

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Sawler v. Barrett, 2010 NSSM 32

Claim: SCCH 323987

Registry: Halifax

Between:

Susan Sawler

Claimant

v.

Adam Barrett

Defendant

Adjudicator: W. Augustus Richardson, QC

Heard: March 30, 2010 in Halifax, Nova Scotia.

Appearances: Susan Sawler, Claimant, for herself
Ian Joyce, Shawn MacMillan, for the Defendant

By the Court:

[1] The claimant Ms Sawler purchased a second-hand 2003 Polaris Sportsman ATV (the “machine” or the “ATV”) from the defendant Adam Barrett in the last part of 2009 for \$4,500.00. She says that the machine was defective, did not work properly from the start and cost her roughly \$3,000.00 in repairs. She claims “some money back” on the ATV from Mr Barrett.

[2] Mr Barrett defends on the basis that:

- a. It was a second-hand machine sold to Ms Sawler’s knowledge without any express or implied warranty of fitness for use;
- b. *Caveat emptor* (“buyer beware”);
- c. If there was an implied warranty of fitness for use, it ran out before any problems developed; and
- d. Ms Sawler may have damaged the machine through improper use or operation.

The Facts

[3] Ms Sawler lives in the country, at the end of a long, gravel driveway. She wanted an ATV with a plow attachment so that she could plow herself when necessary. In late 2009 she looked on Kijiji and saw an ad for the machine for \$4,800.00. The ad had been placed by Mr Barrett. He had himself purchased the machine after seeing it in an ad on Kijiji. He had purchased it in April 2009 from “an elderly gentleman.” He said (and I accept) that he only used it 5-6 times himself before deciding to sell it. He made that decision in the fall of 2009 because he was “downsizing” into a condominium and had no space for the ATV.

[4] The ad Mr Barrett placed on Kijiji was not put into evidence. According to Mr Barrett it said that the machine (according to Mr Barrett’s testimony) was “well maintained” and that it had a “plow and push bar.”

[5] Ms Sawler and her sister met Mr Barrett in Halifax to look at the machine. The machine looked good. Ms Sawler told Mr Barrett that she was on low income and didn’t want to buy “a piece of junk.” She says that he told her that there were no problems with it and that he’d had it serviced regularly.

[6] Mr Barrett agreed that he told Ms Sawler that “it was well maintained.” He says he told her that he’d purchased it from an older gentlemen, that he was selling it “as is” and that it was “well maintained.” When asked at trial whether he had maintained the machine during his ownership he said: “Whenever there was an issue with the machine I took it in to be fixed ... I take care of my things ... The service work was done by a professional ... just some oil, some grease, replace some seals, a belt ... just routine maintenance.”

[7] There was no room to test drive the ATV at Mr Barrett’s. He says that he offered her the chance to test drive the ATV, and that she declined. He suggested she at least turn it on, and when she didn’t he did it for her. She says that there was no room to test drive it, and denies that he turned it on. I find that the machine was not operated although the engine was started.

[8] Some negotiation then took place. Mr Barrett eventually agreed to accept \$4,500.00 for the machine. He also agreed to deliver it to Ms Sawler (since she didn’t have a trailer) for \$50.00, which he did.

[9] Before moving on I have to address the issue of when this transaction took place. Mr Barrett was adamant that the sale took place in October 2009. His counsel in cross-examination suggested to Ms Sawler that it was October 5th, 2009. Ms Sawler on the other hand said it took place in early November. She says that she knew it was November because she registered it a day or two after receiving the machine from Mr Barrett. The certificate of registration was put into evidence and shows a registration date of November 12th, 2009.

[10] I accept Ms Sawler's evidence on this point. I do so because Mr Barrett's maintenance records contain an invoice for service work done on that machine that is dated November 9th, 2009. The sale could not have taken place in October if Mr Barrett was having it serviced in November.

[11] Returning to the chronology Mr Barrett delivered the ATV to Ms Sawler. He showed her how to turn it on. Then he left. Shortly thereafter she started it up. It made a loud "clunk" sound when she put it in gear. It didn't sound right to her. She called Mr Barrett and he told her that it was fine, that it was a powerful machine and typically made such a sound when switching gears.

[12] The next day the ATV wouldn't start. She had Bro's Cycle, a local dealer look at it. She was advised that the ATV "requires extensive repair." She was told that the ATV's value prior to the suggested repairs would be \$1,500, plus or minus \$500: Ex. 1. The recommended work included "drive clutch cracked (requires replacement), driven clutch (requires new bushings, cover seal), clutch cover seal." She ultimately paid \$3,046.00 for parts and labour to effect the required repairs.

[13] She contacted Mr Barrett but was told by him "buyer beware." She then decided to commence this action in Small Claims Court. Mr Barrett went to astounding and somewhat silly efforts to avoid being served personally, but Ms Sawler was eventually able to effect service.

[14] Mr Barrett's defence was, as noted, the following:

- a. It was a second-hand machine sold to Ms Sawler's knowledge without any express or implied warranty of fitness for use;
- b. *Caveat emptor* ("buyer beware");
- c. If there was an implied warranty of fitness for use, it ran out before any problems developed; and

d. Ms Sawler may have damaged the machine through improper use or operation.

[15] I should say now that I do not accept that the law is that a sale of second-hand goods never carries any implied warranty of fitness for use. The existence of such a warranty under the *Sale of Goods Act* will in my mind depend on the circumstances and facts of the particular sale. The fact that a car (or an ATV) is second-hand does not *ipso facto* mean that there is no such warranty—only that the existence or extent of any such warranty will depend upon the circumstances surrounding the sale.

[16] In this case I am satisfied on the evidence that Mr Barrett expressly represented to Ms Sawler that the ATV:

- a. Had been well-maintained;
- b. Had always had all necessary repairs or maintenance effected; and
- c. Had no problems that he was aware of at the time of the sale.

[17] I am also satisfied that these representations were, to Mr Barrett's knowledge, not true.

[18] First, he did not reveal to Ms Sawler what he knew to be true, which as that on November 9th, 2009 it was suggested to him by Route 1 Motor Specialists, who had serviced the ATV just days before he sold it to Ms Sawler, that he should “replace clutches has one clutch has 6 cracked in it:” see Invoices entered at hearing. There is no evidence that he followed through on that recommendation. I note too that cracks and other problems with the clutches were later identified by Ms Sawler's mechanic as being one of the repairs that was needed.

[19] The other problem is the impression Mr Barrett conveyed when he told Ms Sawler that the ATV was “well-maintained.” What he didn't tell her was that he had in fact had it serviced four times between the time he purchased it in the spring of 2009 and November 2009: see invoices. That “service maintenance” cost him a total of \$1,585.52. That is a lot of money to spend on an ATV that had only been used 5-6 times, especially given that it appears he had to have it serviced almost every time he took it out.

[20] His representation that the ATV had been “well-maintained” and that “there were no problems with it” in my opinion amounted to misrepresentations knowingly made by Mr Barrett.

He knew that had Ms Sawler been provided with the full story (particularly the fact that the clutch was cracked and needed repair) she would not have purchased the ATV. The ATV's condition was clearly a concern to her. Ms Sawler had asked for copies of the invoices when she met with him but he told her that he didn't have them at the time. Mr Barrett knew that she didn't have much money and that she didn't want to buy "a piece of junk."

[21] Regardless then of whether or not there was any implied warranty of fitness for use, I am satisfied that there was a material misrepresentation made by Mr Barrett to Ms Sawler; that he knew his representations were untrue; and that Ms Sawler was relying upon those representations in entering into the agreement to purchase the ATV.

[22] With respect to damages, I note the evidence that the ATV without the repair work recommended by Bro's Cycle was in the range of \$1,500 plus or minus \$500. I also note that she paid \$4,500 for the ATV but then had to spend a little more than \$3,000 in repairs. Based on this evidence I conclude that her loss or damages are \$3,000.00. That is what it took to give her what she thought she was getting, based on Mr Barrett's representations: a second-hand ATV "in good repair."

[23] I will also give her costs of \$180.00.

Dated at Halifax, this 20th day of April, 2010

Original: Court File)
Copy: Claimant)
Copy: Defendants)

W. Augustus Richardson, QC
ADJUDICATOR