IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Tremblett v. Portabay Auto Sales & Services, 2015 NSSM 44

Claim No: SCCH 440695

BETWEEN:

Name Tony C. Tremblett **Claimant**

Name John DeWolfe c.o.b. as Portabay Auto Sales & Service **Defendant**

Tony C. Tremblett – Self Represented.

J. Patrick L. Atherton appeared for the Defendant.

(Edited for grammar, punctuation and readibility)

Editorial Notice: Addresses and phone numbers have been removed.

DECISION

This claim follows the purchase of a motor vehicle by the Claimant.

Facts

The Claimant, Tony Tremblett, purchased a vehicle from the Defendant, Portabay Auto Sales and Services ("Portabay") at its lot in Porter's Lake, Nova Scotia. Portabay is a business name registered to John A. DeWolfe. The vehicle that was purchased is a 2005 Chevrolet Equinox with an odometer reading of 163,412 kilometres. The purchase took place on September 25, 2014, after approximately two weeks of occasional visits and negotiations. The purchase price also included the installation of a trailer hitch by the Defendant. These facts are not in dispute.

The Claimant testified that he experienced problems with the vehicle from the outset. He described problems with the steering and strange noises before purchasing the vehicle. He testified that he brought the claims to Mr. DeWolfe's attention. The problems persisted after the purchase. He requested the dealer make repairs which ultimately yielded no result. In addition, he alleges the documentation prepared for the transaction does not reflect the purchase price agreed to by the parties.

Mr. Tremblett attempted to resolve the matter with Mr. DeWolfe. Clearly, it did not go well. The car was returned several times and some repairs were affected although not to the Claimant's satisfaction. Mr. Tremblett wanted to make a claim under the warranty he purchased, but he did not have the documentation or the name of the warranty provider. He tried to obtain that information from Mr. DeWolfe. Further, he alleged that the vehicle had not been repaired. The result was Mr. Tremblett and Mr. DeWolfe engaged in several heated arguments over the need for further repairs, with obscenities and vulgarities exchanged. At one point, Mr. DeWolfe told Mr. Tremblett he was not dealing with him any longer. On another occasion, Mr. Tremblett sought to speak with Mr. DeWolfe, who left the business' location which ended with Mr. Tremblett chasing him through Porter's Lake in their vehicles. These latter facts, while not relevant to the contract in the matter, create the setting for this case. Mr. Tremblett seeks $3000 plus costs, the maximum limit under the warranty. At the hearing, he submitted invoices and claims totalling $2736.41. I shall deal with the individual claims further in this decision.

The Issues

The issues in this matter are straightforward and relate to the condition of the vehicle and the existence of a warranty.

- What was the purchase price of the vehicle?

- What was included in that purchase price and was it fulfilled?

- Is the condition of the vehicle such that it constitutes a breach of contract or other implied warranty or condition prescribed by law?

- What is the status of the Registration and Administration fees of $499, (a.k.a. "lien fees of $500")?

- Was there a valid warranty in place and are the claims under that warranty to be pursued against the Defendant?

It is important to note that this decision does not address the interpretation of the financing agreement for the purchase of the vehicle. In order to bring that to this court, the lender, Carfinco Inc., would have to be named as a Defendant. This decision will be without prejudice to any

rights the Claimant or Defendant have against each other or Carfinco Inc. relating to the financing of the vehicle.

The Evidence

The Claimant's Evidence

Paul McGurk is a friend of the Claimant, Tony Clemett. Mr. McGurk accompanied the Claimant on several occasions to the Defendant's place of business. During one of those visits, they took the vehicle for a test drive. When they did so, the men noticed a strange noise. Mr. McGurk testified that when they returned, they spoke with John DeWolfe about the problems. They also discussed the purchase price. He recalled the parties settled on $4500 for the vehicle. He was also told that the Defendant was supposed to fix something with the steering and install a trailer hitch. Mr. McGurk could not recall the time this discussion took place in relation to the rest of the transaction.

Under cross examination by Mr. Atherton, Mr. McGurk confirmed that they visited the Defendant's place of business approximately five or six times. At least two or three of those occurred before Mr. Tremblett purchased the vehicle. He recalls an asking price of $5000 but also recalled the final terms were not concluded until Mr. Tremblett went to Mr. DeWolfe's office. He was not present for any of the discussions in the office. He did not recall any details regarding financing or an extended warranty. He believes the first time they went to look at the vehicle was on September 13, 2014 and Mr. Tremblett took delivery on September 25.

Tony Clem Tremblett testified that when he took the vehicle for a test drive, he identified some problems to Mr. DeWolfe. He testified that DeWolfe agreed to have it fixed before the vehicle was purchased. He testified that the asking price was $4900 and he offered $4500, which was accepted by the Defendant. On the day he took delivery, he was advised by Mr. DeWolfe that the vehicle was ready, and, specifically, the trailer hitch, steering bearing and transmission line were also repaired. After several delays from the agreed pick up time, he took delivery of the vehicle at 9:10 pm that evening. He testified that the vehicle had broken down in St. Croix, Nova Scotia. He testified that the vehicle did work initially, except for the trailer hitch which was not properly installed. The trailer hitch did not work at all and he testified that Mr. DeWolfe would not repair it. He took the vehicle to another service entity, Dial A Tire, which sold Mr. Tremblett a new hitch and installed it. He encountered more problems after the vehicle was at his home, and sought to have repairs done by the Defendant.

He testified that until the purchase, he and Mr. DeWolfe discussed at considerable length that they had agreed to a purchase price of $4500 not $5000. They also agreed the "$500" lien fee would be waived if the payments were made. He believes he was overcharged for the price of the vehicle. He also seeks the return of his $625 for the price of the warranty. He did not receive any documents but eventually received a pink piece of paper tendered into evidence. The pink sheet

of paper has different terms listed on the back, an administration fee of $300. In addition, it appears the corner where the payment details were to be listed has been torn off.

Under cross examination by Mr. Atherton, Mr. Tremblett testified that he looked at the vehicle on September 13, 2014. He was adamant that his initial offer was for $4000 with 24% financing; the price agreed to was $4500. However, Mr. Atherton tendered into evidence a sales contract showing the purchase price at $5000; $625 for the warranty and a $1000 credit which was deducted. Mr. Tremblett acknowledged his signature on the document. He testified that steering and other bearings and repairs were to be done from the 13th forward. He submits that this is why he did not take the vehicle until the 25th. There was no reference anywhere in the documentation about what work was to be done. He testified the vehicle broke down on Sunday after he took delivery and felt the repairs were under the 30 day, "50/50" warranty. He believes the repairs which were needed to be done was work that was agreed to by Mr. DeWolfe at the time of closing, but not completed. He testified that the steering shaft was indeed replaced but it was done with a used part rather than a new one.

In redirect evidence, Mr. Tremblett denied any discussion of a trade-in at the time of purchase. That took place at a later date. Mr. DeWolfe offered Mr. Tremblett $1000 for his Sonoma van but he declined the offer.

John Alexander DeWolfe is the principle of Portabay Auto Sales and Services. He recalls meeting Mr. Tremblett initially for the purchase of the vehicle. He specifically recalls this first time as Mr. Tremblett was hauling a fishing boat with his Sonoma. He testified to advising Mr. Tremblett that he was prepared to accept $4500 as the purchase price provided the van was included as part of the deal. Mr. Tremblett advised him that he would be keeping the van. After negotiations, they agreed upon a price of $5000. Mr. Tremblett signed all of the requisite documents. He presented the warranty documentation and testified that it applied only to power train parts and not gaskets. At the same time, the parties signed the sales agreement, the financing agreement and the warranty. Mr. DeWolfe testified he was advised of a steering problem when Tremblett took delivery of the vehicle but that it was repaired with part in his garage.

When the Claimant advised him of the break downs, Mr. DeWolfe initially attributed it to the Starter Interrupt Payment Acknowledgment. Typically, this system is designed to shut down the vehicle when a payment is missed for the financing of the car. The inclusion of the device was standard language in the lending contract, and presumably there is no possibility of a loan without one.

The Small Claims Court sees many cases involving the enforcement of contracts of debt. In some cases, the Defendant is completely in the wrong choosing simply not to pay their obligations. There are also some cases where there are numerous problems with the lending contract itself or where valid legal defences could or should be raised. The use of a Starter Interrupt Payment device puts tremendous power in the hands of a lender that has not proven its case in court to

establish any right to enforce its debt. Furthermore, given Mr. DeWolfe's testimony that he thought the vehicle was shut down inadvertently by this device tells me that this is not an unusual occurrence.

He confirmed that discussion became heated and words were used. Mr. DeWolfe said that he would "call it quits right there", meaning that he was not taking any further responsibility for repairing the vehicle.

Under cross examination, Mr. DeWolfe testified that the vehicle had been returned and the mechanic was to take a look at it. He acknowledged the documentation was not provided to Mr. Tremblett. He testified that his mechanic looked at the vehicle and found there were no problems with it. None of his mechanics gave evidence at the hearing.

Findings and the Law

It is accepted law that in order for the court to find a breach of contract, the onus is on the Claimant to provide evidence that will prove the existence and terms of the contract on a balance of probabilities. If a breach of that contract is found, the law requires that the court award damages that will put the Claimant in the position as if the contract had been fulfilled.

I shall now address the issues identified at the beginning of this decision.

Purchase Price

It is necessary to review the law regarding the interpretation of contracts. Reference is made to the following passage from the Supreme Court of Canada in *Eli Lily v. Novapharm*, [1998] 2 S.C.R. 129, where Justice Iacobucci stated the following for the majority of the Court:

"The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination....
...Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face....
...However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words."

The Claimant purchased a 2005 Chevrolet Equinox from the Defendant after two weeks of visits and negotiations. Undoubtedly, several prices and terms were discussed. Mr. Tremblett signed the sales documentation which had the purchase price described on it. I am not prepared to find that Mr. Tremblett misunderstood the agreement. The plain language of the document sets the purchase price at $5000 to which Mr. Tremblett placed his signature. I find the contract was to sell the vehicle for $5000. Therefore, I disallow the $500 claimed as overcharging.

Condition of the Vehicle

The documentation is silent on any repair work required before the Claimant was to take delivery. The evidence of Mr. Tremblett, Mr. McGurk and Mr. DeWolfe all confirm that a towing package was expected to be installed. While it was installed, I find the system was inadequate and did not fulfill the requirements of the contract. I find Mr. DeWolfe refused to repair it, and consequently, Mr. Tremblett was required to do it on his own accord. Mr. Tremblett has tendered into evidence receipts totaling $101.12 for the cost of installation. I accept that figure is reasonable. I award the Claimant, $101.12 under this head of damages.

The second portion of the claim relates to several conditions to repair the vehicle prior to its delivery. There is considerable disagreement on the need for this. However, I find there was an intention on the part of both parties for Mr. DeWolfe to replace the steering arm. Mr. Tremblett testified to receiving a used part, a fact which Mr. DeWolfe did not contradict. I find that the part was a used part. I find as well that any parts that were installed were also used.

If the parties intended to use new parts in those circumstances, then it would be necessary to make that stipulation, either verbally or in writing. I do not find that any such stipulations were made or accepted. Consequently, there is no obligation on the part of the Defendant to have new parts installed in this case. Therefore, I find the repairs that were necessary to fulfill the contract were undertaken and completed.

Breach of Contract

Mr. Tremblett experienced mechanical difficulties with the vehicle when he took delivery. I find he had previously viewed the vehicle and identified problems to Mr. DeWolfe. The evidence is not clear as to what specifically was identified beyond the steering and several noises. I accept the evidence of Mr. DeWolfe that repairs were completed with used parts. No evidence has been provided by Mr. Tremblett beyond his own testimony to demonstrate what other problems were encountered, or what other remedies were required. While I have some doubt whether Mr. DeWolfe's mechanics looked at the vehicle and determined there were no problems, the onus to prove the agreement is on the Claimant. He has not discharged the onus.

Reference is made to the provisions of the *Consumer Protection Act*:

The liability of a seller to a buyer, such as an automotive dealership to its customer, is defined in Section 26(3):

Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:

…(h) a condition that the goods are of merchantable quality, except for such defects as are described;

…(j) a condition that the goods shall be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale.

Further, section 26(5) states:

(5) There shall be implied in every consumer sale of services a condition, on the part of the seller, that the services sold shall be performed in a skilful and workmanlike manner.

In addition, I refer to the decision of Adjudicator Beryl MacDonald (as she then was) in *Robinson v. Atkinson*, 2004 NSSM 31which provides an excellent summary of the law respecting the sale of used vehicles:

> "35. A seller can give an express warranty to a buyer that the item sold will for example, continue to operate for a specific period of time. There was no express warranty given by Atkinson to Robinson when Robinson purchased this truck.
> 36. The motor vehicle inspection certificate issued in respect to the truck is not a document that in any way guarantees, or purports to guarantee, that the truck, examined at the time of the inspection, will continue to work for any period of time after the date of the inspection.

37. The truck purchased by Robinson from Atkinson was purchased second hand and was a 1988 model. Therefore it was approximately 16 years old and this would be obvious to Robinson. Atkinson did tell Robinson that the truck was in good condition but I do not accept that this was given in the nature of a warranty of fitness or to imply that the truck would continue to work for any particular period of time before repairs would be needed. I accept that Atkinson, by placing the words "as is where is " on the receipt given to Robinson did so to clearly indicate he was giving no warranties nor making any representations as to the continued operation of the vehicle. The truck was working on the day of sale and there were no defects known to Atkinson that he attempted to hide from Robinson. I accept the evidence that the clutch in the truck had been installed approximately a year ago and that a clutch may fail without warning.
38. There are few reported cases involving sales of used vehicles between individuals. However, in *Keefe* v. *Ford*, 27 N.S.R.(2d) at page 361, Justice Pace quoted from *Peters* v. *Parkway Mercury Sales Limited* (1975), 58 D.L.R. (3d) 128 at pp.134-135:

"In my opinion, there is a substantial distinction between the implied condition of fitness in the case of the sale of a second hand car and that which is implied in the sale of a new car. Persons who purchase used cars, especially older models with substantial mileage, must expect defects in such cars will come to light at any time. In the present case the insistence of the plaintiff on the benefit of a used car guarantee and the reluctance of the vendor to give such a guarantee, clearly indicate that the parties realized the possibility that the car was not likely to be free of defects and that some defects might come to light even within the first 30 days following the sale. In my view, they entered into the contract of sale and purchase on that basis. In *Godsoe* v. *Beatty* (1959), 19 D.L.R.(2d) 265 ....., Ritchie, J.A., quoted with approval (at p. 267) a passage from 77 Corp. Jr. Sec., at p. 1199 containing the following statement:
'A used car dealer is not an insurer of the cars he sells and is not required to inspect them for latent defects. Where a second hand motor vehicle will run, the fact that frequent repairs are necessary does not establish a failure of consideration...'"
39. Justice Pace continued in his decision to quote from the decision of Lord Denning in *Bartlett* v. Sidney *Marcus, Ltd*., [1965] to ALL E.R. 753, at p. 755:
"It means that, on a sale of a second hand car, it is merchantable if it is in usable condition, even though not perfect. This is very similar to the position under s. 14(1). A second hand car is 'reasonably fit for the purpose' if it is in a roadworthy condition, fit to be driven along the road in safety, even though not as perfect as a new car.
Applying those tests here, the car was far from perfect. It required a good deal of work to be done on it; but so do many second hand cars. A buyer should realize that, when he buys a second hand car, defects may appear sooner or later; and, in the absence of express warranty, he has no redress. Even when he buys from a dealer the most that he can require is that it should be reasonably fit for the purpose of being driven along the road. This car came up to that requirement. The plaintiff drove the car away himself. It seemed to be running smoothly."
40. In the case of the situation relating to the truck sold by Atkinson to Robinson, I note that this truck was capable of being driven along the road and that on the day of sale, it appeared to be running smoothly and was driven to 23 Beacon Street as requested by Robinson.
Robinson himself was later able to drive that truck further into the driveway located at 23 Beacon Street.

41. In *Sheldon* v. *Robinson* (1997), 158 N.S.R. (2d) 359., the plaintiffs purchased, from the Defendants, an eight year old used vehicle on an "as is where is" basis. This was a sale involving a seller of used cars. However, it does provide some guidance in respect to the issue relating to the sale of used cars. Shortly after purchase the plaintiffs in this case encountered engine trouble requiring the expenditure of $829.00 for repair. The small claims court adjudicator allowed the plaintiff's claim against the Defendant dealer on the basis of provisions of the *Consumer Protection Act*. The Supreme Court Justice on review reversed this decision. Justice Palmeter stated at Paragraph 13, quoting from a previous decision he had made in *Penney* v. *Brent (sic) Pontiac Buick GMC*, (1989) 95 N.S.R. (2d) 321:

> "The vehicle was sold 'as is', which could mean that the vehicle could only be durable for a short period of time or perhaps not at all. The purchaser accepted the vehicle as is and in my opinion the definition of durability in this case must depend on that circumstance."
> 42. Justice Palmeter stated at paragraph 18:
> "In this case the respondents purchased the motor vehicle in the face of clearly expressed conditions and disclaimers. They had every opportunity to inspect the vehicle and they did assume a substantial risk. In my opinion any warranty, if at all, implied under the *Act* (*Consumer Protection Act*) would be minimal at best and not under the circumstances as found by the adjudicator."
> 43. Justice Palmeter reversed the decision of the Adjudicator and relieved the Defendant from the payment of any cost of repair to the Plaintiff having determined that the vehicle had operated for a sufficient period of time based on the circumstances of the facts before him.....

While this decision is not binding on me, I find it to be very persuasive and informative.

Based on the evidence of Mr. McGurk and Mr. Tremblett, I find the vehicle made noises at the beginning of the viewing, prior to the negotiations for its purchase. I note there were no stipulations of the vehicle being sold "as is, where is". Given the statement of the law above, the expectations for a purchaser of a 9 or 10 year old used vehicle are very low. There is no evidence the Claimant made any effort to have the vehicle inspected by a mechanic prior to its purchase. There is no evidence from any of the mechanics who did the work for Mr. Tremblett. As noted previously, Mr. DeWolfe's mechanics did not testify either. However, the onus was on the Claimant to prove the problems with the vehicle offend the provisions of the *Consumer Protection Act* or amounted to a breach of contract. He has not done so. The claims for the other Dial-A-Tire invoices, the Canadian Tire invoice, Atlantic Under Car and the $200 estimate to repair the transmission line are all denied.

Warranty

The transaction involved the purchase of a limited protection warranty at a cost of $625.

I accept Mr. Tremblett's evidence that he did not receive any documentation at the time of or following the transaction. He received the "pink sheet" only after he insisted on it. That document does not look like the agreement tendered into evidence by the Defendant's counsel. To be clear, this means he did not receive a copy of the sales agreement, the financing agreement nor the warranty.

The documents in evidence show the original application for the warranty, "the white copy", was at all times in the possession of Portabay. It was never sent to the warranty provider, Global Warranty. The warranty application refers to confirmation to be expected from Global Warranty with a direction to "the Applicant" (Mr. Tremblett) to notify Global Warranty if he does not receive confirmation within 30 days. Mr. Tremblett had no way of knowing this as he did not receive his copy of the warranty application. Mr. DeWolfe did not testify to mailing the warranty documentation to Global Warranty. He did not produce a certificate or other evidence of the warranty.

Given that he has not received any notification from the warranty provider and received no documentation whatsoever from the dealer, I find the most logical inference to be that the warranty documents were not sent to Global Warranty. Whether this was inadvertent or otherwise is immaterial. Mr. Tremblett paid $625 plus HST, for a warranty he did not receive. I find the Claimant has proven this portion of his claim. I allow him $718.75.

Registration and Administration Fee

The sales agreement included a "Registration and Administration Fee" of $499.00. I find this to have been the subject of the "$500 Registration of Lien". Mr. Tremblett alleges that this was to have been waived in due course. I find there is no evidence to support this position. However, I am not satisfied Mr. DeWolfe is entitled to the full amount.

No details were given as to what this fee might include. There was no evidence that a registration under the *Personal Property Security Act* was completed or any registration of the motor vehicle under the *Motor Vehicle Act*. These fees would need to be paid. These two fees total approximately $137.00 plus an annual renewal of $9.25 in the case of the financing agreement. I am not prepared to find that much searching or processing was performed by the Defendant to justify such a substantial fee. I reduce the amount allowed to $200. I order $299 to be refunded to the Claimant.

Summary

In summary, I order the following for the Claimant:

Cost of Towing Package	$ 101.12
Warranty Reimbursement	$ 718.75
Registration and Administration Fee	$ 299.00
Prejudgment Interest (4%)	$ 44.75
Costs	$ 99.70
Total	**$1263.32**

Therefore, the Claimant, Tony C. Tremblett shall have judgment against John A. DeWolfe, carrying on business as "Portabay Automotive Sales and Services", in the amount of $1263.32.

This judgment shall be without prejudice to any action or defence either party has against the finance company, Carfinco Inc., under the financing agreement. Where Mr. Tremblett has raised issues regarding the interest rate, I believe it would be fairer to address this or any other issues relating to the agreement that may arise, should any action be taken by or against the lender.

Conclusion

The Claimant shall have judgment against the Defendant in the amount of $1263.32. This judgment shall be without prejudice to any claim or defence to either party under the Financing Agreement.

Dated at Halifax, NS,
on September 15, 2015.

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Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)