IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citaton: *Shahini v. Parnell*, 2017 NSSM 15

Claim No: SCCH 458959

BETWEEN:

Latif Shahini **Claimant**

v.

Patrick Parnell and Blanch Marie Parnell **Defendants**

Latif Shahini – Self Represented;

Patrick Parnell – Self Represented;

Decision Rendered on February 21, 2017

Editorial Notice: Addresses and phone numbers have been removed from the electronic version of this judgment

DECISION

This claim arises from the purchase of a vehicle by the Claimant from the Defendant, Patrick Parnell, or his mother, Blanch Parnell. Most of the facts are not in dispute.

On November 24, 2016, the Claimant, Latif Shahini, attended to Patrick Parnell's house to view the vehicle which is the subject of this claim, a 2001 Acura TL. Mr. Shahini was accompanied by James (Jim) Estabrook, who introduced the parties and helped to set up the meeting. The mileage on the vehicle is estimated to be approximately 350,000 km. Mr. Parnell recommended Mr. Shahini take the vehicle for a test drive and have it inspected by a mechanic. He drove it a short distance and offered to take the vehicle. After negotiations, the parties settled on $2000 cash and a mattress from the Claimant's store. There was some discussion about the amount of gas in the vehicle. The following day, the Claimant smelled gas and found there was a leak from the hose. He made several demands for a refund. The Defendant refused. He is now suing for the purchase price of the vehicle and $700 for the mattress.

Addition of Party

During the proceeding, it became clear that at the time of the transaction, the vehicle was owned by the Defendant's mother, Blanch Marie Parnell. Any discussions or representations were made

by Patrick Parnell. Both parties should have been named in this proceeding. Mrs. Parnell was present in Court. As noted in these reasons, I found no liability on the part of either defendant and thus, there is no prejudice to adding her. The style of cause is amended as stipulated herein.

Issue

Are the Defendants liable to the Claimant for breach of contract or misrepresentation in selling the vehicle?

If so, what is the extent of the damages?

The Law

This transaction is a private sale. Mr. Parnell is employed as a car salesman at Harvard Auto. Mrs. Parnell is not in the business of selling automobiles. Therefore, none of the warranties found in the *Consumer Protection Act* and *Sale of Goods Act* apply.

I considered the issue of a private sale of a vehicle in the case of *Villeneuve v. Sypher* 2014 NSSM 70. The law stated in that decision is equally applicable to this matter:

"The law respecting the sale of used vehicles differs significantly from the sale of new vehicles. This principle has been addressed in the courts of Nova Scotia. An excellent review of the law was provided in the Small Claims Court case of *Robinson v. Atkinson* 2004 NSSM 31. In that case, Adjudicator MacDonald (now Justice Beryl A. MacDonald of the Nova Scotia Supreme Court Family Division), stated the following:

> "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.

44. At the time Atkinson purchased the truck it was running. He had an opportunity to take it for a test drive had he wished to do so. He did not ask to have it examined by a mechanic. He did little examination of the truck himself. The vehicle was capable of being driven and was driven to 23 Beacon Street, Amherst, Nova Scotia. Robinson knew he was purchasing an old used vehicle. He knew he was purchasing the truck from a seller who was selling on the basis of an "as is where is" sale. Therefore, he knew or should have known that the seller was not providing an warranty in respect to the continued operation of the truck, irrespective of the comment by the buyer that the truck was in "good condition". As a result, I find that there was no misrepresentation by Atkinson.

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

I find Justice MacDonald's application of the law to be similarly persuasive and informative.

Findings

Based on a review of the evidence, I find the Claimant purchased the vehicle and took it only for a short test drive before purchasing it. The vehicle was 16-17 years old and had approximately 350,000 kilometres driven on it. It smelled of gas but was operable. The Defendant recommended on more than one occasion that he have it inspected by a mechanic. There is some disagreement about who that mechanic was to be. Mr. Shahini insists that Mr. Parnell recommended a mechanic and refused to let him consult another. Mr. Parnell denies that. In my view, it is not relevant. I do not find there was any pressure to purchase the vehicle. Mr. Shahini had the option to test drive the vehicle more, take it to a mechanic or even decline the purchase.

There was a gas smell discovered the following day. It was only at that point Mr. Shahini discovered the other problems with the car.

I find Mr. Parnell made representations of work done to the vehicle, “almost $5000 worth”. There is no evidence before me that the representation was untrue. While I have my doubts about such a statement, the onus was on the Claimant to show it was not true and that he relied on it. He has not discharged the onus.

I find there to be no failure of consideration, fundamental breach, negligent misrepresentation or fraud. In other words, there is no basis to find liability.

The claim is dismissed.

Provisional Assessment of Damages

In the event that I had found for the Claimant, I make a provisional assessment of damages. In his Claim, Mr. Shahini seeks $2500 plus general damages and costs. Essentially, this is a full refund, without any suggestion of returning the car.

As I have previously found, the vehicle was operational. In evidence, both parties acknowledged that Mr. Shahini continues to drive it. There has been no failure of consideration. None of the mechanics gave evidence. Mr. Parnell acknowledged there was an issue with the hose. There is in evidence an estimate from Top Point Auto Limited to the gas leak of $400. Had I found the Defendants liable, I would have limited damages to $400 plus HST.

However, where I have not found them liable, the claim is dismissed with each party bearing their own costs.

An order shall issue accordingly.

Dated at Halifax, NS,
on February 21, 2017.

_____

Gregg W. Knudsen, Adjudicator

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