IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Black v. Dexter's Autohaus, 2008 NSSC 274

Date: 2008/09/17
Docket: S. H. No. 258757
Registry: Halifax

Between:

Terry B. Black

Plaintiff
(Defendant by Counterclaim)

and

2168826 Nova Scotia Limited, carrying on business as
Dexter's Autohaus, Dexter's Audi, and Dexter's Subaru

First Defendant
(Plaintiff by Counterclaim)

and

Don Burke

Second Defendant

Judge: Justice N. M. Scaravelli

Heard: July 14 and 15, 2008, in Halifax, Nova Scotia

Counsel: Philip Whitehead, and Andrew Trider for the Plaintiff
William Ryan, Q.C. for the Defendant

By the Court:

[1] This matter involves an issue of contract and arises out of a transaction concerning the purchase and sale of a motor vehicle, a 2000 Audi A6.

[2] The Plaintiff having previously agreed to purchase the vehicle from the Defendant dealership, took possession of the vehicle on July 15, 2005. The Plaintiff alleges the purchase of the vehicle was conditional upon a satisfactory inspection of the vehicle on or before July 19, 2005. On July 17, 2005 the Plaintiff was involved in a single vehicle accident in which the Audi was totally destroyed. The Plaintiff seeks refund of the purchase price including value of trade-in of his previous vehicle based upon unsatisfactory inspection.

[3] The Defendants contend the purchase of the vehicle was completed prior to the unilateral insertion of the condition on the Bill of Sale by the Plaintiff which was not agreed to by the Defendant. Further, and in the alternative, the Plaintiff cannot rely on the condition to render the agreement null and void as his own action made the completion of the inspection impossible. The first Defendant further contends in the event the Plaintiff was not the owner of the vehicle at the time of the accident, the relationship between the Plaintiff and Defendant at the

time was one of bailment. As a result, the Plaintiff, as bailee, was obligated to return the vehicle in the same condition which it left the Defendant's premises. The first Defendant counter-claims for damages.

Issue

Was the contract between the Plaintiff and the First Defendant subject the handwritten condition inserted by the Plaintiff?

Plaintiff

[4] The Plaintiff testified that in May of 2005 he was in the market for a used vehicle and contacted the Defendant, Mr. Burke, salesman at the time with the Defendant dealership. The Plaintiff looked at the 2000 Audi A6 and test drove the vehicle with Mr. Burke. He was interested in the vehicle, but felt the price was too high at the time. Discussions continued into June 2005 when the Plaintiff was permitted to take the vehicle overnight to show his wife and further test drive. The vehicle was returned and discussions regarding price continued with an agreement

finally reached on July 14th, 2005 for a purchase price of $26,500.00 and trade-in allowance for the Plaintiff's existing vehicle in the amount of $2,000.00.

[5] At that time the Plaintiff states he advised Mr. Burke that he wished to further test drive the vehicle and have it examined by a mechanic. Mr. Burke responded that if the Plaintiff were intending to take the vehicle over the weekend, that a deposit would be required. The Plaintiff stated he gave a $3,000.00 deposit over the telephone using his credit card. A meeting was set up for Friday in order to allow for paper work. He attended the dealership offices on Thursday the 14th where he was introduced to Ms. Warner, the business agent. Ms. Warner produced the documents "in order to purchase the vehicle".

[6] At this meeting, the Plaintiff stated he advised Ms. Warner that he intended to have a mechanical inspection and further test drive the vehicle and that she had no problem with this occurring. The Plaintiff further advised her that the paperwork should reflect this condition and that she agreed.

[7] The Plaintiff made arrangements with his Bank to obtain the money to purchase the vehicle. He met with Mr. Burke on Friday, July 15th with the Bank

draft in his possession. The Plaintiff signed a number of forms dealing with the extras and the warranties and when presented with the Bill of Sale noted there was no reference to the vehicle inspection. The Plaintiff stated he insisted this condition be put in before he handed over the money. He then wrote on the Bill of Sale the following words:

> Deal subject to a satisfactory inspection having been completed by the Buyer on/before July 19, 2005. If not satisfactory then Buyer is at liberty to declare the deal null and void with Buyer's deposit returned without having been cashed before July 19/2005.

The Plaintiff states that Mr. Burke left the room, came back and agreed to the term following which the Plaintiff signed the document. Mr. Burke also wrote in the words "Audi certified" which he initialled at the request of the Plaintiff.

[8] The Plaintiff then gave Mr. Burke the Bank draft and keys to his car. He stated that Mr. Burke told him he needed the keys in the event the vehicle needed to be moved over the weekend. Mr. Burke took the plates off the trade-in vehicle and placed them on the Audi. The Plaintiff asked Mr. Burke why he was doing this as he was test driving the Audi. He stated Mr. Burke's reply was that "you are

going to buy the car" as he was confident that the Plaintiff would be happy with the vehicle.

[9] The Plaintiff stated he took the car home that evening and parked it in the garage. He did not drive the vehicle the following day, Saturday July 16th as he knew he was going to have to travel to pick up his son on Sunday at Baywater Beach approximately 70 kilometres distance.

[10] The Plaintiff stated he left his home around 4:30 p.m. accompanied by his youngest son and travelled Highway # 103 and then on towards Blandford. As he approached a turn on the highway, a bear entered the road from his right-hand side. He swerved left to avoid contact and lost control of the vehicle. The vehicle left the road, entered a wooded area, rolled over and eventually rested against a tree. The Plaintiff noticed smoke or steam coming from the vehicle. He got his son and crawled out of the driver's side window and made his way to the highway. Two vehicles stopped to offer assistance. A call to 911 was made. The Plaintiff accepted a drive towards his original destination. He then returned to the scene where he met the Police, Fire Department and an ambulance. The vehicle was totally destroyed by the collision and fire.

[11] The Plaintiff called Mr. Burke or left a message that evening reporting the accident. On Monday, July 18th, he called Mr. Burke and told him the vehicle was destroyed. He stated that Mr. Burke indicated he should not have allowed the Plaintiff to write the conditional clause in the Bill of Sale. On the same day he spoke with the Manager, Mr. Sangster, and the Owner, Mr. Dexter, and was advised that he was the owner of the vehicle and was on his own regarding this matter. At that time, he was also advised that the Bank draft was cashed and the trade-in vehicle had been sold.

[12] On July 19, 2005 the Plaintiff drafted and delivered the following letter to the Defendant dealership:

> As per the purchase/sale agreement of July 15th/08 for the 2000 Audi A6 I have inspected the vehicle and have found it not satisfactory. According to the conditions of the sale I am at liberty to declare this purchase/sale null and void which I am now doing.
>
> I want a full refund of my deposit and bank draft. I also want my 1999 Pontiac Grand AM car returned to me as it too was part of the purchase/sale. There is no deal. It is now null and void.

[13] On the same date, the Plaintiff drafted the following letter which was signed by Tom McDonnell's Service Centre:

> This note is to confirm that Terry Black booked an appointment with Tom McDonnell's Service Centre for the purpose of a pre-purchase vehicle inspection of a 2000 Audi A6. He cancelled this inspection appointment today as this vehicle has been destroyed by collision and fire damage.

[14] Under cross-examination the Plaintiff acknowledged his meeting with Ms. Warner followed the negotiation of the deal with Mr. Burke. He could not recall how many days before July 15th this meeting occurred. He assumed the purpose of the meeting with Ms. Warner was to prepare for purchase of the vehicle. He acknowledged discussing the extra coverage and options for the vehicle. The Plaintiff was referred to his discovery examination April 2007 where he stated he did not recall meeting with, talking to or dealing with Ms. Warner. The Plaintiff stated that upon reading Ms. Warner's transcript of discovery in preparation for the trial, his recollection of the discussion with her was triggered.

[15] The Plaintiff stated he could not recall telling his Insurance Company that he should be covered following the accident. He was referred to his discovery

evidence and subsequently confirmed making this statement to the Insurance Company.

[16] The Plaintiff acknowledged the vehicle permit for the Audi was registered in his name and is dated July 15, 2005, although he stated he could not recall if the permit was given to him that day. He was referred to and acknowledged the RCMP Accident Report where he was listed as the registered owner of the vehicle.

[17] Regarding the unsatisfactory inspection letter of July 19th, 2005, he stated the reason he was not satisfied was because the price was still an issue and he was not happy with the condition of the vehicle. Later under cross-examination he acknowledged agreeing to the price.

[18] When questioned on his direct testimony regarding not using the vehicle from Friday when he took the vehicle home until Sunday, the Plaintiff was referred to a previous statement he gave to his Insurance Company where he stated he drove the vehicle around on the weekend. The Plaintiff acknowledged this refreshed his memory and corrected his direct examination on this issue.

[19] Regarding the Bill of Sale and his evidence that Mr. Burke authorized him to put in the condition and signed the Bill of Sale after the Plaintiff inserted the condition, the Plaintiff was referred to his discovery evidence where he acknowledged that, in fact, it was actually Ms. Warner who had previously signed the Bill of Sale. The Plaintiff corrected his testimony in this regard.

Second Defendant - Burke

[20] The Defendant, Mr. Burke, testified negotiations throughout were between him and the Plaintiff. As salesman, he is the link between the buyer and the dealership during negotiations. Mr. Burke stated during this process he told the Plaintiff that he would have to take matters to his boss for decisions and did, in fact, go to his Manager several times throughout negotiations. This included permission for the Plaintiff to take the vehicle overnight for test drive in June 2005, as well as ultimately agreeing on the trade-in value and the final price of the vehicle.

[21] Mr. Burke stated they reached a deal on July 14th, 2005 and shook hands. At that time, he obtained a $3,000.00 deposit from the Plaintiff by way of credit card and

introduced him to Ms. Warner to complete the paperwork. On Friday July 15th Mr. Burke was tasked with making sure the car was ready for pick-up later that day. This included arranging for the tire monitors to be installed pursuant to the Plaintiff's discussions with Ms. Warner, cleaning/detailing and filling the vehicle with gas. On the same date Mr. Burke received a packet of documentation from Ms. Warner including a delivery check list. The Plaintiff arrived at the dealership at 5:00 p.m. and brought with him a certified cheque in the amount as agreed to between the Plaintiff and Ms. Warner after adding extras during their meeting. While with Mr. Burke, the Plaintiff signed the Protection Certificate, the Platinum Theft Protection Guarantee, the Tire Rim Protection form and his trade-in vehicle Disclosure Statement.

[22] Mr. Burke stated that when he presented the Bill of Sale to the Plaintiff for signature, the Plaintiff said he was going to have the car inspected and wrote the condition on the Bill of Sale prior to signing the Bill of Sale. Mr. Burke stated he did not respond to the statement or the insertion of the condition. He did not leave the office and return to confirm this condition as stated by the Plaintiff. Mr. Burke acknowledged he did insert and initial the Audi certified term as requested by the Plaintiff as the Audi was a certified vehicle which automatically included a warranty.

[23] Following completion of the paperwork they went outside and the “vanity plates” were removed from the trade-in vehicle and placed on the Audi. At that time Mr. Burke stated the Plaintiff did not express any concerns or make any objections with respect to the transfer of plates prior to leaving the premises.

[24] Under cross-examination Mr. Burke explained he did not discuss the insertion of the condition with his Manager as this had never happened before and he believed the deal was done. He acknowledged receiving a call from the dealership on Saturday, July 16th regarding the condition. They wanted to know how the condition got in the Bill of Sale as it was out of the ordinary.

[25] Mr. Burke acknowledged that he did not tell the Plaintiff on Friday or call him on Saturday following discussions with Mr. Mason from the dealership, to indicate the condition was not considered acceptable or relevant.

Ms. Warner

[26] Ms. Warner is the Financial Services or Business Manager. Her job is to process the paperwork after the deal is made. This includes transfer of title of the vehicle, confirming insurance, discussing warranty, options, and financing. She recalled meeting with the Plaintiff after being notified by Mr. Burke of the sale. During her meeting with the Plaintiff she prepared the Standard Protection Certificate. She discussed elective options which the Plaintiff decided not to take. He did, however, elect to take the Platinum Tire and Rim Protection, which Ms. Warner completed. She also completed the Standard Platinum Theft Protection Guarantee. All of these documents are computer generated. At the meeting she obtained a copy of the Plaintiff's driver's license which she needed to match the permit on the trade-in vehicle. She also obtained a copy of the Plaintiff's insurance card for proof of insurance coverage. The Plaintiff also delivered the permit to his trade-in vehicle which he signed over in her presence. Ms. Warner then prepared the registration for the Audi vehicle in the Plaintiff's name which she forwarded to the Registrar of Motor Vehicles on that date.

[27] Ms. Warner stated she confirmed the Audi certification (warranty) and discussed financing options. The Plaintiff indicated he would arrange for his own financing. Her evidence is that at no time was there any discussion by the Plaintiff

regarding his desire to further test drive or inspect the vehicle. After the meeting was concluded Ms. Warner completed the delivery check list for the vehicle which she delivered to Mr. Burke together with other prepared forms for the Plaintiff's signature and the Registry of Motor Vehicles form for the Audi. She stated that Mr. Burke would have no authority to make any changes to terms of the Bill of Sale.

[28] Under cross-examination Ms. Warner stated that she noted the insertion of the condition in the Bill of Sale after all documentation and funds were returned to her by Mr. Burke for processing. She brought this matter to the attention of Mr. Mason, the Used Car Manager. Mr. Mason later advised Ms. Warner that he spoke with Mr. Burke regarding the condition and was advised that Mr. Burke did not agree with the condition, that the deal had been completed and it was of no relevance. Based on this discussion Ms. Warner processed the deal. She confirmed that she did not contact the Plaintiff to discuss this condition or to make him aware that the dealership did not consider it relevant. Had she thought the condition was relevant, she would have stopped the deal.

Law

[29] Both parties rely upon the *Sale of Goods Act*, R.S.N.S. 1989, c.408. The relevant provisions are as follows:

Further interpretive provisions

4 (3) Where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a 'sale', but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an 'agreement to sell'.

(4) An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be transferred. R.S., c. 408, s.4.

Transfer of property in specific or ascertained goods

20 (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. R.S., c. 408, s. 20.

21 Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is

made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. When goods are delivered to the buyer on approval, or 'on sale or return' or other similar terms, the property therein passes to the buyer.

(a) when the buyer signifies his approval or acceptance to the seller, or does any other act adopting the transaction; or

(b) if the buyer does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, or, if no time has been fixed on the expiration of a reasonable time and what is a reasonable time is a question of fact.

Risk of seller versus risk of buyer

23 Unless otherwise agreed, the goods remain at the sellers risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyers risk, whether delivered has been made or not, provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault, and provided also that nothing in this Section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party. R.S., c. 408, s.23

[30] The Plaintiff further submits the circumstances of this case are similar to cases involving a “battling of the forms” or last shot doctrine. In support he cites *Caribou-Chilcotin Helicopters Ltd. v. Ashlaur Inc.,* 2006 (B.C.J. No. 24). Essentially these lines of authorities deal with formation of contracts via correspondence without the parties being present where it is generally held that a contact is complete as soon as the last form is sent and received without objection being taken to it. In the present case, the Plaintiff submits the Defendant was aware of the notation made by the Plaintiff on the one page contact. Further, based on the Defendant’s conduct in permitting the Plaintiff to take the Audi and not raising any objection, the Plaintiff was reasonably entitled to believe the Defendant accepted the conditional contract.

[31] I find the *Caribou* case and authorities referred to therein dealing with the battle of the forms does not apply to the matter before the Court, as these cases deal with the conduct of parties negotiating at a distance.

Findings of Fact

[32] I find the following to have occurred:

On July 14, 2005:

(1) The Plaintiff and First Defendant agreed to the terms of purchase and sale of the Audi vehicle, which included adjustments for trade-in value, extras, document fee and licensing fee;

(2) The Agreement was not subject to a condition of inspection of the vehicle;

(3) The Plaintiff paid a $3,000.00 down payment towards purchase of the vehicle;

(4) The Plaintiff signed over the registration of his trade-in vehicle to the Defendant;

(5) The Defendant completed transfer of the registration of the Audi vehicle to the Plaintiff and forwarded it to the Registry of Motor Vehicles;

On July 15, 2005:

(1) The Plaintiff attended his financial institution and obtained a bank draft for the adjusted purchase price of the vehicle;

(2) The Plaintiff attended the Defendant's premises to complete paperwork, pay the balance of the purchase price and take delivery of the vehicle;

(3) After signing plate registration, tire rim and warranty and fabric protection forms, he inserted on the Bill of Sale the condition regarding inspection of the vehicle and signed the Bill of Sale which had previously been signed on behalf of the Defendant. Mr. Burke did not indicate agreement;

(4) The plates on the trade-in vehicle were transferred to the Audi. The Plaintiff received the vehicle registration, keys and left the premises with the Audi.

[33] I do not accept the evidence of the Plaintiff that on July 14th he indicated both to Mr. Burke and Ms. Warner that prior to purchasing the vehicle he intended to further test drive and conduct inspection by a mechanic. Nor do I accept his evidence that the $3,000.00 deposit was to enable the Plaintiff to take the vehicle for a further test drive. He was inconsistent in his evidence and often contradicted himself. Moreover, the Plaintiff was not required to pay a deposit to take the vehicle for previous overnight test drive in June 2005. Nor did the Plaintiff insert test drive as a condition in the contract. The substance of his evidence regarding material facts did not coincide with his conduct. On the other hand, his conduct in this transaction was consistent with the evidence given by Ms. Warner and Mr. Burke which I accept.

Conclusion

[34] I find that all fundamental terms of the contract had been agreed to on July 14, 2005. The contract was not subject to any condition at that time. Moreover, title to the Audi had been transferred to the Plaintiff prior to the insertion of the condition. The Plaintiff conducted himself in a manner that was inconsistent with the contract being conditional up to the signing of the Bill of Sale. I find this was inserted by the Plaintiff on July 15th as an afterthought. As a result the condition did not form a part of the contract of sale and was of no relevance. The Plaintiff was the registered owner of the vehicle at the time of the accident.

[35] Accordingly the Plaintiff's claim is dismissed.

[36] The Defendant shall have costs (and disbursements) based on Tariff A Scale 2 (basic) for the two day trial. I determine the amount involved to be in the $25,000.00 to $40,000.00 range.

J.