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Docket: CI 19-01-24455
(Winnipeg Centre)
Indexed as: Garcia v. 9323244 Canada Ltd. et al.
Cited as: 2023 MBKB 181

2023 MBKB 181 (CanLII)

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

NATASHA GARCIA,)	
)	
)	<u>Tyler Warren</u>
plaintiff,)	for the plaintiff
- and -)	
)	
9323244 CANADA LTD. OPERATING)	<u>Lincoln Atten</u>
AS AMERIKAL AUTO LTD. AND)	for the defendants
AMER KHOUDEDA,)	
)	
defendants.)	<u>Judgment Delivered:</u>
)	December 8, 2023

TOEWS J.

INTRODUCTION

[1] The plaintiff is suing the corporate defendants named in the style of cause and Amer Khoudeda, the sole shareholder, director and officer of the numbered corporate defendant 9323244 Canada Ltd., in respect of the sale of a 2012 BMW (the vehicle). Although the statement of claim appears to name two corporate defendants in addition to Mr. Khoudeda, it is the numbered corporation that appears on the bill of sale dated March 27, 2023 (see Exhibit 2). Amerikal Auto appears to be a trade name only. In any

event, for the purposes of these reasons the corporate defendants named in the statement of claim will simply be referred to as the corporate defendant or Amerikal Auto, while Mr. Khoudeda will be referred to as Amer. I have adopted these appellations in order to remain consistent with the Agreed Statement of Facts filed as Exhibit 15 by the parties in this proceeding.

[2] The facts agreed to by the parties in Exhibit 15 are:

1. The Plaintiff purchased a vehicle, 2012 BMW X5 501, VIN No.: 5UXZ8C53CL423297 (hereinafter referred to as "the vehicle"), from the Defendants, 9323244 CANADA LTD. OPERATING AS AMERIKAL AUTO LTD. (hereinafter referred to as "Amerikal Auto"), and AMER KHOUDEDA (hereinafter referred to as "Amer");
2. The Plaintiff purchased the vehicle from Amerikal Auto and Amer on or about March 27, 2018.
3. The Plaintiff was credited with \$7,000.00 for her trade in, a 2006 Infiniti FX 35, by the Defendants, Amerikal Auto and Amer.
4. The sale price for the vehicle was \$17,500, plus GST and PST.
5. The Plaintiff paid to Amerikal Auto and Amer \$11,865.00 including GST and PST for the vehicle, plus the \$7,000 value for the trade in of the Plaintiff's 2006 Infiniti FX35.
6. 6722491 Manitoba Ltd. Operating as Renn's Auto Diagnostic Inc. and also operating as Renn Auto (hereinafter collectively referred to as "Renn Auto"), is located at 965 Cottonwood Road, Winnipeg, MB, R2J 1G3.
7. The safety on the vehicle was performed by Renn Auto. The vehicle received a pass on the safety performed by Renn Auto.
8. The Plaintiff also received a 36-month Driver's Shield, a warranty, from Lubrico.

[3] I would note that beyond the agreed facts set out above, there is very little by way of agreement between the testimony of the plaintiff on the one hand, and the testimony of Amer on the other. In addition to her own testimony, the plaintiff called a third person to provide testimony in support of her position.

THE TESTIMONY OF THE PLAINTIFF

[4] The plaintiff testified that she was alone when she purchased the vehicle on March 27, 2018. She states she found out about the vehicle online and states that the online advertisement stated that the vehicle was in “mint” condition. She states that she took the vehicle for a test drive two or three times.

[5] The plaintiff also testified that she told Amer what she needed the vehicle for. She stated that Amer advised her that it was a good car and that she should not worry about it. She testified that she was concerned about the high kilometres on the vehicle (approximately 216,000 km), but she relied on Amer’s assurances and agreed to purchase the vehicle.

[6] The plaintiff acknowledged that the bill of sale (Exhibit 2) stated that the vehicle was being sold on an “as is” basis and the “as is” condition is expressly set out in the terms of sale in Exhibit 2. She testified that Amer did not mention that it had been in an accident, that the vehicle was originally from the USA or that it had been sold as an accident repair vehicle.

[7] She stated that after she purchased the vehicle and when she was a few minutes away from the place of purchase, an engine light came on. She stated that she immediately contacted Amer who told her not to worry about the “check engine light”. It appears the issue was attended to on her return to the place of purchase and was told by Amer “we’ll take care of you.”

[8] She testified that soon after purchasing the vehicle, oil started leaking from the twin turbos. As indicated in Exhibits 3 through 5, the plaintiff took the vehicle to another

repair shop, European Auto, where it was serviced a number of times. In addition to the repairs that were covered by the Lubrico warranty that the plaintiff received with the purchase of the vehicle, some of the third party work done on the vehicle was not covered by the Lubrico warranty and was in part related to normal wear and tear not covered by the warranty. Approximately \$12,000 was covered by the warranty, but she had to pay approximately \$3,295.98 of her own money on repairs.

[9] The plaintiff testified that during the time she owned the vehicle she put approximately 24,000 km on the vehicle. She stated that she did not recall receiving the Carfax (or Carproof as it was known at the time) vehicle history report (Exhibit 1) from Amer which sets out in detail the history of the vehicle. She states that at the time of the sale she only received the bill of sale (Exhibit 2). She states that she did not receive the Carfax report even though it appears that her witness, Arnie Calixto (Calixto), a person of many years' experience in the automobile sales business who was assisting her in the purchase of the vehicle, received a copy of the Carfax (Carproof) report by way of e-mail from Amer following a three-way text conversation between the plaintiff, Calixto and Amer about the sale of the vehicle.

[10] I would note in passing that although Exhibit 1 is dated November 8, 2019, over a year after the date of the purchase of the vehicle, the testimony I heard establishes that the date would indicate the date the document was printed, but that the information contained on Exhibit 1 would have been set out in the online report at the time of the date of the purchase. In addition, the report in 2018 would have been generated from an online site from Carproof, but that Carfax purchased that company. The online

substantive information from Carproof in 2018 and subsequently Carfax in 2019 would have been substantially the same despite the change in ownership.

[11] The plaintiff also testified that she did not receive any of the warranty information from Lubrico at the time of the purchase, but agrees that the vehicle did have a warranty as stated by Amer and the warranty documentation were filed as Exhibits 21 and 23.

[12] The plaintiff also testified that her husband was not present on the date of the sale and her recollection of whether her husband attended at the place of Amer's business or if he also participated in the test drive of the vehicle was not particularly clear. However, she stated that she enlisted the help of Calixto.

[13] The balance of her testimony sets out the various times that she took the vehicle in to have it repaired and that it ultimately was sold to European Auto for \$5,000 when she was told the vehicle required a new engine.

THE TESTIMONY OF ARNIE CALIXTO

[14] Calixto testified that he has been in the car business for approximately 25 years and is presently employed by a large Winnipeg auto dealership in the area of sales and finance. He stated that in the course of his business dealings, he has been in contact with Amer on a few occasions in respect of purchasing vehicles from Amerikal. He stated that in respect of this transaction, he spoke with Amer about the vehicle who stated that the vehicle was a "sound" vehicle and agreed that there was some discussion about the warranty being offered by Amer.

[15] Although it appears that an email with the Carfax (Carproof) information was directed to him at his e-mail address, he states that he did not recall giving the

information to the plaintiff or reviewing that information personally. He stated that if he had read the report he would have advised the plaintiff not to buy the vehicle. In particular, he stated that owing to various differences between vehicles of American origin and those specifically made for the Canadian market, he would advise against buying an American vehicle.

THE TESTIMONY OF THE DEFENDANT AMER KHOUEDA

[16] Amer testified that he is the president, manager, and sole operator of Amerikal, the corporate defendant. There were no other employees at the time of the purchase of the vehicle nor did Amerikal provide any mechanical or repair services to the vehicles that Amerikal sold. Amerikal utilized either third parties for that purpose or sold warranty products like Lubrico which the purchasers relied upon to defray the costs of obtaining repair services from authorized third parties.

[17] Amerikal commenced business in 2017, buying and selling automobiles as well as doing detailing work on automobiles. Amer testified the vehicle was purchased at a “dealer” auction in January 2018.

[18] Exhibit 24 sets out the advertisement which Amerikal placed in respect of the vehicle sold to the plaintiff. He notes that there were two online advertisements placed for the vehicle, with the exhibit here being from Facebook. He stated that the other online advertisement placed on Kijiji would have had similar, if not identical wording. In discussing the use of the word “mint” in respect of describing the vehicle he stated he would not have used that word in an advertisement to describe the vehicle nor does the word or phrase “mint” or “mint condition” appear in the Facebook advertisement.

[19] Amer testified that both the plaintiff and her husband came to Amerikal's place of business on multiple occasions, approximately four or five times, and that her husband came first, about two weeks prior to the vehicle being sold to the plaintiff. Her husband asked him about the vehicle which was in the parking lot. He states the husband told him he saw the advertisement for the vehicle online. At this time, Amer states that the business had only sold about 10 to 15 vehicles in total since the business opened and the advertisement referred to the specific vehicle sold to the plaintiff.

[20] Amer states that the American origin of the vehicle was disclosed to the plaintiff at one of their meetings and that her husband was also aware of the vehicle's origin as the vehicle which the plaintiff was planning on trading in also had an American origin. Amer testified that on the third visit, March 17, 2018, the husband of the plaintiff, along with the plaintiff, came to take the vehicle for a test drive. The husband signed an agreement which allowed him to take the vehicle on a test drive on that date for approximately two and three-quarter hours. (See Exhibit 19)

[21] During the course of their discussions about purchasing the vehicle, Calixto participated in a text message chat between the plaintiff and Amer as evidenced by the text messages filed as Exhibit 20 and dated March 20, 2018. During that text message chat between Amer, the plaintiff and Calixto (who was introduced by the plaintiff as her cousin in the texts), Calixto asked for a copy of the Carfax (Carproof) report and in order to send him a copy of that report, Amer requested that Calixto send him his e-mail address. The text messages indicate that Calixto sent Amer his e-mail address. The text

messages also indicate that Amer provided the other participants, which included the plaintiff, with warranty information which came with the vehicle.

[22] Amer testified that upon the sale of the vehicle to the plaintiff she was provided with a hard copy of the sales contract, a copy of the Carfax (Carproof) report, the warranty brochure, the title ownership paperwork and Exhibit 22, the vehicle's certificate of inspection. She was also provided with a copy of the application for the Lubrico warranty, a copy of which was signed by the plaintiff on March 27, 2018, and tendered as Exhibit 23 by the defendants.

[23] Amer stated in his testimony that he discussed the history of the vehicle with the plaintiff in a conversation with the plaintiff and her husband on March 27, 2018, and that it was his recollection that the plaintiff never came to his place of business by herself. He states that the vehicle was working at all times and that it was in reasonable condition. Amer testified that it was the plaintiff's husband who brought the vehicle back on the day of the purchase within a half an hour of the purchase after the check engine light came on. He states that the only problem was the gas cap which caused the engine light to go on and the problem was solved by tightening the gas cap.

[24] Amer agreed that this was a high kilometre vehicle and that over a 10-month period Lubrico paid out approximately \$12,000 in warrantied repairs while the plaintiff paid out \$3,295.98 in repairs not covered by warranty.

[25] Amer testified that a new vehicle of this kind which the plaintiff purchased for \$17,500 would have sold for \$50,000 to \$60,000 in 2012, approximately \$70,000 for a new model in 2018 and approximately \$110,000 for a 2023 model.

ANALYSIS AND DECISION

[26] In considering the evidence, it is clear to me that the plaintiff's recollection of the details of the various meetings between her and Amer leading up to the purchase of the vehicle, including the number of meetings, who attended various meetings and what was said during the course of those meetings, is not clear. Indeed, prior to the commencement of her testimony her counsel advised the court that she was suffering from the long-term effects of Covid which could have an effect on her ability to recall information. Whether it was because of Covid or not, it was apparent to me that the plaintiff was unable to recall a number of details surrounding the purchase of the vehicle which, while not necessarily important individually, generally contributed to an overall lack of precision in her testimony. This included her inability to clearly recall the substance of conversations or details such as how many meetings occurred in the two weeks leading up to the sale of the vehicle or what occurred during those meetings or discussions.

[27] The plaintiff testified she did not receive anything other than the bill of sale on the date of the purchase from Amer and yet admitted she had information about the warranty that she received with the vehicle. The evidence at Exhibit 23 shows that on the date of the sale she signed the application for the warranty. Furthermore, she denied ever receiving or seeing the Carfax (Carproof) report or the vehicle transfer of ownership document. Yet, the possession and production of the latter document would have been necessary for her to register and insure the vehicle.

[28] As for her assertion that the online advertisement for the vehicle described it as “mint” or in “mint condition” the copy of the advertisement does not use those words. When shown a copy of the online advertisement she was reluctant to acknowledge that the vehicle depicted in the advertisement was the same one she purchased, despite being the same make, model, year and colour of the used vehicle she purchased (being a 2012 BMW X5), advertised just one month prior to the date of purchase. I have no hesitation in concluding that in fact it described the vehicle she purchased.

[29] Furthermore, in her testimony she minimized, if not denied, the involvement of her husband in the negotiation process leading up to the purchase of the vehicle and denied that the history and details of the vehicle were ever discussed between Amer and her husband. She further denied any discussion regarding her trade-in vehicle and the vehicle she purchased from Amerikal as both coming from the USA.

[30] It seems to me that the testimony of her husband would have been very helpful in sorting out the facts of this matter, but unfortunately, he did not provide testimony at trial.

[31] Furthermore, the testimony of Calixto who was called by the plaintiff, offered testimony that generally supported the defendants’ position. He provided background information on the relationship between Carfax and Carproof, and stated that the report from Carproof and subsequently Carfax after its purchase of Carproof gave a detailed timeline and record of a vehicle’s condition in an easy to understand format, displaying information such as the vehicle’s country of origin, registration history, major accident

and service events. That is borne out from a review of Exhibit 1, which specifically deals with the vehicle purchased by the plaintiff.

[32] Although Calixto recalled receiving information about the Lubrico warranty from Amer, he states he did not recall receiving or seeing the Carproof report. Yet, he acknowledged that he provided his e-mail address to Amer in the group chat text set out in Exhibit 20 and further acknowledged that an e-mail containing a link to the Carproof report was sent to his e-mail address from Amer on the same day they had the group chat message communications. This is corroborated by Exhibit 28.

[33] In respect of Calixto's testimony, I would also note that he provided his understanding that Amer's assurances that the vehicle was safe were made in the context of the certificate of inspection which certified that the vehicle was safe and fit to drive on Manitoba roads. In respect of the mechanical condition of the vehicle and that Amer would take care of the plaintiff if the vehicle broke down, he understood this to mean that the Lubrico warranty would cover mechanical failures and defects in accordance with the terms of that warranty.

[34] In contrast to the testimony of the plaintiff, I found the testimony of Amer to be straightforward and clear. He was not evasive, but rather provided a clear response to the questions put to him. He outlined the history of the vehicle while it was in his possession and the steps he took to repair various defects. He was also quite clear in respect of his interactions with the plaintiff and her husband. He explained that they each attended his place of business on various occasions, with only the husband attending on his own. In respect of the extended two and three-quarter hour test drive that he

authorized, the evidence supports his position that it was the plaintiff's husband who signed the authorization.

[35] In weighing the evidence in this case, it is my opinion that the evidence of Amer is more reliable than that of the plaintiff and to the extent that it conflicts with the evidence provided by the plaintiff, I accept the recollection and therefore the testimony of Amer as being more accurate.

[36] It is my conclusion that Amer sent the Carfax (Carproof) vehicle report to Calixto, despite Calixto's inability to recall receiving or reviewing it. In my opinion, Calixto was working with or on behalf of the plaintiff in receiving that information and on that basis this was a reasonable way of communicating with the plaintiff in respect of making her aware of this information.

[37] Furthermore, I accept the testimony of Amer that on the date of the purchase he provided the plaintiff with not only the bill of sale, but also the other documents he testified he gave her, including a hard copy of the Carfax (Carproof) report, the warranty brochure, the title ownership paperwork and Exhibit 22, the vehicle's certificate of inspection. I find that she was also provided a copy of the application for the Lubrico warranty, a copy of which was signed by the plaintiff and tendered as Exhibit 23 by the defendants.

[38] Furthermore, it is my opinion that considering the disclosures made by Amer in the course of the negotiations, both orally and in writing, the plaintiff was not misled. The vehicle was six years old with a significant number of kilometres on the odometer. It was specifically sold on an "as is" basis. She drove it for approximately an additional

24,000 kilometres before she was advised by a third-party mechanic that it needed substantial repair.

[39] I agree with counsel for the defendants that this case is strikingly similar to one considered by Abra J. in *Loewen v. Alruda (c.o.b. Alrudha Auto Sales)*, 2011 MBQB 194, 267 Man.R. (2d) 304, where the plaintiff's action was dismissed. Many of the factors identified by Abra J. in that case in leading to his decision to dismiss the claim are also present here. I find the reasoning of Abra J. in the *Loewen* case to be relevant to my decision to dismiss the claim here as well. In this case some of the specific factors include:

- a) The vehicle was purchased on an "as is basis";
- b) The plaintiff had ample opportunity to closely inspect the vehicle, but did not do so, instead relying on Calixto and her husband to assist her in coming to the decision to purchase the vehicle;
- c) The plaintiff drove the vehicle for approximately 24,000 kilometres over the course of less than a year before it was undriveable;
- d) The safety certification was in full force and effect when the plaintiff purchased the vehicle; and
- e) The defendants disclosed all relevant information required by law to the plaintiff and took no steps to conceal any matters of concern.

[40] In my opinion, the plaintiff clearly knew that she was not purchasing a new vehicle, but rather an older vehicle with a high odometer reading. In the context of selling this

vehicle to the plaintiff, the defendants took all steps required by the law and complied with the law, including the CPA.

CONCLUSION

[41] In the result, I am dismissing the plaintiff's claim. The defendants shall have one set of costs.

[42] In my view, the plaintiff should have commenced this action in the small claims court given that the net amount claim here is approximately \$15,000, the maximum amount recoverable in the small claims court. Had the plaintiff been successful, I would have only awarded costs in her favour in accordance with the amount generally awarded in a small claims court proceeding. However, the plaintiff chose to proceed with the action in this court and therefore the defendants who were called upon to defend the case in this court are entitled to their costs based on the tariff applicable in this court.

_____ J.