

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

MARY W. WAINAINA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. CPU4-09-002820
	)	
BAYSHORE FORD TRUCK, INC., and	)	
DAVID G. MWANGI,	)	
	)	
Defendants.	)	

Date Submitted: June 16, 2012  
Date Decided: July 16 2012

**MEMORANDUM OPINION AND ORDER**

**Theopolis K. Gregory Sr., Esquire**, Law Offices of Theopolis K. Gregory, Sr., 2227 N. Market Street, 2<sup>nd</sup> floor, Wilmington, DE 19802.  
*Attorney for Plaintiff*

**Henry A. Heiman, Esquire**, Cooch & Taylor, PA, 1000 West Street, 10<sup>th</sup> floor, P.O. Box 1680, Wilmington, DE 19899.  
*Attorney for Defendant*

**WELCH, J.**

## I. Introduction.

This is an action for breach of contract and fraud arising out of the alleged sale of a motor vehicle from Defendant Bayshore Ford Truck, Inc. (“Bayshore”) to Plaintiff Mary W. Wainaina (“Ms. Wainaina”) and Defendant David G. Mwangi (“Mr. Mwangi”). On April 28, 2009, Ms. Wainaina filed the Complaint in this action<sup>1</sup>, alleging that Mr. Mwangi and Bayshore committed fraud and breach of contract by changing the title to a vehicle that Ms. Wainaina and Mr. Mwangi jointly purchased from Bayshore, and thus was originally jointly titled in both their names, to titling the vehicle in Mr. Mwangi’s name only without Ms. Wainaina’s knowledge or consent. Ms. Wainaina alleged that she suffered monetary damages in the amount of \$17,673.17 as a result of this fraud/breach of contract – based on her loss of the vehicle and the fact that she continues to be bound by a third party financing agreement entered into to finance the purchase of the vehicle at issue. Ms. Wainaina also requested that the award of court costs and damages for pain and suffering suffered as a result of the alleged fraud.

On May 19, 2009, Bayshore filed an Answer, denying the averments in the Complaint and asserting various affirmative defenses. Mr. Mwangi was properly served, but did not file an Answer. On May 14, 2010, the Court entered an Order granting Ms. Wainaina’s then pending Motion for Default Judgment against Mr. Mwangi. The Court then set this matter for an inquisition hearing on damages against Mr. Mwangi. On November 19, 2010, after hearing on damages, the Court entered judgment in favor of Ms. Wainaina and against Mr. Mwangi in the amount of \$20,545.18, plus pre and post judgment interest and court costs.

On March 26, 2012, the Court held a trial on Ms. Wainaina’s Complaint against Bayshore. Ms. Wainaina testified during her own case in chief. Joe Tracy (“Mr. Tracy”) testified

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<sup>1</sup> At the time of the filing of the Complaint, Ms. Wainaina was *pro se*. Ms. Wainaina later retained her counsel at trial, Mr. Gregory. Mr. Gregory did not file an Amended Complaint on Ms. Wainaina’s behalf after he was retained by Ms. Wainaina.

during Bayshore's case in chief. The parties submitted numerous documents into evidence at trial. At the conclusion of the trial, the Court ordered the parties to submit their closing arguments in the form of written memoranda of law. Accordingly, on March 27, 2012, the Court issued a briefing schedule. The parties submitted the requested legal memoranda. This is the Court's final memorandum Opinion and Order after consideration of the pleadings, the oral and documentary evidence submitted at trial, the arguments of the parties, and the applicable law. For the following reasons, the Court enters judgment in favor of Bayshore.

## **II. The Facts**

From January 1, 2006, through December 31, 2006, Ms. Wainaina lived in Pennsylvania.<sup>2</sup> In late 2006, Ms. Wainaina briefly considered moving to Maryland. When she was considering this move, Ms. Wainaina stayed with friends in Maryland for three days and obtained a Maryland Drivers' License using their address.<sup>3</sup> The Maryland Drivers' License was issued on November 8, 2006.<sup>4</sup> Ms. Wainaina's address listed on this Drivers' License is: 9903 Quiet Glen Ct., Springdale, Maryland, 20774.<sup>5</sup> Ms. Wainaina admitted that she also had a Pennsylvania Drivers' License at this time.

Ms. Wainaina testified that she was considering the potential move to Maryland because she and Mr. Mwangi were considering starting a motor vehicle salvage towing business. In order to start this business, Ms. Wainaina and Mr. Mwangi decided that they needed to purchase a vehicle and trailer capable of towing salvaged vehicles. Ms. Wainaina testified that she and Mr. Mwangi decided to purchase a Ford F-350 from Bayshore.

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<sup>2</sup> Plaintiff's Exhibit # 1.

<sup>3</sup> Plaintiff's Exhibit # 3.

<sup>4</sup> Plaintiff's Exhibit # 3.

<sup>5</sup> Plaintiff's Exhibit # 3.

Ms. Wainaina testified that on December 2, 2006, she and Mr. Mwangi completed an application for credit to finance the purchase of the F-350.<sup>6</sup> Ms. Wainaina testified that she completed this credit application at Bayshore, with the help of a sales representative. The credit application lists Mr. Mwangi as Ms. Wainaina's uncle.<sup>7</sup> Ms. Wainaina testified that she and Mr. Mwangi are not related, and she never told anyone at Bayshore that they were related. Moreover, Ms. Wainaina testified that she never told anyone that she and Mr. Mwangi lived at the same address, because they did not live at the same address.

Ms. Wainaina and Mr. Mwangi's joint credit application with J.P. Morgan Chase Bank, N.A. was approved.<sup>8</sup> On December 5, 2006, Ms. Wainaina and Mr. Mwangi executed a contract with J.P. Morgan Chase Bank, N.A. based on their approved application.<sup>9</sup> The Wainaina-Mwangi-Chase loan agreement provides that the total amount financed is \$33,883.00.<sup>10</sup> The loan agreement also provides for an annual interest rate of 16.89%.<sup>11</sup> Based on this annual interest rate, if Wainaina-Mwangi paid off the loan according to the payment schedule, they would incur an additional \$20,296.39 in financing charges.<sup>12</sup> Accordingly, the anticipated total amount required to be paid by Wainaina-Mwangi, pursuant to the terms of this agreement was \$54,179.39.<sup>13</sup> On May 17, 2007, Ms. Wainaina refinanced this agreement solely in her name and signed a new promissory note.<sup>14</sup> The refinancing agreement provided that the total amount financed is \$33,485.55, and provides an interest rate of 15.652% per year.<sup>15</sup> Thus, the anticipated total amount required to be paid by Ms. Wainaina under this note is \$48,487.20, based on an

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<sup>6</sup> Plaintiff's Exhibit # 4.

<sup>7</sup> Plaintiff's Exhibit # 4.

<sup>8</sup> Plaintiff's Exhibits # 9, 28.

<sup>9</sup> Plaintiff's Exhibits # 9, 28.

<sup>10</sup> Plaintiff's Exhibit # 28.

<sup>11</sup> Plaintiff's Exhibit # 28.

<sup>12</sup> Plaintiff's Exhibit # 28.

<sup>13</sup> Plaintiff's Exhibit # 28.

<sup>14</sup> Plaintiff's Exhibit # 29.

<sup>15</sup> Plaintiff's Exhibit # 29.

anticipated finance charge of \$15,001.65.<sup>16</sup> The note provides that Ms. Wainaina's address is 1 Maryland Circle, Apt LL-97, Whitehall, PA 18052.<sup>17</sup>

Ms. Wainaina also submitted into evidence a contract for sale of the F-350.<sup>18</sup> This document includes Ms. Wainaina's name typed in the field for "customer name."<sup>19</sup> Mr. Mwangi's name is handwritten in the field as well.<sup>20</sup> Ms. Wainaina's address is listed as: 605 Sopwith Dr, Apt. K, Baltimore, Maryland, 21220.<sup>21</sup> Ms. Wainaina testified that she did not sign this document, and she has never lived at the Sopwith Dr. address listed on this document. However, Ms. Wainaina did admit that she did sign another document titled "Buyer's Order," which lists her address as the same Sopwith drive address listed on Plaintiff's Exhibit # 5, and is also dated December 5, 2006.<sup>22</sup> Ms. Wainaina testified that Bayshore mailed a copy of this document to her at her Pennsylvania address.

In order to complete the sale, Bayshore required Mr. Mwangi and Ms. Wainaina to submit proof of insurance.<sup>23</sup> On December 5, 2006, Mr. Mwangi presented Bayshore with proof that he had obtained insurance for the F-350 in the state of Maryland.<sup>24</sup> Ms. Wainaina admitted that she was not a party to this insurance contract, and never saw the proof of insurance document provided by Mr. Mwangi to Bayshore until discovery in this case.

At the time that Mr. Mwangi and Ms. Wainaina purchased the vehicle (December 5, 2006), it was registered in Delaware with the help of Bayshore, in Ms. Wainaina's name only.<sup>25</sup> Ms. Wainaina admitted that she knew that this registration was only a temporary registration and

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<sup>16</sup> Plaintiff's Exhibit # 29.

<sup>17</sup> Plaintiff's Exhibit # 29.

<sup>18</sup> Plaintiff's Exhibit # 5.

<sup>19</sup> Plaintiff's Exhibit # 5.

<sup>20</sup> Plaintiff's Exhibit # 5.

<sup>21</sup> Plaintiff's Exhibit # 5.

<sup>22</sup> Plaintiff's Exhibit # 7.

<sup>23</sup> Plaintiff's Exhibit # 8.

<sup>24</sup> Plaintiff's Exhibit # 8.

<sup>25</sup> Plaintiff's Exhibit # 10.

thus was effective for sixty days. Ms. Wainaina testified that Mr. Mwangi picked up the vehicle from Bayshore, and that she never received a copy of the temporary registration until she personally contacted Bayshore in June 2007. The temporary registration lists two addresses for Ms. Wainaina – her Pennsylvania address and the Sopwith Dr. Maryland address listed in the finance agreement and sale documents.<sup>26</sup> However, the Pennsylvania address is crossed out.<sup>27</sup>

Ms. Wainaina testified that other documents related to the sale were solely in her name. Specifically, Ms. Wainaina testified that a document titled “Invoice/Bill of Sale” was solely listed as in her name.<sup>28</sup> Also, the odometer disclosure statement issued by Bayshore at the time of the sale only lists Ms. Wainaina in the field for “transferee.”<sup>29</sup> Ms. Wainaina admitted that she signed this document even though it incorrectly listed her address as the Sopwith Drive, Maryland address referenced earlier in this memorandum Opinion and Order.<sup>30</sup>

Nevertheless, Ms. Wainaina testified that since the time of the December 5, 2006 sale, she has learned that Bayshore and Mr. Mwangi successfully re-titled the F-350 solely in Mr. Mwangi’s name.<sup>31</sup> Ms. Wainaina testified that she discovered this fact in May 2008 after she contacted the Baltimore police because she was having trouble contacting Mr. Mwangi. Ms. Wainaina testified that the Baltimore police informed her that there was nothing they could do because their investigators determined that the vehicle was properly titled in Mr. Mwangi’s name in Maryland. Ms. Wainaina testified that she never directed or in any way instructed Bayshore to re-title the vehicle solely in Mr. Mwangi’s name.

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<sup>26</sup> Plaintiff’s Exhibit # 10.

<sup>27</sup> Plaintiff’s Exhibit # 10.

<sup>28</sup> Plaintiff’s Exhibit # 11.

<sup>29</sup> Plaintiff’s Exhibit # 11.

<sup>30</sup> Plaintiff’s Exhibit # 11. Ms. Wainaina also admitted she signed another document dated December 5, 2006, titled “Buyer’s Order,” incorrectly listing this same Maryland address. Plaintiff’s Exhibit # 25.

<sup>31</sup> Plaintiff’s Exhibit # 18.

Ms. Wainaina testified that on or about November 2008, she hired a law firm to further investigate this matter. Ms. Wainaina testified that this firm's investigators discovered documents establishing that after the sale, the Bayshore sent the Delaware Division of Motor Vehicles a form titled "Delaware Dealer's Reassignment," listing only Mr. Mwangi.<sup>32</sup> Ms. Wainaina testified that she never signed this document. Bayshore also issued a new odometer disclosure form addressed solely to Mr. Mwangi.<sup>33</sup> Ms. Wainaina testified that Bayshore never provided her with a copy of the new odometer disclosure form until one week before trial.

Also as a result of this investigation, Ms. Wainaina discovered that on February 16, 2007, Bayshore sent the Maryland Motor Vehicle Administration a document titled "Letter of Correction," which provides as follows:

To Whom it May Concern: Please except this letter of correction. Bayshore Ford Truck Sales, Inc. sold this 2003 Ford F350 VIN# 1FTWW32F33EA68053 to David Mwangi. While filling out the back of the title to Bayshore Ford Truck Sales, Inc. the word bandy was accidentally filled in an error. *On the billing Mr. Mwangi's wife's name was printed. However she is not owner or co-owner of this vehicle. Due to that I placed white out over her name and typed his in the proper spot. Please excuse any errors. No Fraud was intended.*<sup>34</sup>

Ms. Wainaina testified that she was not notified or otherwise made aware that Bayshore sent this letter, nor was her authorization requested before it was sent. Ms. Wainaina testified that she never told anyone at Bayshore that she and Mr. Mwangi were married.

Ms. Wainaina testified that she has also become aware that in November 2006 (prior to the Wainaina-Mwangi-Bayshore sale actually completed in this case), Mr. Mwangi attempted to

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<sup>32</sup> Plaintiff's Exhibit # 18.

<sup>33</sup> Plaintiff's Exhibit # 16.

<sup>34</sup> Plaintiff's Exhibit # 19.

purchase the vehicle from Bayshore using her name.<sup>35</sup> In these documents, Ms. Wainaina's correct Pennsylvania address is listed.<sup>36</sup>

Ms. Wainaina testified that after she discovered that the vehicle was no longer titled in her name, she stopped making payments under the Chase Promissory Note, Plaintiff's Exhibit # 29. Ms. Wainaina submitted documentary evidence established that as of July 24, 2008, she owed a total of \$29,550.14.<sup>37</sup> This document, states that Ms. Wainaina was at this time delinquent in payments.<sup>38</sup> Ms. Wainaina testified that she made her last payment on the promissory note in May 2008.

On cross examination, Ms. Wainaina elaborated as to why she did not seek to re-register the vehicle in her and Mr. Mwangi's names after the 60 day registration expired. Ms. Wainaina testified that Mr. Mwangi picked up the vehicle from Bayshore in December 2006. Later, Ms. Wainaina and Mr. Mwangi discussed whether and where to register the vehicle. Ms. Wainaina testified that Mr. Mwangi told her that he was not using the vehicle at this time, so there was no need to register the vehicle. Ms. Wainaina also admitted that she never reduced her business relationship with Mr. Mwangi to writing.

Ms. Wainaina testified that based on her failure to make payments pursuant to the promissory note, Chase repossessed the F-350. She admitted that the vehicle was sold and the sale proceeds were applied to the remaining loan balance. Ms. Wainaina testified that she is not aware of the amount of the sale proceeds. Moreover, Ms. Wainaina did not introduce any documentary or other evidence regarding the amount of the sale proceeds, or the remaining deficiency balance on the Chase loan, if in fact a deficiency balance remained after this sale.

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<sup>35</sup> Plaintiff's Exhibits # 22, 23.

<sup>36</sup> Plaintiff's Exhibits # 22, 23.

<sup>37</sup> Plaintiff's Exhibit # 44.

<sup>38</sup> Plaintiff's Exhibit # 44.



Mr. Tracy testified during Bayshore's case in chief. Mr. Tracy is the general manager of Bayshore and has been employed in this capacity for six years. Mr. Tracy testified that in typical third party financing sales at Bayshore sales representatives assist customers in filling out the third party financing application documents.

Mr. Tracy also testified that temporary motor vehicle registrations are only effective in Delaware for sixty days. Mr. Tracy testified that it is his understanding that after this sixty day period elapses, the vehicle must be registered in at least one name listed on the purchase order executed between the dealer and the buyer. Mr. Tracy testified that it is the buyer's responsibility to re-register the vehicle after the sixty day temporary registration expires, and that the dealer typically is not involved in this process.

Mr. Tracy testified that in order to title a vehicle in Maryland, the person seeking to obtain a Maryland title must be a Maryland resident, with a Maryland mailing address. Thus, Mr. Tracy testified that the vehicle could not have been titled in Ms. Wainaina's name in Maryland during December 2006, because she was not a Maryland resident at this time.

### **III. Discussion**

In civil claims, the plaintiff, here Ms. Wainaina, bears the burden to prove each and every element of its claim(s) by a preponderance of the evidence.<sup>39</sup> The side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists.<sup>40</sup>

In order to prevail on her fraud claim, Ms. Wainaina must prove the following elements by a preponderance of the evidence: (1) a false representation, usually one of fact, made by defendant; (2) the defendant's knowledge of, or believe as to, the falsity of the representation, or that it was made with reckless indifference to the truth; (3) defendant's intent to induce the

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<sup>39</sup> *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967)

<sup>40</sup> *Id.*

plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) *damage to the plaintiff as a result of such reliance.*"<sup>41</sup>

Further, in order to succeed on her breach of contract claim, Ms. Wainaina must prove the following elements by a preponderance of the evidence: (1) the existence of a contract; (2) that defendants breached an obligation imposed by the contract; and (3) *that plaintiff incurred damages as a result of the breach.*<sup>42</sup>

The Court finds that Ms. Wainaina, despite otherwise presenting an extremely compelling case with respect to liability, *especially liability for fraud*, has failed to meet her burden to prove damages on either claim by a preponderance of the evidence. In the Complaint, Ms. Wainaina requests that the Court award monetary damages in the amount of \$17,673.17. In Ms. Wainaina's post-trial opening brief, she requests that the Court award damages in the amount of \$59,397.20. Ms. Wainaina argues that this calculation of damages is based on a balance (\$28,638.57 listed on a May 16, 2008 statement plus interest from that point at the rate of 16.89%) reflected in a Plaintiff's Exhibit # 38. However, *this exhibit was not submitted into evidence at trial*, and in fact was redacted out of the table of contents in Plaintiff's trial exhibit binder. Thus, the only logical starting point for damages would be the July 24, 2008 Chase letter, indicating that at that time, Ms. Wainaina owed a total of \$29,550.14 on the promissory note.<sup>43</sup> Ms. Wainaina testified that she did not make any payments after this time – therefore, assuming the Court were to conclude that liability for fraud was established by a preponderance of the

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<sup>41</sup> *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).

<sup>42</sup> *VLIW Tech., LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).

<sup>43</sup> Plaintiff's Exhibit # 44.

evidence, the present value of damages could presumably be calculated based on this figure, plus interest at the rate of 15.652% per year set forth in the promissory note.<sup>44</sup>

However, on cross examination, Ms. Wainaina admitted that Chase repossessed the F-350, sold this vehicle at post repossession sale, and applied the proceeds of this sale to the balance on the promissory note. Notwithstanding this fact, Ms. Wainaina failed to present even a *scintilla* of evidence regarding the sale price of the vehicle, or the remaining deficiency balance on the promissory note. Moreover, Ms. Wainaina has not so much as acknowledged this fact in post trial briefing, or asserted that such evidence is in any way unavailable. In short, the Court is left without a critical piece of evidence necessary to a reasoned calculation of damages. Therefore, notwithstanding the well presented and strong case with respect to liability for fraud, the Court must find that Ms. Wainaina has failed to meet her burden to establish the essential element of damages for both her breach of contract and fraud claims by a preponderance of the evidence. Finally, even had the missing Plaintiff's Exhibit # 38 been submitted into evidence, this exhibit (a purported May 16, 2008 statement) would not cure the more critical error in proof – the lack of any record evidence on the repossession sale price and deficiency balance, if any remaining on the promissory note.

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<sup>44</sup> Plaintiff's Exhibit # 29.

**IV. Conclusion**

Therefore, for the reasons set forth in this Memorandum Opinion and Order, judgment is hereby entered in favor of Bayshore and against Ms. Wainaina. Each party shall bear their own costs.

**IT IS SO ORDERED this 16<sup>th</sup> day of July, 2012.**

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John K. Welch,  
Judge

cc: Ms. Tamu White, Chief Civil Clerk, CCP