

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Tingley v. Sapp*, 2017 NSSM 4

Claim: SCCH-457632

Registry: Halifax

Between:

Paul J. Tingley

Claimant

v.

Joel Sapp and The Used Car Factory 21

Defendants

Decision

Adjudicator: Eric K. Slone

Heard: January 3, 2017

Date of Decision: January 22, 2017

Appearances: Paul J. Tingley, Claimant, Self-Represented
Joel Sapp and The Used Car Factory 21, Defendants,
Self-Represented

By the Court:

1 The Claimant is an individual who resides in Halifax.

2 The named Defendant Joseph Sapp is the owner of the limited company 2117335 Nova Scotia Limited, which carries on business as The Used Car Factory 21 (which I will hereafter refer to as “Factory 21.”) Although Mr. Sapp is personally named as a Defendant, there is nothing in the evidence that would suggest that he is personally liable for any of what the Claimant seeks. Liability, if any, would attach to Factory 21.

3 The claim concerns a used car that has, or is alleged to have, significant mechanical problems. Such cases are often seen in this court, but this case has an unusual twist.

4 Both parties were the victims of a blatant fraud by a third party, one Michael Surette (“Surette”), who was at the time working as a sales agent for Factory 21. In June and July of 2016, Surette accepted a series of cash payments from the Claimant toward the purchase of a 2005 Ford Focus, which payments Surette himself pocketed. The Claimant never received this vehicle. Mr. Sapp, who was Surette’s boss, knew nothing of Surette’s antics. He eventually came to learn that Surette had stolen money in similar ways from approximately fifteen people, before he absconded. I was told that Surette was eventually apprehended by the police and is incarcerated awaiting trial. While it is not the function of this court to pass judgment on the guilt or innocence of anyone, particularly of someone who was not a party to the proceeding and who was not in court to testify, nevertheless for the purposes of this case, the undisputed facts before me lead to no other conclusion than that already stated.

Surette committed a blatant fraud that has produced financial hardship for both his former employer and for his customer, the Claimant.

5 As satisfying as it may be to focus on Surette as the bad actor in this scenario, the dispute before this court is between the innocent parties who were left with the fallout of Surette's fraud.

6 The case has two very different components:

- a. The liability of Factory 21 for the Surette fraud, and
- b. The liability of Factory 21 for the defects in the vehicle that the Claimant eventually bought from Factory 21.

7 When Mr. Sapp learned of the fraud by Surette, he immediately accepted responsibility and tried to make amends, as best he could within his financial limitations. Had there been an issue as to whether or not Factory 21 was liable for Surette's fraud, I would have held that there was - on the theory of "ostensible" or "apparent authority." Mr. Sapp allowed Surette to operate under its umbrella and clothed him with apparent authority as a Factory 21 salesman. That is enough to pin liability on Factory 21.

8 Mr. Sapp testified that he did not have the cash available to repay all Surette's victims, but he did have some vehicles that he could offer in substitution. Mr. Sapp offered the Claimant a credit for the \$3,905.15 that he had handed over to Surette, which the Claimant was able to use toward the purchase of a different vehicle, a 2008 Mazda 3 ("the Mazda") that Factory 21 owned.

9 The Mazda had a total sale price of \$4,424.05 (including taxes), which (after crediting the payments made to Surette) required a further payment of \$520.00. The sale was documented in a sales contract dated October 7, 2016. That contract included a 30 day "50-50" bumper to bumper warranty, which meant that if any repairs were needed within the first month the Claimant could bring the vehicle to the Factory 21 facility and the cost would be shared 50-50 between the Claimant and Factory 21.

10 In my view, once this transaction was completed, there is no further relevance to the Surette fraud. The Claimant has already received full value for his losses suffered as a result of Surette's actions.

11 The remaining issue concerns the mechanical condition of the Mazda, and whether Factory 21 has any responsibility for things that have since gone wrong.

Liability for deficiencies in a used vehicle

12 The Claimant must be taken as knowing that there is considerable risk in the purchase of a 9-year old vehicle with almost 200,000 kilometres driven, and which is being sold for approximately one-fifth its original price. He also knew that Factory 21's business model was (in whole or in part) to buy vehicles at auction and resell them at a profit. It is well known that vehicles sent to auction come from a variety of sources, including trade ins, repossessions and insurance write-offs. There is no evidence before me as to the history of the Mazda.

13 Factory 21 has its own mechanic, Frank Lambert, who checks over the vehicles that the company buys. He also does a Motor Vehicle Inspection, which he is licenced to do. As he testified, sometimes he will send a vehicle to be inspected by an independent facility nearby. In the case here, he inspected the Mazda himself and issued a certificate dated September 27, 2016, which was less than two months prior to the sale to the Claimant.

14 There is no question that the Claimant relied on the MVI certificate and report, which - to the extent that it does so - offers some assurance that certain components are in working order. How long they will last is a different question.

15 All vehicle dealers in Nova Scotia are subject to the terms of the *Consumer Protection Act*, and in particular the implied warranties of reasonable fitness, merchantability and durability. The relevant parts of the Consumer Protection Act are these:

26 (1) In this Section and Section 27, "consumer sale" means a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use

(2) In this Section and Section 27, "purchaser" means a person who buys or agrees to buy goods or services.

(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;

(h) a condition that the goods are of **merchantable** quality, except for such defects as are described;

(j) a condition that the goods shall be **durable** for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale. **(Emphasis added)**

16 These implied warranties are intended to supply a minimum level of protection for purchasers of used merchandise, including vehicles. Where the seller provides an express warranty, such as is the case here, the implied warranties establish something of a floor, in the sense that the express warranty cannot be less protective than the implied warranty.

17 Having said that, the cases in Nova Scotia make pretty clear that the implied warranties are not very strong. Some 20 years ago, the Supreme Court of Nova Scotia made this clear in *Robertson v. Seddon*, 1997 CanLII 9845 (NS SC). In that case, the buyer had succeeded in the Small Claims Court in holding a dealer responsible for some repairs that became necessary a few weeks after the purchase. The sale had been on an “as is” basis. The adjudicator made a finding that the vehicle was not durable, because of the repairs that became necessary. The dealer appealed. Associate Chief Judge Palmetier wrote for the court that “ a person buying a motor vehicle in an "as is" condition, with a declaration that there is no warranty, express or implied, and a further declaration that the purchaser is responsible for all repairs, cannot be expected to receive much warranty under the Act, if in fact there should be any.”

18 In the years since, adjudicators of this court have been perhaps a little more forgiving, but have been mindful not to elevate the implied warranties under the *Consumer Protection Act* into full-blown warranties that would place heavy obligations on sellers. Consumers often have the option of buying extended warranties which are realistic in the sense that they spread the financial risk more fairly.

19 In the case at hand, Factory 21 extended a 30-day, 50-50 warranty, at no extra cost to the Claimant. As mentioned, the Claimant would be entitled to the benefit of this warranty, or the implied warranty of “reasonably fit” or “durability” - whichever is more favourable to him.

The problems with the vehicle

20 As described by the Claimant, he experienced issues immediately upon taking possession on October 7, 2016. On the way home, the gas light came on, so he filled the tank with gas. The washer fluid light was also on, so he put in washer fluid. I do not see these things as defects, although the Claimant seemed rattled by them.

21 The next day, the engine light came on, which is more concerning. However, he was unable to deal with this issue right away as he was going away. When he returned a week later, there seemed to be a puddle of some kind of fluid underneath the driver’s side. He decided to take the vehicle into City Mazda and have them run a full diagnostic test on the vehicle. That facility found problems with the rear driver’s side wheel bearing, front passenger side wheel bearing, brakes and battery, and on October 17, 2016, quoted him approximately

\$1,700.00 to fix those items. The Claimant did not have the work done, but paid \$198.29 for the diagnostic testing. There was no evidence as to what the Claimant did over the next month. The next event, as described, was to involve a government Motor Vehicle Inspector, Kyle Langille, who operates a mobile inspection service and who has supervisory responsibility over all inspectors in Nova Scotia. He inspected the vehicle on November 17, 2016, and failed it on a number of mechanical issues. He essentially took the vehicle off the road until a number of mechanical issues were addressed.

22 Another few weeks later, the Claimant decided to get another repair opinion from an outfit called After Warranty Automotive Repairs in Middle Sackville. On December 15, 2016, that company gave him a quote for almost \$2,500.00, including some mechanical issues that City Mazda had not identified. It is noteworthy that on the way to that facility, with his wife following behind in another car, one of the wheels appeared to be wobbling, looking (to her) as if it was coming off the axle. The Claimant had to replace the wheel bearings just to get home.

23 By the time the matter came to court, the vehicle had not been repaired (other than the wheel bearing repair) and the Claimant has had almost no use out of it - with approximately 244 kilometres driven in total since the purchase.

24 During all of this time that the Claimant was having trouble with the vehicle, the one thing that he did not do was to inform or involve Factory 21. Under the terms of the 50-50 warranty, Factory 21 would have been the one to diagnose and repair mechanical problems.

25 Mr. Sapp had little to say about the mechanical problems. His mechanic, Frank Lambert, was concerned that the inspector, Mr. Langille, had not contacted him to go over the inspection with him. He does not accept the legitimacy of the City Mazda or After Warranty estimates, because he is concerned that they may be recommending repairs that are excessive, if not outright bogus. He believes that the need for repairs is often a matter of opinion, and repair facilities have an inherent conflict of interest by recommending work that they benefit from. I see a grain of truth there, but would not go anywhere near as far as to discredit these estimates because of alleged conflict. However, since none of the mechanics or inspectors was brought to court to testify, their opinions do not carry as much weight as they otherwise might.

26 In the end, I am left in some considerable doubt as to the extent of repairs that would be necessary to make this vehicle driveable.

27 On the one hand, I do not believe that it passed the “reasonably durable” test in the *Consumer Protection Act*.

28 On the other hand, I am concerned that the Claimant never brought the vehicle back to Factory 21 so that they could repair it, or (at least) satisfy themselves as to its mechanical condition. By accepting the 50-50 warranty, the Claimant essentially obligated himself to allow Factory 21 to do the repairs at their joint expense. It appears that his only reason for not bringing the vehicle back to Factory 21 was because of his lingering mistrust after the Surette fraud. I do not find that to have been a reasonable response.

29 Claims for breach of warranty, whether express or implied, are damage claims. This brings about a duty on the part of the aggrieved party (the Claimant) to mitigate or minimize his losses. In my view the most responsible and cost-effective thing would have been to call on Factory 21 to honour the 50-50 warranty.

30 Based on the evidence, I assess damages at \$1,500.00, including the cost of diagnostic testing. Based upon the agreed-upon 50-50 warranty, I am holding Factory 21 responsible for one-half of that total, namely \$750.00.

31 The Claimant incurred the \$199.35 filing fee, because his claim was over \$5,000.00. He also paid \$115.00 to serve the claim. I will allow the Claimant these costs. The judgment will be for \$750.00 plus \$314.35 for costs, for a total of \$1,064.35.

Eric K. Slone, Adjudicator