Claim No: 288171

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Kateco Transport v. Cummins Eastern Canada L.P., 2008 NSSM 6

BETWEEN:

CATHY HAYLOCK c.o.b. as KATECO TRANSPORT

Claimant

- and -

CUMMINS EASTERN CANADA LP.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on January 15, 2008

Decision rendered on January 16, 2008

APPEARANCES

For the Claimant: self-represented

For the Defendant: Ron Pye, Customer Support Manager

BY THE COURT:

[1] The Claimant seeks the return of money and damages for the alleged failure of the Defendant to supply and honour an extended warranty on a truck engine.

[2] The Claimant Cathy Haylock is a truck owner and operator who carries on her business using the name Kateco Transport. I formed the impression at trial that this is a limited company, although a search of the online records of the Nova Scotia Companies Office shows no record of any such company. I must therefore conclude that it is a business name. I indicated at trial that I would amend the style of cause to reflect the business, and I do so by adding the words "c.o.b. as Kateco Transport" to the name of the Claimant. This should suffice to eliminate any confusion for present purposes.

[3] The Claimant bought a new 2002 model year Peterbilt truck in December of 2001. The vehicle contains a Cummins engine which came with a standard warranty. Cummins allows an owner to purchase an extended warranty on the engine at or before the 5-year mark. To be eligible for that warranty the engine must be assessed by Cummins and pass certain tests. If repairs are needed, those must be done at the owner's expense before the warranty will be issued.

[4] The Defendant is the Eastern Canada representative of Cummins Canada.

[5] The Claimant thought she had until the end of December 2006 to put her warranty in place. In fact, she had only until the 5-year anniversary of the

in-service date of December 13, 2001. When she called the Defendant on or about December 12, 2006 she learned that there was urgency to get the vehicle in for assessment and any necessary work. The Defendant agreed to open a work order dated before the expiry of the 5 years and allow the assessment and repairs to be done soon as possible.

[6] To make a long story short, over the ensuing weeks the Defendant took payment of $3,525.76 for the warranty and put the engine through a series of tests, which detected two problems requiring service. One was to repair some oil leaks which was done at a cost of $709.77. The other was to replace the “air to air” cooler system at a cost of $1,724.59. These two repairs were done by an authorized repair facility in Truro.

[7] After all of this was done, the Claimant thought she had met all of the requirements and had her warranty. However, in early April she received notice from the Defendant that the warranty was being rejected because all of the steps had not taken place before the 5-year mark. This was not the Defendant’s own decision. It had tried to put the warranty through but Cummins Canada rejected it. The written notice informed the Claimant that her money for the warranty would be refunded.

[8] In fact, there was no refund issued. Her money sat as a credit on the Defendant’s books until October 2007 when a cheque was finally issued and mailed to the Claimant. She did not receive it until November because she was on the road for the month of October. She has not cashed that cheque because of her belief that she was entitled to other relief, and she did not want her cashing the cheque to signal that she was accepting the refund as the end of the matter.

[9] The Claimant understands that this court cannot give her a valid warranty. What I conclude is that the Defendant probably should have known better than to try to provide the warranty when there was essentially no time to get the engine assessed and certified in time. In the result, it took the Claimant's money and forced her into doing repairs that she says she would not necessarily have done, or not done until later. It also forced her to make several trips from Truro to Dartmouth to the Defendant's facility. On at least one of those occasions she had to pay her driver to do the trip.

[10] The Claimant explained that as a small independent trucker, she cannot afford necessarily to do every repair that might be recommended. While she likely would have repaired the oil leaks right away, she says that she would not likely have replaced the air to air because it was functioning adequately for her purpose. She only did it to obtain the warranty.

[11] I find that the Defendant made a promise to the Claimant that it would provide the warranty. It never indicated that it was in any doubt. Though the decision was made by others, it was this Defendant that could not deliver what it promised and breached the contract.

[12] The Claimant is entitled to a refund of the money paid for the warranty. This is not in question. I also find that she was put to unnecessary expense and allow her the sum of $600 for the cost of making two trips with the vehicle to Dartmouth.

[13] The repairs are less clear cut. Even if she would not have done them, she benefited by doing them. The law reflects this situation by allowing the

expense and then reducing the recovery by a factor that reflects "betterment." It is my finding that the oil leaks were a necessary and valuable repair, and there should be no recovery for that. The replacement of the air to air is something that I accept would not have been done at that time, and perhaps not for years. But her engine was the better for it. I allow recovery of the $1,724.59 expense with a 50% reduction for betterment.

[14] In the result the Claimant shall have recovery for the cost of the warranty ($3,525.76), and damages representing travel expenses ($600.00) and the cost of premature repairs ($862.30).

[15] The Claimant is also entitled to prejudgment interest at 4% on the warranty expenses from the date it was paid - February 2, 2007 until the date of the refund cheque - October 1, 2007. I do not allow any interest on the other items. The interest amount is $93.12. She is also entitled to her filing fee of $170.88.

[16] The total recovery is therefore:

Return of cost of warranty	$3,525.76
Damages: Travel expenses	$600.00
Damages: Cost of premature repairs	$862.30
Interest	$93.12
filing fee	$170.88
TOTAL	**$5,252.06**

[17] There are a couple of complications that need to be factored in. First of all is the fact that the Claimant is sitting with an uncashed cheque in the amount of $3,502.08. That cheque is dated October 1, 2007. The difference in amounts between what she paid and what was refunded reflects the 1% reduction in the HST from 15% to 14% in the interim. There has since been a further reduction to 13%.

[18] In my view, the Claimant is entitled to receive back what she paid, dollar for dollar. There is no reason to recalculate the HST. This would create added complexity. Moreover, in principle the court should not involve itself in a litigant's tax affairs. For example, we have no way of knowing and ought not to be concerned with whether a litigant is able to claim input tax credits. As such, the full amount of the judgment should be paid.

[19] As for the uncashed cheque, it may or may not be stale-dated. Should the Claimant elect to deposit it, then it would stand as a credit against the judgment. Should she elect to return it to the Defendant, she should make arrangements with the Defendant to do so in a way that satisfies the Defendant that the cheque will not be cashed.

Eric K. Slone, Adjudicator