested potential buyers." eBay's omission of bid retraction language in the Non-Binding Bid Policy makes sense in light of the fact that a bid on one of these items cannot result in an enforceable sale. The Non-Binding Bid Policy further drives this point home by stating that the seller of such items falling into the non-binding bid category is not obligated to even contact anyone who responds to the listing. This further emphasizes the fact that for items such as real estate, eBay's online auction is simply a meeting place for buyers and sellers to get each other's contact information. Clearly, non-binding bids are retractable.



Finally, it is difficult to imagine how plaintiff suffered any damages from DAVESJAMIE's bid retraction. Plaintiffs claim that allowing DAVESJAMIE to withdraw a bid prevented future buyers from being introduced to them. However, sellers suffer no harm when users retract non-binding bids because such bids were never binding or enforceable in the first place. Non-binding bids are simply a way for interested buyers and sellers to exchange contact information for further discussions about the sale item.

The complaint filed by plaintiffs states no basis for relief and further discovery will not alter the essential facts. Therefore, dismissal of plaintiffs' complaint with prejudice as to defendant eBay is appropriate. PRESSLER, Current N.J. COURT RULES, Comment R. 4:6-2, (GANN). Defendant's application to dismiss the first, second, third, fourth, fifth and ninth counts of plaintiffs' complaint with prejudice is granted.