

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

RICHARD DEVINCENTIS, )  
)  
Plaintiff, )  
) C.A. No. N10C-08-069 MMJ  
v. )  
)  
EUROPEAN PERFORMANCE, INC., )  
)  
Defendant. )

Submitted: March 5, 2012  
Decided: April 17, 2012

On Defendant European Performance, Inc.'s  
Motions for Summary Judgment

**DENIED**

**MEMORANDUM OPINION**

Paul E. Bilodeau, Esquire (argued), Daniel R. Losco, Esquire, Losco &  
Marconi, P.A., Wilmington, Delaware, Attorneys for Plaintiff

Arthur D. Kuhl, Esquire (argued), Cheryl A. Ward, Esquire, Reger Rizzo &  
Darnall LLP, Wilmington, Delaware, Attorneys for Defendant

**JOHNSTON, J.**

Plaintiff Richard E. Devincentis (“Devincentis”) filed this action against Defendant European Performance Inc. (“European Performance”), alleging breach of contract and breach of bailment contract. Devincentis claims that as a result of European Performance’s breach, his 2003 Ferrari 360 Spider Roadster (the “Vehicle”) sustained substantial damage. Devincentis seeks damages for diminution in value of the Vehicle, loss of use of the Vehicle, and other unspecified contractual damages.

European Performance filed this Motion for Summary Judgment, arguing that: (1) Devincentis lacks standing to bring the instant action; and (2) Devincentis’ suit is barred by the statute of limitations. Alternatively, European Performance moves for partial summary judgment, arguing that Devincentis is not entitled to the full amount of damages requested.

The Court finds that Devincentis has standing to bring the instant action and has filed the Complaint within the applicable statute of limitations. The Court, however, finds that a genuine issue of material fact exists as to the appropriate measure of damages to which Devincentis would be entitled should European Performance be found liable. Therefore, European Performance’s Motion for Summary Judgment, and alternative Motion for Partial Summary Judgment, must be denied.

## **FACTUAL BACKGROUND AND PROCEDURAL CONTEXT**

On March 16, 2007, Devinentis purchased the Vehicle from World Motor Sports through Ebay. Divinentis paid approximately \$165,000 for the Vehicle. Devinentis claims that, at the time of purchase, the Vehicle had a fair market value of \$165,000.<sup>1</sup>

The Vehicle subsequently was delivered to Devinentis and titled in Delaware. The title to the Vehicle, dated August 29, 2007, reveals no liens on the Vehicle.

On October 12, 2007, Wilmington Trust Company (“Wilmington Trust”) made an interest only loan to Devinentis in the amount of \$100,000. Devinentis pledged the Vehicle as collateral for the loan.

In November 2007, Devinentis retained European Performance to perform routine maintenance on the Vehicle. On November 12, 2007, Devinentis dropped the Vehicle off at European Performance for service. Devinentis claims that while the Vehicle was awaiting service, European Performance left the keys inside the Vehicle. That same day, the Vehicle was stolen.

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<sup>1</sup> European refutes this claim, arguing that the Vehicle was worth only \$100,000 to \$110,000 when purchased by Devinentis.

The Vehicle was recovered by the Elsmere Police Department on November 12, 2007. Devinentis claims that the Vehicle sustained approximately \$115,000 to \$135,000 in damage as a result of European Performance's alleged breach.

European Performance arranged for the Vehicle to be repaired at a body shop in Pennsylvania. Due to financial difficulties at the body shop, it took over two years for the Vehicle to be repaired. The Vehicle eventually was returned to Devinentis on December 16, 2009. Devinentis, however, took the Vehicle to the body shop on three more occasions because additional repairs were necessary.

At some point in time, Devinentis defaulted on the loan from Wilmington Trust. This Court entered an Order of Replevin on April 15, 2010, allowing Wilmington Trust to repossess the Vehicle. At the time of repossession, the Vehicle was located at the body shop in Pennsylvania.

After taking possession of the Vehicle, Wilmington Trust sold it for \$49,500. Wilmington Trust subsequently cancelled the \$51,500 balance on Devinentis' loan.

## DISCUSSION

### I. Standing

#### *Parties' Contentions*

European Performance argues that Devincentis lacks standing to bring the instant action because any legal interest Devincentis had in the Vehicle was extinguished by the Order of Replevin. Moreover, European Performance claims that, pursuant to the terms of the loan agreement between Devincentis and Wilmington Trust, Wilmington Trust is entitled to any and all compensation for damage to the Vehicle. Therefore, Devincentis does not have a tangible interest in the outcome of the matter.

Devincentis concedes that he no longer has a possessory interest in the Vehicle, but claims that he still has standing to proceed with the instant action because he suffered an injury-in-fact.

#### *Analysis*

##### *Devincentis Sustained an Injury-in-fact*

The term “standing” refers to a party’s right to invoke the jurisdiction of the Court to enforce a claim or redress a grievance.<sup>2</sup> Standing is a threshold issue, concerned “only with the question of *who* is entitled to

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<sup>2</sup> *Dover Historical Soc’y v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1110 (Del. 2003).

mount a legal challenge and not with the merits of the subject matter in controversy.”<sup>3</sup> Generally, in order to have standing, a plaintiff must show an injury-in-fact, and that plaintiff’s interests are within the “zone of interests to be protected.”<sup>4</sup>

It is undisputed that Devinentis’ possessory interest in the Vehicle was terminated by the Order of Replevin.<sup>5</sup> Nonetheless, the Court finds that Devinentis is entitled to seek recovery for damage caused to the Vehicle by European Performance’s alleged breach, which occurred prior to repossession. Clearly, Devinentis has suffered an injury-in-fact if the value of the Vehicle decreased by over \$100,000 after it was placed in European Performance’s possession. Under these circumstances, common sense dictates that property value loss is within the zone of protected interests. To deny standing would leave Devinentis without a remedy.

*Cancellation of Debt Does Not Prevent Standing*

European Performance further argues that any interest Devinentis may have had in the outcome of the litigation was extinguished by the terms of Devinentis’ loan agreement with Wilmington Trust. According to

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<sup>3</sup> *Id.* (emphasis in original).

<sup>4</sup> *Id.*

<sup>5</sup> *See also* 6 *Del. C.* § 9-609(a)(1) (“After default, a secured party may take possession of the collateral.”).

European Performance, the terms of the loan agreement provide that Wilmington Trust is entitled to *all* sums due if European Performance is found liable for the damage caused to the Vehicle.

The loan agreement, executed by Devinentis and Wilmington Trust, identified the Vehicle as collateral. Collateral also included “[a]ll proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in the Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party’s insurer, whether due to judgment, settlement or other process.”

As provided by the loan agreement, Wilmington Trust repossessed the Vehicle upon Devinentis’ default. Wilmington Trust then resold the Vehicle for \$49,500 and cancelled the remaining \$50,500 balance on the loan. In so doing, Wilmington Trust foreclosed any future debt collection, and relinquished its right to receive any proceeds recovered for damage to the Vehicle. Even assuming, *arguendo*, that Wilmington Trust had not canceled the \$50,500 loan balance, any recovery to Wilmington Trust would have been capped at \$50,500, plus contractual costs and fees. Devinentis would be entitled to any surplus recovery.

An argument can be made that any recovery to Devinentis must be offset by the amount of debt reduction. However, that is an issue affecting the proper measure of damages, not bearing upon standing.

Under the facts of this case, the Court finds that Devinentis has standing to pursue to instant action.

## **II. Statute of Limitations**

### *Parties' Contentions*

European Performance argues that because Devinentis seeks strictly tort relief, his action is subject to the already-expired two year statute of limitations for tort actions. According to European Performance, the type of damages suffered, rather than the cause of action pled, determines the applicable statute of limitations.

In response, Devinentis claims that the damages sought – diminished value and loss of use – are appropriate remedies for breach of contract claims. Therefore, the appropriate statute of limitations is three years.

### *Analysis*

#### *Nature of Damages Controls Statute of Limitations*

It is well-settled Delaware law that the nature of the damages, and not the cause or type of action instituted, determines what statute of limitation



controls a particular action.<sup>6</sup> Therefore, the Court’s inquiry is limited to determining whether the relief requested – *e.g.*, diminution in value of the Vehicle and loss of use of the Vehicle – warrants application of the two-year statute of limitations for tort actions<sup>7</sup> or the three-year statute of limitations for contract claims.<sup>8</sup>

Contrary to European Performance’s assertion, the relief sought by Devinentis is not strictly tort relief. This Court previously has held that “[i]n establishing a damage theory, ‘regardless of whether the cause of action sounds in contract or tort, the focus is to identify the [injured parties’] interests and to compensate for the damage done to them.’”<sup>9</sup> A plaintiff is

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<sup>6</sup> *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119, 1123 (Del. 1987). See also *Read v. Local Lodge 1284, Int’l Ass’n of Machinists and Aerospace Workers, AFL-CIO*, 528 F.2d 823, 825 (3d Cir. 1975).

<sup>7</sup> See 10 *Del. C.* § 8107 (“No action to recover damages for wrongful death or for injury to personal property shall be brought after the expiration of 2 years from the accruing of the cause of such action.”).

<sup>8</sup> See 10 *Del. C.* § 8106 (“[N]o action based on a promise ... shall be brought after the expiration of 3 years from the accruing of the cause of such action.”).

<sup>9</sup> See *Atwell v. RHIS, Inc.*, 2006 WL 2686531, at \*1 (Del. Super.) (“Damages in both a breach of contract or negligence action are ... limited to those which were proximately caused by the offending party.”); *Carey v. McGinty*, 1988 WL 55336, at \*6 (Del. Super.) (“[T]he damages which are recoverable for breaches of duties created by contract are those injurious consequences which ‘might have been foreseen or anticipated’ as being likely to follow from the negligent act or breach, these consequences to be considered to be the natural and probable consequences. This standard applies equally whether the action is founded upon breach of contract or negligence.”) (citation omitted).

entitled to recover for all damage directly or proximately caused by the defendant.<sup>10</sup>

In the context of a breach of contract claim, a plaintiff is entitled to compensation sufficient to place the non-breaching party in the same position as if the contract had been performed.<sup>11</sup> The measure of damages is the loss actually sustained as a result of the breach of the contract.<sup>12</sup> Additionally, the plaintiff may recover any incidental or consequential losses that arose as a result of the breach.<sup>13</sup>

Here, Devincentis raised two claims – breach of contract and breach of bailment.<sup>14</sup> A bailment is defined as a delivery of personal property by

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<sup>10</sup> See *J.J. White, Inc. v. Metro. Merch. Mart*, 107 A.2d 892, 894 (Del. Super. 1954) (“A civil action for damages will lie either for the breach of a contract or for the breach of some duty imposed by law; but whether the action is ex contractu or ex delicto, the measure of damages, in the absence of any showing of wilful, wanton or intentional wrongdoing, invariably is the loss or injury resulting, directly or proximately, from the wrongful act of the defendant.”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Restatement (Second) of Contracts § 347 (1981), cited with approval in *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 n. 6 (Del. 2001).

<sup>14</sup> A bailment is defined as a delivery of personal property by one person, the bailor, to another, the bailee, who holds the property for a certain purpose, usually under an express or implied-in-fact contract. Black’s Law Dictionary (9th ed. 2009). If a bailee returns the property in damaged condition, the plaintiff has a choice of remedies. *Celanese Corp. of America v. Mayor and Council of Wilmington*, 78 A.2d 249, 250-51 (Del. Super. 1950). The plaintiff may either bring a tort action for the damage occasioned by the bailee’s negligence or a claim for breach of the bailment contract. *Id.* Here, Devincentis elected to proceed under a breach of contract theory.

one person, the bailor, to another, the bailee, who holds the property for a certain purpose, usually under an express or implied-in-fact contract.<sup>15</sup> If a bailee returns the property in damaged condition, the plaintiff has a choice of remedies.<sup>16</sup> The plaintiff may either bring a tort action for the damage occasioned by the bailee's negligence or a claim for breach of the bailment contract.<sup>17</sup> Here, Devinentis elected to proceed under a breach of contract theory

Devinentis seeks damages for diminution in value of the Vehicle, loss of use of the Vehicle, and other unspecified contractual damages. The Court finds that such relief falls squarely within recovery contemplated by contract law. So long as Devinentis can demonstrate actual loss, he is entitled to compensation for the damage allegedly caused by European Performance.

#### *Devinentis' Complaint Timely Filed*

The Court finds unpersuasive European Performance's argument that Devinentis' claims are governed by the two-year statute of limitations applicable to tort actions. Devinentis' Complaint neither alleges negligence

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<sup>15</sup> Black's Law Dictionary (9th ed. 2009).

<sup>16</sup> *Celanese Corp. of America v. Mayor and Council of Wilmington*, 78 A.2d 249, 250-51 (Del. Super. 1950).

<sup>17</sup> *Id.*

nor seeks relief unique to a tort action. Rather, Devincentis' Complaint establishes claims for breach of contract<sup>18</sup> and breach of bailment,<sup>19</sup> and seeks contract damages. Therefore, Devincentis' claims are governed by Section 8106's three-year statute of limitations.

Devincentis filed this action on August 6, 2010 – well within the three-year statute of limitations.<sup>20</sup> Accordingly, the Court finds Devincentis' Complaint to be timely.

### **III. Diminution in Value**

#### *Parties' Contentions*

Devincentis claims that the Vehicle had a fair market value of \$165,000 when it was purchased in March 2007. Had European Performance properly performed its duties as bailee, the Vehicle would have

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<sup>18</sup> See *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003) (finding that a plaintiff may establish a *prima facie* case of breach of contract by demonstrating: (1) the existence of the contract, whether express or implied; (2) the breach of an obligation imposed by that contract; and (3) the resultant damage to the plaintiff).

<sup>19</sup> See *Celanese Corp. of America v. Mayor and Council of Wilmington*, 78 A.2d 249, 251 (Del. Super. 1950) (holding that a plaintiff may establish a *prima facie* case of breach of bailment by demonstrating: (1) the hiring of a bailee; (2) the delivery of the property to the bailee in good condition; (3) the return of the property in bad condition; and (4) the amount necessary to put the property in good condition).

<sup>20</sup> At oral argument, Devincentis conceded that the triggering date for the statute of limitations was the date of the theft – November 12, 2007.

been returned to Devinentis with a fair market value of \$165,000.<sup>21</sup> However, because European Performance purportedly failed to properly discharge its duties under the bailment contract, the Vehicle's fair market value diminished by approximately \$115,000 to \$135,000.

European Performance argues that prior to the alleged breach, the Vehicle had a fair market value of only \$100,000 to \$110,000. According to European Performance, the Vehicle had been involved in an accident prior to Devinentis' purchase. Alternatively, European Performance argues that if the fair market value of the Vehicle before the alleged breach was \$165,000, Devinentis' damages should be capped at \$65,000 because he already has recovered \$100,000 from Wilmington Trust.

### *Analysis*

#### *Genuine Issue of Material Fact Concerning Valuation of Vehicle*

In determining the appropriate measure of damages for a breach of contract claim, the Court first must quantify the loss suffered by the non-breaching party.<sup>22</sup> In a case of defective or partial performance, this Court has held that the measure of damages is "equal to the difference between the

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<sup>21</sup> It is worthy of noting that the Vehicle was taken to European Performance solely for routine maintenance.

<sup>22</sup> *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at \*4 n.13 (Del. Ch.).

value that the performance would have had if there had been no breach and the value of such performance as was actually rendered.”<sup>23</sup> Accordingly, in the context of damage to a vehicle, the appropriate measure of damages is the difference between the value of the vehicle before the breach and the value of the vehicle after the breach.<sup>24</sup>

The parties dispute the fair market value of the Vehicle before and after the breach. Devincentis claims that prior to European Performance’s defective performance, the Vehicle had a fair market value of \$165,000. Devincentis offered the expert report of Michael Cassidy (“Cassidy”) to corroborate his calculation of the value of the Vehicle prior to the alleged breach. Additionally, Devincentis offered the deposition testimony of Francis deRuschi, a former sales manager of a local Ferrari dealership. deRuschi testified that at the time of the Vehicle’s purchase in March 2007, \$165,000 was a reasonable purchase price.

As a result of European Performance’s alleged breach, Devincentis claims that the fair market value of the Vehicle decreased by \$115,000 to \$135,000. According to Cassidy’s report, the Vehicle sustained structural damage that diminished its value. As further evidence of the diminution in

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<sup>23</sup> *R.M. Williams Co. v. Frabizzio*, 1993 WL 54423, at \*12 n.13 (Del. Super.).

<sup>24</sup> *Teitsworth v. Kempinski*, 127 A.2d 237, 238 (Del. 1956).

value of the Vehicle, Devinentis points to the fact that the Vehicle was resold for only \$49,500.

In response, European Performance argues that the Vehicle only had a fair market value of \$100,000 to \$110,000 prior to the alleged breach. European Performance's expert, L.E. Batton, stated that the Vehicle had been involved in an accident prior to Devinentis' purchase. According to Batton, the Vehicle showed evidence of frontal impact and obvious poor frame repairs.

European Performance also disputes the fair market value of the Vehicle after the alleged breach. Relying on a "Diminished Value Consideration" Report provided by Travelers Insurance, European contends that the Vehicle had diminished in value by \$25,000 to \$30,000.<sup>25</sup>

Viewing the facts in the light most favorable to Devinentis, the nonmoving party, the Court finds that a genuine issue of material fact exists as to the valuation of the Vehicle both before and after the alleged breach. Therefore, summary judgment must be denied on the issue of damages for diminution in value of the Vehicle.

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<sup>25</sup> In his report, Batton stated that after European Performance's alleged breach, the Vehicle required "extensive repairs. Yet, Batton estimated the fair market value of the Vehicle post-breach to be between \$100,000 and \$110,000 - the same figure he provided for the pre-breach fair market value. The Court is unable to reconcile this seemingly inconsistent evaluation.

#### IV. Loss of Use

##### *Analysis*

##### *Genuine Issue of Material Fact as to Whether Devinentis is Entitled to Recover for Loss of Use of Vehicle*

A plaintiff may seek damages for the lost use of a vehicle caused by the defendant's breach.<sup>26</sup> Generally, the appropriate measure of damages for loss of use is the rental cost of the substitute vehicle.<sup>27</sup>

The failure to procure a replacement vehicle, however, does not preclude recovery for loss of use.<sup>28</sup> To require an aggrieved party to obtain a substitute vehicle in order to be entitled to loss of use damages would impose an unreasonable condition of financial ability.<sup>29</sup> Such a requirement

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<sup>26</sup> *Atwell v. RHIS, Inc.*, 2006 WL 2686531, at \*2 (Del. Super.); *Catalano v. Higgins*, 191 A.2d 330, 333 (Del. Super. 1963); *Teitsworth v. Kempinski*, 127 A.2d 237, 240 (Del. 1956); *Adams v. Hazel*, 102 A.2d 919, 920 (Del. Super. 1954).

<sup>27</sup> *Nat'l Dairy Prod. Corp. v. Jumper*, 130 So.2d 922, 923 (Miss. 1961); *Perry v. Harris*, 197 N.E.2d 416, 419 (Ohio Ct. App. 1964).

<sup>28</sup> See, e.g., *Warren v. Heartland Auto. Servs., Inc.*, 144 P.3d 73, 79 (Kan. Ct. App. 2006); *Cress v. Scott*, 868 P.2d 648, 651 (N.M. 1994); *Camaraza v. Bellavia Buick Corp.*, 523 A.2d 669, 671 (N.J. Super. Ct. App. Div. 1987); *Meakin v. Dreier*, 209 So.2d 252, 254-55 (Fla. Dist. Ct. App. 1968); *Perry*, 197 N.E.2d at 419; *Holmes v. Raffo*, 374 P.2d 536, 542 (Wash. 1962); *Malinson v. Black*, 188 P.2d 788 (Cal. Dist. Ct. App. 1948).

<sup>29</sup> See *Naughton Mulgrew Motor Car Co. v. Westchester Fish Co.*, 173 N.Y.S. 437, 439 (N.Y. App. Div. 1918) ("Surely it would be unjust to compel the owner of the car to hire another car in order to entitle him to claim compensation for the loss of the use of his own car. He might, for example, not be financially able ... to hire a car."); *Holmes*, 374 P.2d at 542 ("If [a court] were to hold that a plaintiff who has lost the use of his pleasure automobile ... cannot be compensated because he has not hired a substitute vehicle, [the court] would be placing upon recovery a condition of financial ability to hire another



is inconsistent with the purpose in awarding loss of use damages, which is to compensate the aggrieved party for *either monetary loss or inconvenience* suffered during the time required for repairs to the property.<sup>30</sup>

However, when a vehicle has been substantially destroyed or is not substantially repairable, a number of jurisdictions deny recovery for loss of use damages.<sup>31</sup> To hold otherwise would allow the injured party to recover two-fold for the same loss.<sup>32</sup> That is, injured party could seek compensation for the full value of the vehicle as well as loss of use. As noted by the court in *Fort Pitt Gas Co. v. Evansville Contract Co.*, “The right to use ... [is] incident to [] ownership, and therefore compensation for [] destruction, which of course extinguished the ownership, would necessarily be compensative of the consequent deprivation of its use.”<sup>33</sup>

In the instant action, although the Vehicle was repaired post-breach, a factual dispute exists as to whether repairing the Vehicle would place it in

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automobile to take the place of the injured automobile. The law cannot condone such a condition.”).

<sup>30</sup> *Warren*, 144 P.3d at 79 (citing *Cress*, 868 P.2d at 651).

<sup>31</sup> *Fuller v. Martin*, 125 So.2d 4, 7 (Ala. App. Ct. 1960); *Orr v. Williams*, 379 S.W.2d 181, 189 (Mo. Ct. App. 1964); *Hayes Freight Lines v. Tarver*, 73 N.E.2d 192, 193 (Ohio 1947); *Helin v. Egger*, 238 N.W. 364, 365 (Neb. 1931); *Adams v. Bell Motors*, 121 So. 345, 347-48 (La. Ct. App. 1928); *Langham v. Chicago, R.I. & P. Ry. Co.*, 208 N.W. 356, 358 (Iowa 1926).

<sup>32</sup> *Fort Pitt Gas Co. v. Evansville Contract Co.*, 123 F. 63, 64 (3d Cir. 1903).

<sup>33</sup> 123 F. at 64.

substantially the condition it was in before European Performance's alleged breach. According to Devinentis, the Vehicle should have been declared a total loss because roughly \$117,000 was expended for repairs. Notwithstanding the substantial repairs performed on the Vehicle, it was resold for only \$49,500. As additional support, Devinentis presents Cassidy's report, which concluded that the Vehicle was disqualified from being a potentially marketable car to a retail Ferrari or highline car specialist because the "Vehicle History Report" disclosed the fact that the Vehicle had been stolen and sustained structural damage.

European Performance, on the other hand, clearly believed that the Vehicle was "repairable." Rather than declare the Vehicle a total loss, European Performance retained an auto body shop to rebuild and repair the Vehicle. Batton, European Performance's expert, estimated that after repairs, the Vehicle had a fair market value of \$110,000 to \$120,000.

The Court finds there to be a genuine issue of material fact as to whether repairing the Vehicle placed it in substantially as good a condition as before European Performance's alleged breach. If the Vehicle was not substantially repairable, Devinentis is not entitled to damages for loss of use.

Additionally, a genuine issue of material fact exists as to the proper measure of damages for loss of use. The parties dispute: the amount of time each month Devinentis used the Vehicle; the reasonable rental cost of a substitute car; and whether loss of use damages are even reasonable for a purely pleasure automobile.

### **CONCLUSION**

The Court finds that although Devinentis' right to possess the Vehicle was extinguished by the Order of Replevin, Devinentis has standing to bring the instant action. Additionally, the Court finds that because Devinentis commenced the instant matter within three years of the alleged breach, his Complaint is timely.

The Court further holds that genuine issues of material fact exist as to the valuation of the Vehicle before and after the alleged breach for purposes of calculating diminution in value damages; whether the Vehicle was "repairable" such that Devinentis would be entitled to loss of use damages; and the proper measure of any loss of use damages.

**THEREFORE**, European Performance's Motions for Summary Judgment are hereby **DENIED**.

**IT IS SO ORDERED.**

/s/ *Mary M. Johnston*  
The Honorable Mary M. Johnston