Claim No: 425855

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Theriault v. Mobility Auto Sales Inc., 2014 NSSM 40

BETWEEN:

PATRICIA THERIAULT

Claimant

- and -

MOBILITY AUTO SALES INC. and FORBES KIA

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearings held at Dartmouth, Nova Scotia on May 13, 2013 and June 3, 2014

Decision rendered on July 1, 2014

APPEARANCES

For the Claimant	self-represented
For the Defendant, Mobility Auto Sales	Jeff Bigelow, owner
For the Defendant, Forbes Kia	Jason Sawler, general manager

BY THE COURT:

[1] The Claimant initially sued “Jeff Bigelow (Mobility Auto Sales)” and Kia Forbes, arising out of her purchase of a used 2006 Hyundai Sonata automobile. At the initial hearing it was determined that the proper name of the seller of the car was Mobility Auto Sales Inc., and I ordered that the style of cause be amended to reflect same.

[2] It was also determined that the Claimant had no real claim against Forbes Kia, but had sued it out of an abundance of caution because it needed to sign a document perfecting title to this vehicle. Once it was shown that Forbes Kia had no objection to signing the document, it was agreed that it would be let out of the lawsuit. As such, it was no longer involved when the case came back for a hearing on the evidence on June 3, 2014. The claim is dismissed against Forbes Kia.

[3] As such, all references to the Defendant hereafter are to Mobility Auto Sales Inc.

[4] The relief that the Claimant was seeking initially, as disclosed in her claim form and as stated in the initial court hearing, was to have the transaction with the Defendant reversed, which would have had her return the car for a full refund. It would also have required the Defendant to return to her the older model Saturn that she had traded in. By the time of the June 3 hearing, the Claimant had sold the Hyundai and was only interested in monetary compensation for some of the expenses she had incurred.

[5] The chain of relevant events starts with the Claimant, on February 22, 2014, test driving the 2006 Hyundai Sonata which was on the Defendant's used car lot. The Claimant had actually expressed interest in this vehicle about a month earlier, which was the subject of some complaint by the Defendant, but I consider that irrelevant since nothing was ever agreed to. On February 22 she made up her mind and agreed to buy it. The written contract was drawn to arrive at a net price of $5,000.00, allowing for taxes and approximately $2,000.00 for the trade in of her Saturn. The contract states in one part that there is no warranty, while elsewhere it states that there is a limited 30-day warranty for "normal wear and tear" requiring the Claimant to have the work done at its facility with a 50-50 share of cost of parts.

[6] Because the Defendant is in the business of selling used cars, there is also a limited implied warranty of durability found in the *Consumer Protection Act.*

[7] On the day after the purchase the "check engine" light came on, and the Claimant brought the car back to the Defendant. Although the evidence is a bit unclear on this point, it appears that an employee of the Defendant simply tightened the gas cap, after which the light went off. The Claimant was also complaining of a noise in the rear end, most audible when driving over potholes. The employee of the Defendant and Mr. Bigelow test drove the vehicle and said that they could not detect any such noise.

[8] On the following day, when it appears that the engine light came on again, the Claimant decided to take the vehicle to a Hyundai dealer for a full inspection.

This revealed a number of things which spooked the Claimant and caused her to regret her purchase.

[9] I note that the Claimant could easily have had the vehicle inspected before she bought it, in which case she would have known more about the issues she might be facing with an 8-year-old car driven over 125,000 kilometres. Instead she relied on the relatively recent inspection sticker which, as most people know, only covers limited components.

[10] The Hyundai dealer discovered that there were worn bushings which might account for the road noise. It also alerted the Claimant to the fact that there was a manufacturer's recall on the vehicle to address premature rusting of a rear frame cross-member. This would be done at no cost.

[11] The Claimant had all necessary work done at a net cost to her of $367.49, including the cost of the inspection. In addition, there was some inconvenience as the vehicle was out of service for a time and needed to re-pass its safety inspection.

[12] At no point did the Claimant ask the Defendant to do the repair or pay for any part of it. She simply wanted to reverse the transaction. To further complicate matters, she also reneged on her obligation to sign the ownership papers of the Saturn over to the Defendant, since she was hoping to get it back. As a result of this omission, the Defendant sat with a car that it could not sell, and in fact expended money on advertising that was essentially wasted, because it could not have completed a purchase with a customer. The Defendant counterclaims for this expense.

[13] In my view, the bushing problem that became known one or two days after the purchase was the full responsibility of the Defendant. It did not fall under the limited 50-50 warranty, because it had nothing to do with regular wear and tear. I do not think this explicit warranty applies to a defect that was already in existence; it is intended to cover premature deterioration within the 30 days after the purchase. However, I find that this defect was covered by the implied warranty under the *Consumer Protection Act,* which means that the Defendant is fully responsible for the cost - not just for half. Nor does it have the right to insist on doing the repair itself.

[14] The issue of the manufacturer's recall is neither here nor there. Mr. Bigelow on behalf of the Defendant conceded that he was unaware of the recall. Since there was no cost involved, there are no damages that flow from that.

[15] I find that the Defendant must bear responsibility for the cost of the bushing repair. I also find that the cost of the inspection which disclosed the needed repairs was also reasonably incurred and chargeable to the Defendant.

[16] Even so, the Claimant's reaction to these problems was out of proportion to the issue. She could not have succeeded in having the contract reversed. To reverse a transaction, there must be a fundamental breach of the contract. The minor warranty claim did not rise to the level of a fundamental breach of contract. As such, her refusal to sign over the title to the Saturn was unreasonable and breached her contract with the Defendant.

[17] The Claimant said that she gave the Defendant the opportunity to repair the vehicle. With respect, I do not believe she ever limited her demand to the Defendant repairing, or paying for repair. She was insisting on returning the vehicle and obtaining her money and Saturn back. She was at best equivocal in what she was communicating. She would have been within her rights to have the repair done and hold the Defendant fully or partly responsible. Instead, I find that she panicked and overreacted.

[18] It was a mistake on her part to withhold the ownership certificate for the Saturn, until May 15, 2014, after the initial court appearance and after the time she sold the Hyundai , thus putting herself in a position where she could not have reversed the transaction.

[19] The Defendant counterclaims for the cost of continuing to advertise the vehicle while lacking the ability to sell it. The Defendant produced evidence that it had been spending $60.00 per week for ads in both the Auto Trader and on the Kijiji website. It claims for 12 weeks, or $720.00. It also asks for a further $2,000.00 representing the cost of the Saturn - a claim that makes no sense to me since it has the vehicle.

[20] I accept that some expense was unnecessarily incurred by the Defendant, but it was not reasonable for it to continue to spend money advertising when it knew that the Claimant appeared to be deliberately withholding the ownership certificate. A party such as the Defendant has a duty to mitigate its damages. I assess the reasonable damages at 5 weeks, or $300.00.

[21] The Claimant asks for her cost of issuing the claim in the amount of $193.55. She paid the amount for a claim over $5,000.00, because that was

what she was initially claiming. I find that she never had a claim of that magnitude. I limit her cost recovery to $96.80, which would have been the cost to commence a claim seeking less than $5,000.00.

[22] The Defendant seeks its cost of commencing the counterclaim which is $64.10. I find that this was reasonably incurred and I allow it.

[23] In the end, the responsibility of the parties to each other is this.

Cost of inspection and repair	$367.49
Costs to Claimant	$96.80
Damages suffered by Defendant	($300.00)
Costs to Defendant	($64.10)
Net to Claimant	$100.19

[24] In the end, offsetting the damage claims and costs, the Defendant shall pay the Claimant the sum of $100.19.

Eric K. Slone, Adjudicator