

**Duru v Queens Auto Mall Inc.**

2012 NY Slip Op 32306(U)

September 5, 2012

Supreme Court, Queens County

Docket Number: 4409/11

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

EMANUEL DURU and JULIET FRANCIS,

Plaintiffs,

-against-

QUEENS AUTO MALL INC. and THRIFT  
INVESTMENT CORPORATION,

Defendants.

Index No: 4409/11

Motion Date: 5/9/12

Motion Cal. No.: 4

Motion Seq. No.: 1

The following papers numbered 1 to 11 read on this motion by plaintiffs for summary judgment on their claim based upon violation of General Business Law § 198-b and for a preliminary injunction staying the Lien sale of the vehicle

PAPERS  
NUMBERED

Order to Show Cause-Affidavits-Exhibits .....	1 - 6
Answering Affidavits-Exhibits.....	7 - 9
Replying Affidavits.....	10 - 11

Upon the foregoing papers it is ordered that this motion is granted.

A trial to determine the amount of money damages to which plaintiffs are entitled pursuant to General Business Law § 198-b shall be held on Friday, October 19<sup>th</sup>, 2012 at 10:00 a.m. in Part 2, courtroom 46 of the Courthouse located at 88-11 Sutphin Blvd., Jamaica, N.Y.

Plaintiff shall file a Note of Issue no later than 20 days prior to the date set herein for the inquest.

This is an action to recover damages for breach of contract and violation of General Business Law (GBL)§198-b, also known as the Used Car Lemon Law, seeking, among other things, to compel the defendant, Queens Auto Mall Inc., to accept the return of the vehicle, refund the purchase price, monetary damages and attorney's fees. The plaintiffs move for summary judgment on their breach of contract and GBL §198-b, causes of action.

In support of their motion plaintiffs submitted a copy of an itemized repair estimate from BKM Auto Repair and the affidavit of Emanuel Duru alleging the following facts.

On December 3, 2010 the plaintiffs purchased a used 2005 BMW, 7 Series (745LI) vehicle ID# WBAGN3505DS59658 which had 88,421 miles from the defendant, Queens Auto Mall for \$23,337.00. Plaintiffs paid \$12,000.00 in cash and financed the remainder through Thrift Investment Corporation. (Although Thrift Investment Corporation is a named defendant, plaintiffs' counsel states that it was not served with the summons and complaint.)

While plaintiff, Duru, was driving the car home from Queens Auto Mall, the "check engine light" came on. After he reached home and while attempting to park the car, the car went forward although the gear shift was in reverse. A message on the dashboard stated "check transmission and go to your nearest BMW dealer". Duru turned off the engine, waited a few minutes, restarted the car and parked the car. After the car was parked and before shutting the engine, the engine accelerated and the "check engine light" came on.

On Saturday, December 4, 2010 plaintiffs returned to Queens Auto Mall where Nick, the owner, told him they were too busy and to come back on December 6th.

On December 6th, on his way to return the car, the car stalled in the middle of Astoria Blvd. When Duru restarted the car, the gear jumped from drive to neutral, warning messages appeared on the dashboard including a transmission warning, "check engine", "check engine pressure" and "see your nearest BMW dealer/mechanic". Duru found BKM Auto Repair (BKM) near where he was stopped. He called BKM and was advised to allow the car to cool down and then bring the car to their workshop. Duru proceeded to BKM where the mechanics performed a diagnostics of the car. BKM prepared a written itemized estimate identifying the parts and the labor necessary to repair vehicle, and instructed Duru to return to Queens Auto Mall to have the car repaired. Duru proceeded to Queens Auto Mall and showed the repair estimate from BKM to Bruno, the General Manager, and, Nick, the owner. Dura was told him to leave the car, go home and they would send the car to a BMW dealer for repairs. Dura left the car. On December 13th Dura received a call and picked up the car.

On December 16th Dura took the car back and left it at Queens Auto Mall with the same complaints. Later that day, Dura received a call from Champion Auto Repair (Champion), Queens Auto Mall's repair shop/agent, to pick up the car. Dura took the car for a test drive with Champion's manager, Gus,. During the test

drive, all the dashboard warning lights came on again. Gus sent Dura to see another mechanic, Adrian at 50-30 69th Place, Woodbine, Queens. Adrian told Dura that he checked the car, reset the engine computer and said everything was okay. Shortly after Dura left Adrian, the lights came on again whereupon Dura went back to Adrian. Adrian reset the engine computer again.

Dura left Adrian and proceeded directly to Queens Auto Mall where he confronted Nick. Dura asked for a different car. Nick refused saying that the car gives "false" information, which Nick claimed was common for the 2004 and 2005 BMW 745LI. Nick told Dura to ignore the lights.

Dura returned with the car to Queens Auto Mall on December 20, 21, 31 and January 4, 17, 22 and 24, 2011 with the same complaints, i.e. the check engine light, oil pressure low, and other warning messages appearing on the dashboard. He saw either Bruno or Nick and was told to go to their mechanic, Gus at Champion. Gus sent Dura to Adrian. Several times Dura demanded that Queens Auto Mall accept return of the car and exchange it for a different car. Nick, Bruno and Gus all continued to claim that the lights were "false" messages and there was nothing wrong.

On Monday, January 24th Dura took the car to Champion. Although Gus again claimed that the check engine light was a "false" message, Dura left the car with Gus. Later that day Dura called Champion and was told by an allegedly irate Gus that Dura had "blown" the engine and that it would have to be replaced at a cost of \$10,000.00.

After speaking with Gus, Dura went to Queens Auto Mall on the evening of January 24th. Bruno told him that the warranty had expired and that plaintiffs would have to have the car repaired. Dura attempted to pick up the car from Champion on four occasions, but Gus refused to release the car to Dura. Gus stated that the car will be released to Queens Auto Mall because it had paid for the new engine. On February 22, 2011 plaintiffs commenced the instant action.

Pursuant to GAL. § 198-b(b)(1) at the time of the purchase of a used car, a dealer is required to give a purchaser a written warranty for a period of time based on the milage on the vehicle. The written warranty requires a dealer or his agent to repair or, if the dealer chooses, to reimburse the purchaser for the reasonable cost of repairing a covered part (GAL. § 198-b [b][2]). Covered parts must include at least the engine and its parts, transmission, drive axle, brakes, radiator, steering,

alternator, generator, starter, and ignition system excluding the battery (GAL. § 198-b [b][2][a-g]). The dealer is required to make such repairs or reimbursement even after the expiration of the warranty period where the purchaser has notified the dealer of the failure of a covered part within the warranty period (GAL.

§ 198-b [b][3]). Pursuant to GAL. § 198-b(c)(1) if the dealer or its agent fails to correct a malfunction or defect as required by the warranty in this section which substantially impairs the value of the used motor vehicle to the purchaser after a reasonable period of time, the dealer must accept return of the vehicle and refund the full purchase price or the dealer may, if he so chooses, offer a replacement automobile, making such adjustment in the purchase price as the parties may agree.

The plaintiff's affidavit and documentary evidence are sufficient to establish, prima facie, plaintiffs' entitlement to summary judgment demonstrating that Queens Auto Mall was afforded a reasonable opportunity to correct the defects or malfunctions to the car's engine, its component parts and transmission, and that the defendant failed to diagnose the defects or malfunctions and failed to make the necessary repairs ultimately resulting in the total failure of the engine requiring that it be replaced (see Francis v. Atlantic Infinite, Ltd., 64 AD3d 747 [2006]; cf Matter of Royal Chrysler-Innuendo, Inc., 243 AD2d 1007 [1997]).

The vehicle was subject to a warranty of 30 days or 1,000 miles, whichever occurred first, under GAL. § 198-b.b.][c]). The plaintiffs demonstrated that while Dura was driving the car home from Queens Auto Mall, the check engine light went on in the car. He returned the following day, but was told to come back on December 6th. Three days later on his way back to Queens Auto Mall, the car stalled. When Dura restarted the car, the gear jumped from drive to neutral, warning messages appeared on the dashboard including a transmission warning, "check engine", "check engine pressure" and "see your nearest BMW dealer/mechanic". Although Dura returned to Queens Auto Mall and left the car for repairs on at least seven separate occasions, the defendant consistently maintained that there was nothing wrong with the car and that warnings were "false" messages. However, it is undisputed that the engine totally failed and needed to be completely replaced by January 24, 2011.

In opposition, the defendant, Queens Auto Mall, submitted the affidavit of Ted Levine, its general manager. Levine asserts that although Dura returned at one point complaining about a check engine light going on, he was referred to a "nearby car repair facility". Levine claims that he was advised that the main problems with this vehicle were remedied by that facility. He

asserts that BMW sometimes exhibit "false check engine lights" when there is nothing wrong, that the vehicle is structurally sound and there is nothing wrong with the vehicle.

Levine's, conclusory and hearsay affidavit is insufficient to raise a triable issue of fact. The defendant has failed to submit any competent evidence to demonstrate, that its mechanic, Champion, ever examined the vehicle to determine whether the warning lights were "false" warnings or whether the problems contained in BKM's estimate existed. Nor has defendant submitted any evidence that its mechanic, Champion, made any repairs.

Levine's assertion that plaintiffs' motion must be denied because they have not submitted expert evidence demonstrating that any defects substantially impaired the value of the vehicle is without merit. The plaintiffs' proof need not be by expert evidence (see Fortune v. Scott Ford, Inc., 175 AD2d 303, 305 [1991] appeal dismissed 78 NY2d 1007 [1991]; Jandreau v. La Vigne, supra). In addition, pursuant to GBL 198-b the claim that the defect does not substantially impair the value of the vehicle, is an affirmative defense (GBL § 198-b[c][1][a]) which defendant must plead and prove (see Kandel v. Hyundai Motor America, 51 AD3d 729, 730 [2008]; Jandreau v. La Vigne, 170 AD2d 861 [1991]; Williams v. Planet Motor Car, Inc., 190 Misc.2d 22, 30-31 [2001]).

Accordingly, the plaintiffs' motion for summary judgment on their breach of contract and GBL § 198-b claims seeking, inter alia, rescision and compelling the defendant, Queens Auto Mall to accept return of the automobile is granted. Since the vehicle is in the possession of defendant's mechanic, Champion Auto Center Inc., it is deemed returned.

With respect to the branch of the motion for an injunction enjoining Champion Auto Center Inc., from conducting a lien sale, it is denied as unnecessary. It is apparent from the plaintiff's affidavit that the vehicle is in the possession of the defendant's mechanic, Gus from Champion Auto Center Inc., who has refused to release it to the plaintiffs and has represented that he will return it only to Queens Auto Mall. Accordingly, the defendant may retrieve the vehicle at any time.

Dated: September 5, 2012  
D# 47

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J.S.C.