Cited
As of: Aug 26, 2009

Loza v. F&D Garet Motors Inc.

26542/02

SUPREME COURT OF NEW YORK, QUEENS COUNTY

2007 N.Y. Misc. LEXIS 328; 237 N.Y.L.J. 21

January 16, 2007, Decided

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING THE RELEASE OF THE FINAL PUBLISHED VERSION.

JUDGES: Justice Cullen

OPINION BY: Edgar M. Cullen

OPINION

A non-jury trial was held before the Court on the 6th and 7th days of December 2006. Plaintiff testified on her own behalf and presented the additional testimony of Michael Porcelli an automotive repair expert;

Defendant F & D Garet Motors, Inc. defaulted in this matter (see short form order of Hon. Dollard, J.S.C. dated the 1st of April 2003, and entered on the 24th of April 2003);

Defendant Dependable Credit Corp appeared and offered the testimony of Seraj Wahidullah, an automotive loan broker;

Based upon a preponderance of the credible evidence, the Court finds and determines as follows:

Background

On the 23rd of May, 2002 plaintiff placed a $ 500.00 "non-refundable" deposit with defendant F&D Garet Motors, Inc. toward the purchase of a 1995 Ford Mustang, having been informed specifically that it was deemed a "flood" car only for prior insurance purposes pertaining to a house where it was once garaged; F & D Garet Motors, Inc. thereupon referred plaintiff to a finance/credit broker, Enterprise Automotive, the employer of defendant's [*2] witness, Wahidullah, with whom she filled out a credit application and submitted a breakdown sheet detailing the vehicle, which she had received from F & D and which too, she had executed at its lower portion, on the 24th of May 2002;

Upon submitting the breakdown sheet to a proposed lender, Dependable Credit, Enterprise was informed that a search of the Department of Motor Vehicle records revealed the car to be a "salvage" vehicle and that it would require the entry of that word on the breakdown sheet and another signature by plaintiff to indicate her knowledge of that fact;

Plaintiff had already entered into a retail installment

contract with F & D to purchase the vehicle for $ 9,513.68, and was subject to the forfeiture of her $ 500.00 down payment; she apparently affixed her signature next to the word "salvage" on the breakdown sheet at that time, although the record is cloudy on this issue insofar as there exist two copies of the same sheet, one with the hand written word "salvage" and another with the word typewritten, the latter admittedly done so by Mr. Wahidullah;

The purchase went through following the advance of credit by Dependable Credit in the amount of $ 7,034.46, [*3] at an annual rate of 24.9 percent. Mr. Wahidullah, as loan broker, testified that it was his duty to find the best rate for the customer but upon questioning by the Court, could not state who his customer was, the plaintiff or defendant, Dependable Credit. The Court also took note of the fact that the credit rate was one-tenth of a point below the rate set for criminal usury and the fact that Mr. Wahidullah had an on-going relationship with both F & D and Dependable; plaintiff on the other hand, was a one-time client.

Plaintiff testified that she did not receive a full explanation of the term "salvage" and further that she had continuous problems with the car. In fact, evidence was adduced that clear title was not given her until the 24th of September, 2004, 28 months after purchase, said delay due in part at least, to the vehicle passing a more detailed inspection as demanded by the Department of Motor Vehicles for "salvage" cars;

Defendant's witness, Mr. Wahidullah stated that no detailed inspection of the vehicle was conducted by the lender who accepted it as collateral for his loan;

The record is clear that plaintiff sought to rescind her purchase with F & D Motors, Inc. but [*4] was unsuccessful;

There is no record that plaintiff was ever advised of her right to rescind the retail installment contract;

The Court finds that plaintiff was neither timely advised that the car she was purchasing was a "salvage" car nor that she had a right to cancel the purchase without penalty.

Plaintiff has satisfied her loan with Dependable by way of timely payments and had incurred a total of $ 3,020.70 in finance charges;

Plaintiff testified that she has had continuous problems with the subject vehicle and has had it repaired on multiple occasions; she has also testified to putting approximately 20,000 miles on the vehicle since she took possession, albeit the vehicle has been off the road for approximately two (2) years; no evidence was adduced at trial to show the cost of repairs.

Dependable was named a defendant herein as holder of the consumer credit contract and

Dependable has filed a cross-motion against F & D Motors, Inc. for indemnification;

Plaintiff, inter alia, has prayed for an order sustaining plaintiff's revocation of acceptance; return of the Mustang's sale price and all incidental and consequential damages incurred by plaintiff; return of down payment [*5] and/or net trade allowance; return of all finance charges and interest; return of all collateral charges incurred by plaintiff including insurance fees, costs of "cover," loss of use of the Mustang for significant periods of time, expenditure of funds for alternate transportation, lost time from work while being without the Mustang and attending to the repair of the Mustang and the resulting loss of income, severe aggravation and inconvenience and prejudgment interest at the statutory rate from the date this cause of action accrued; all reasonable attorneys' fees, witness fees, and all court costs and other fees incurred by the plaintiff; an award of punitive damages against defendants by virtue of its' fraudulent conduct; and such other and further relief that the court deems just and appropriate. Her attorneys Sadis and Goldberg, have submitted an affirmation of services rendered seeking $ 46,941.89 in fees and an additional sum of $ 3,920.00 for the preparation of that affirmation of services.

Decision

Plaintiff brought this action pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq., Uniform Commercial Code § 2-601 [*6] et seq., General Business Law § 349; Common Law Fraud, and Breach of Warranty of serviceability.

Plaintiff claims that defendants violated General Business Law § 349 (a), which provides that "[d]eceptive acts or practices in the conduct of any business, trade, or commerce... are hereby declared unlawful." To establish a claim under this statute, plaintiff must show that the defendants' act was "deceptive or misleading in a material

way, and that the plaintiff (was) injured by reason thereof." (see, Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 NY2d 20, 25, 647 N.E.2d 741, 623 N.Y.S.2d 529 [1995]).

Plaintiff also claims that defendants violated Uniform Commercial Code § 2-601 et seq. for delivery of non-conforming goods, alleging that at the time of delivery, the car had prior accidents, damages, or reported title problems and it was not fit for its intended purpose (see, Uquhart v. Philbor Motors, 9 A.D.3d 458, 459, 780 N.Y.S.2d 176 [2004]).

Plaintiff also claims defendants engaged in common law fraudulent representations. The essential elements of such claims are representation of a material existing fact, [*7] falsity, scienter, reliance and injury (see, Urquhart v. Philbor Motors, supra, 9 A.D.3d 458, 459 (citations omitted)).

Finally, plaintiff claims defendants breached warranties and violated plaintiff's right of revocation under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq. Under this federal consumer protection statute, "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title [15 U.S.C. § 2301 et seq.], or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief (A) in any court of competent jurisdiction in any State or the District of Columbia" (15 U.S.C. § 2310(d)(1)).

Plaintiff has shown that the sales representatives for defendant F & D Garet Motors, Inc. knowingly misrepresented the history of the car, that plaintiff reasonably relied on the misrepresentations in placing a non-refundable deposit upon a contract to purchase the car, and that the car was not fit for its intended purpose (see, Urquhart v. Philbor Motors, Inc., supra, 9 A.D.3d 458 [*8] [2004]). Further, plaintiff has shown that defendants failed to inform her of and rejected her timely attempts to exercise her right to revoke acceptance of the car upon discovery of the car's defects (see, UCC § 2-607, § 2-608; see also Cliffstar Corporation v. Elmer Industries, Inc., 254 A.D.2d 723, 678 N.Y.S.2d 222 [1998]).

Accordingly, plaintiff's acceptance of the car is deemed revoked and defendant F & D Garet Motors, Inc. is ordered to return the entire purchase price of the automobile, in the sum of $ 9,513.68 and to make suitable arrangements with plaintiff to pick-up the vehicle from her;

Defendant Dependable Credit, a party to this transaction, mutually benefitting from its consummation with F & D Motors Inc., is ordered to refund the sum of $ 3,020.70 to the plaintiff, said sum representing the interest paid by her to them on the loan.

Dependable Credit's cross-motion for legal fees and indemnification from F & D Motors, Inc. is denied; it is the presumption of the Court that a 24.9 percent annual interest rate encompasses such risks as legal fees in its defense.

Under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310 (d) [*9] , and New York General Business Law § 349, plaintiff also seeks a judgment awarding attorneys' fees, costs, and expenses incurred in this action.

15 U.S.C. § 2310 (d) (2) in pertinent part provides: "If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys fees would be inappropriate."

General Business Law § 349 (h) in pertinent part provides: "The court may award reasonable attorney's fees to a prevailing plaintiff."

Plaintiff's application for the award of a total amount of $ 50,861.89 in legal fees is found by this Court to be bordering on the ludicrous. Such items contained in the attorney's affirmation as seeking $ 61.00 for leaving a message on an answering machine (off-repeated [*10] therein); $ 24.00 for a paralegal's preparation of a folder, and various other intra office duties as mailing out correspondence at the paralegal rate of $ 120.00 per hour, is found by this Court to be beyond the pale, and notice is taken that at such a rate a paralegal at Sadis & Goldberg bills out at more than the salary of the Chief Justice of the United States of America; ($ 218,400 annually to the Chief Justice's $ 171,500.00, based on a 35 hour work week)

While sufficient incentive must exist for competent counsel to take on such cases as the one before the Court, there comes a point where counsel cannot make itself the de facto lead plaintiff in a case where it stands to reap exponentially more than its client. In the instant matter, it appears from the attorneys' affirmation that seven (7) lawyers devoted a total of 173.20 hours of services at an approximate average charge of $ 250.00 per hour for a total of $ 44,820.00 and that two para-legals devoted an aggregate of 25 hours at $ 120.00 per hour for an additional sum of $ 3,000.00; costs and disbursement in the amount of $ 201.89 are also sought; the sum of $ 3,920.00 for preparing its own affirmation of services as directed [*11] by the Court is simply beyond belief.

This matter could have been commenced in the Civil Court of the City of New York (see, N.Y. Civ. Ct Act § 213), but counsel in its discretion chose to proceed in Supreme Court, which could only have been chosen in anticipation of legal fees exceeding the lower court's monetary jurisdiction on an action for violation of the Magnuson-Moss Warranty Act; however, plaintiff's claim for attorneys fees may not be used to satisfy the jurisdictional amount, since attorneys fees are "costs" excluded under 15 U.S.C. § 2310 (d) (3); in any event, that decision was made upon commencement of the action and prior to the accrual of the exorbitant amount of time alleged to have been expended;

In the view of this Court, counsel is required to make a reasonable assessment of its case, not only on the merits, but on its possible costs and benefits. Accordingly, plaintiff's counsel is awarded judgment against defendant F & D Garet Motors, Inc. in the amount of $ 201.89 in costs and disbursements and $ 7,500.00 in fair and reasonable legal fees.

Settle judgment.