November 18, 2004

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Re: Thomas N. Tuoni v. William Binkley, Layne Drexel, & Paul Toth
Case No. 2002-10-339

LETTER OPINION

Date Submitted: November 4, 2004
Date Decided: November 18, 2004

Dear Counsel, Mr. Binkley, & Mr. Toth:

This is an appeal *de novo* brought pursuant to 10 *Del. C.* §5719 *et seq* of a debt action filed by Plaintiff. Trial in the above captioned matter took place on Thursday, November 4, 2004. Following the receipt of evidence and testimony, the Court reserved decision. This is the Court's final decision and order.

The Plaintiff brings three claims before the Court: (1) Thomas N. Tuoni (hereinafter "Plaintiff") is entitled to $15,428.80 for three payment checks tendered by the Defendants that were subsequently made invalid by stop payment orders; (2) the Defendants are responsible for damages to a motor vehicle provided to them by the Plaintiff; and (3) the Defendants are responsible for $11,000 supplied by the Plaintiff for

a parts account. Co-defendant, Layne Drexel (hereinafter "Drexel") brought a cross claim against his co-defendants, William Binkley (hereinafter "Binkley") and Paul Toth (hereinafter "Toth"), for contribution and indemnification based upon their conduct in causing the Plaintiff's loss.

The sole issues before the Court are whether or not Plaintiff has proven by a preponderance of the evidence that he is entitled to collect in this debt action. Second, whether or not all partners arre jointly liable for the actions of the partnership.

THE FACTS

Plaintiff testified at trial.[1] The three Defendants also testified.[2] Following trial the Court finds the relevant facts as follows:

Toth, Binkley, and Drexel entered into a partnership for the purpose of opening a used car business (hereinafter "Wise Motor Cars"). Binkley and Toth conducted the daily business. Drexel provided capitol to start the business. All three Defendants signed personally in a Conditional Agreement (hereinafter "Agreement") between Wise Motor Cars and the Plaintiff. All three defendants were owners of Wise Motor Cars, and at various times drove motor vehicles owned by Wise motor Cars.

In September, 1997 the Defendants, as joint partners, entered into a written agreement ("the Agreement") with the Plaintiff for the purpose of purchasing vehicles to be sold by Wise Motor Cars. The Agreement, in relevant part, provided that Plaintiff

[1] The Court received the following Plaintiff's exhibits into evidence: Exhibit 1 was a copy of the Conditional Agreement; Exhibit 2 was deposit slips; Exhibit 3 was a copy of the stop payment checks; Exhibit 4 was an estimate of repairs on the Acura; Exhibit 5 was a copy of the 7/30/01 three check stubs; and Exhibit 6 was a list of cars the Defendant paid an extra $250.

[2] The Court received the following Defense exhibits into evidence: Exhibit 1, Binkley, was a chart of vehicles over payments made on; Exhibit 2, Binkley, was an estimate of Acura damages from American Auto Body; Exhibit 3, Binkley, was an estimate of Acura damages from Auto Collision; Exhibit 4, Binkley, was a list of vehicles taken by the Plaintiff; Exhibit 4B, Binkley, was a list of vehicles with amounts.

would provide the financing for the purchase of the automobiles, would initially provide the finances up front for the purchase and the Plaintiff would be given $200 up front for this service. At the time the vehicles were sold by Wise Motor Cars, Plaintiff would be refunded the financing he provided, plus an additional $300. Therefore, in exchange for making the initial purchase for Wise Motor Cars the Plaintiff would make a $500 profit per vehicle. The Agreement also provided Plaintiff with an option to retrieve all vehicles and obtain title at his request, reserved the right to inventory the vehicles, and furthermore, Wise Motor Cars was to assume responsibility for all damage or theft of vehicles while the vehicle was on the lot. This Agreement was signed by all Defendants, the Plaintiff, and was witnessed by a separate party.

The parties subsequently entered into a second oral agreement to set up a parts account. The purpose of this account, according to testimony by all parties and trial evidence was to recondition the motor vehicles purchased and prepare them for sale. The Plaintiff gave the Defendants $11,000 to set up this account. All parties testified the Plaintiff did not have access to this account once the funds were deposited. Wise Motor Cars had total control of these funds.

Business was conducted smoothly between the parties for the first two years. While Plaintiff testified he dealt with Toth or Binkley primarily, he also testified that no decisions or meetings were done without the presence of Drexel. Plaintiff testified he purchase approximately forty-five vehicles for Wise Motor Cars.

Plaintiff was not being timely paid and began questioning the co-defendants about the way business was being conducted. Plaintiff noticed cars were being sold and he was not paid for them and the parts account needed frequent replenishing. Plaintiff testified

he placed a 1989 Acura on the Wise Motor Cars lot, and while on Wise Motor Cars lot, the vehicle's hood and fender were damaged. In November, 1999 Wise Motor Cars received estimates to repair the damage yet never made the repairs. These estimates obtained by the Defendant were $300 and $792.80. Plaintiff also obtained an estimate of $1,353.78. The Plaintiff took the car off the lot and sold the vehicle as damaged.

Plaintiff was not paid for three vehicles he delivered to Wise Motor Cars. Plaintiff was given checks on April 21, 2001, on August 6, 2001, and on January 29, 2001. All three checks were invalidated by insufficient funds. Again, on June 28, 2002 he was given checks for these three vehicles. On this occasion Defendant ordered a stop payment, making the checks invalid again. Plaintiff has never been reimbursed the $15,428.80 for these vehicles sold by Wise Motor Cars.

Plaintiff exercised his right to re-acquire the vehicles. The agreement entered into by the parties allowed Plaintiff the right to retake the vehicles from the lot and have valid title transferred back to the Plaintiff by the State of Delaware Department of Motor Vehicle. With the assistance of a police escort, Plaintiff entered Wise Motor Cars and reclaimed the seven vehicles he purchased. Shortly after, Wise Motor Cars went out of business.

THE LAW

A plaintiff in a debt proceeding must prove the underlying action and outstanding debt by a preponderance of the evidence. *See e.g.. Wirt v. Matthews,* C.C.P. N.C., C.A. No. 199-12-271, 2002 CP Lexis 17, January 17, 2002 (Welch, J.)

The Delaware Revised Uniform Partnership Act defines a partnership as an association of two or more persons: (i) to carry on as co-owners of a business for profit

forms a partnership, whether or not the persons intended to form a partnership, and (ii) to carry on any purpose or activity not for profit, forms a partnership when the parties intend to form a partnership. 6 *Del. C.* §15-202.

Where any wrongful act or omission of any partner acting in the ordinary course of business of the partnership, the partnership is liable to the same extent as the partner who acted or omitted. 6 *Del. C.* §1513. A partner is jointly liable for all debts and obligations of the partnership. 6 *Del. C.* §1515(2); *Melvin L. Joseph Construction Co. v. Herring Creek Limited Partnership,* Del. Super., C.A. No 85L-DE3, Chandler, J. (February 10, 1987).

OPINION AND ORDER

It is clear from the testimony and evidence by a preponderance of the evidence in the trial record that Plaintiff delivered the three subject vehicles in question to Defendant and was not reimbursed for these motor vehicles. On two separate occasions Plaintiff was paid with non-negotiable checks. The actual damages to the Plaintiff for these vehicles is $15,428. Plaintiff also has proven at trial by a preponderance of the evidence a loan of $11,000 given to Wise Motor Cars for a parts account. Plaintiff has proven at trial by a preponderance of the evidence that these funds were never reimbursed to Plaintiff and the Court therefore awards judgment in the amount of $15,428.80.

Plaintiff also claimed a 1989 Acura was damaged while on the Wise Motor Cars lot. Both parties obtained estimates. Plaintiff did not establish by a preponderance of the evidence he was entitled to the full cost of repairs. No photos were admitted, nor were any matter estimates as to the value of the vehicle. The blue book value was not admitted into evidence. Actual body damages were proven by the Defendant in the sum of $300.

Therefore Plaintiff is only entitled to the $300 it would have cost to repair the vehicle's body damage as this amount was established at trial by a preponderance of the evidence.

The Court finds following trial that the cross-claim by Drexel was not proven by a preponderance of the evidence. According to Delaware law, a partner is liable for the actions of the partnership. Drexel admitted in testimony he was a partner in Wise Motor Cars, and is therefore jointly and severally liable for the actions of the partnership. Binkley and Toth are also jointly and severally liable for the damages. Therefore, the Court finds in favor of the Plaintiff against all Defendants in the amount of $26,728 plus costs and prejudgment interest from the date of the filing of this Complaint, as well as post-judgment interest. 6 *Del. C.* §2301 *et seq*. Each party shall bear their own costs.

IT IS SO ORDERED this 18th day of November, 2004.

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John K. Welch
Associate Judge

cc. Barbara C. Dooley
Civil Case Manager