

Claim No: 418578

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Turner v. Atlantic Home Health Care Supplies, 2013 NSSM 54

BETWEEN:

HARRY J. TURNER

Claimant

- and -

ATLANTIC HOME HEALTH CARE SUPPLIES

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on October 22, 2013

Decision rendered on October 28, 2013

APPEARANCES

For the Claimant self-represented

For the Defendant Malcolm Perkins, Owner

BY THE COURT:

[1] The Claimant is suing for a refund of the \$1,190.00 that he paid for a Lift Chair (brand name "Pride") which he bought from the Defendant for his wife, who is 82 years old and has significant physical problems.

[2] The Defendant Atlantic Home Health Care Supplies is a trade name used by the limited company, Perkins Health and Safety Limited. Malcolm Perkins ("Perkins") is the owner and operator of the business.

[3] The Claimant believes he is entitled to a full refund because, he says, the chair is the wrong size. He says that he relied on Perkins's assurance that the chair would fit her properly.

[4] The Defendant denies responsibility because, according to Perkins:

- a. The Claimant specifically ordered the model in question;
- b. The Claimant supplied some measurements of his wife, which allowed him to conclude that this model was likely appropriate;
- c. He delivered the chair personally and satisfied himself that the Claimant's wife could sit in it comfortably;
- d. The Claimant has a history of buying items and seeking to return them at later times;
- e. The sales invoice is clear that there are no refunds allowed for "fabric or foam products."

[5] According to the Claimant, he had seen some Lift Chairs at Lawton's Drugs and noted that there was a particular model that might suit his wife, who was unable to leave her home because of her medical condition. He says that he went to the Defendant's store and noted that the Defendant also supplied the same brand of chair. He testified that, at the request of Perkins, he took some measurements of his wife's legs and upper body and supplied them to Perkins, who (he says) then selected the size of chair.

[6] The Claimant testified that Perkins delivered the chair to his home, and left without even seeing that Mrs. Turner could sit comfortably in it.

[7] The Claimant says that the chair did not fit his wife, and that he returned to the Defendant's store a day or two later and asked to be allowed to return it. He says that Perkins suggested that he should try filling some of the cushions with additional stuffing - which is a feature of this type of chair. He says that he immediately went to a fabric store and bought the suggested stuffing, but this did not work. He asked again for the Defendant to pick up the chair and give him a full refund.

[8] The story from the Defendant is a bit different. Perkins says that the Claimant came into the store determined to buy this particular model, which comes in several sizes. He says that the Claimant was asking to order the large size, but that after various discussions and attempts to get accurate measurements he reduced that to the small size. He says that he told the Claimant that it would be highly preferable to have Mrs. Turner try out a few chairs before committing to one. He says that the Claimant insisted on ordering the chair in question. He says that he personally delivered the chair and

assembled it. He says that he did not leave the home before satisfying himself that Mrs. Turner was comfortable in it, and that they knew how to operate the lift mechanism.

[9] Perkins testified that it was not until about two months later that the Claimant sought to return the chair. He also testified that he and his staff have experience with the Claimant who has bought a number of items from the store, and sought later to return them for a refund.

[10] Perkins testified that he did not give any assurance that this model was specifically suited to Mrs. Turner, and that the Claimant made the ultimate decision to order it. He also testified that if the chair is too high - which seems to be the complaint - there are legs that can be adjusted. He simply does not want to provide the refund and have to take a financial loss.

[11] I do not have full confidence in what the Claimant testified to in Court. I appreciate that he regards himself as, and strives to be a person of integrity. He took offence when Perkins asked him whether he had memory problems. Even so, I believe that his memory has failed him in some respects. He insisted on several occasions that he came back to the store one or two days after the chair was delivered, at which time he was told to try the stuffing remedy. This is clearly incorrect. There are documents that show that the chair was delivered on June 23, 2013, and that he purchased the stuffing on July 8, 2013, just over two weeks later.

[12] Two weeks is not two days.

[13] I have a hard time believing that Mrs. Turner did not try out the chair before Perkins left. Initially, the Claimant's testimony was that Perkins did not attend at his house at all. He then amended that to say that he came, delivered the chair and simply left. I find that impossible to believe.

[14] I have a bit of a problem with the testimony of Perkins that the Claimant only sought a refund after two months, but it may be that he was referring to the time between the original sale and when the Claimant made his final request for a refund along with his threat to take the Defendant to court. It is also possible that Perkins was not in the store on an earlier occasion when the Claimant spoke to a member of his staff.

[15] It is clear that Perkins was very frustrated dealing with the Claimant, because of the history with other transactions as well as the multiple meetings they had before this particular chair was ordered.

[16] On all of the evidence, I am not convinced that the Defendant has any obligation to take the chair back. To override the express contractual term that foam and fabric items are not returnable, the Claimant would have to satisfy the court that there was another term, perhaps implied, that was in conflict, or that the Defendant was in breach of contract such that he could not rely on this term. Although not specifically referenced, the Claimant would be relying on s. 26(3) of the *Consumer Protection Act*, which provides:

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:

... (e) where the purchaser, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to

show that the purchaser relies on the seller's skill or judgement and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, a condition that the goods shall be reasonably fit for such purpose; provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

[17] On the evidence before me, I am satisfied that the Claimant knew what he was purchasing and that he instructed the Defendant to order it for him. I am likewise not satisfied that the chair is unsuitable for the purpose. For whatever reason, the Claimant and his wife decided that it was not appropriate for her.

[18] It appears that the Claimant has a history of buying and returning goods that he simply decides that he does not want. In many cases, sellers such as the Defendant will oblige because many items can still be sold as new. The term that disallows the return of foam and fabric items recognizes that such an item may have a reduced value if returned, and - absent some wrongdoing by the seller - the seller should not have to absorb the financial loss of accepting a "used" item in return for the refund of the new purchase price.

[19] There is a very active market - such as through the classified website kijiji - for second-hand devices of this very type, which the Claimant may wish to consider to recover some of his outlay.

[20] In the result, the claim is dismissed.

Eric K. Slone, Adjudicator