SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Wilmington, DE 19801-3733
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July 28, 2008

(E-FILED)

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Submitted: May 19, 2008
Decided: July 28, 2008

RE: *Kenneth McGinnis v. Beverly Testa*
C.A. No. 08C-01-201 FSS

In Replevin – Decision After Bench Trial

Dear Counsel:

Plaintiff wants to replevy a 1994 Plymouth Sundance, bought by him and titled in his name. The car was used by Plaintiff until Defendant took it, claiming

Plaintiff had defaulted on the $1,300 loan she had given him in November 2007, to finance the car's purchase. At the parties' request, the court held a summary trial after routine motions on April 25, 2008.

I.

It appears that the dispute concerns more than money. Plaintiff dated Defendant's daughter and he needed a car to commute to work. Defendant wanted to be helpful. Not only did she give Plaintiff the car loan, her husband helped buy parts and repair the old automobile. The back story not only explains why Plaintiff advanced money to Defendant, it further explains why the paper evidence is simple and inconclusive.

According to Plaintiff, the loan is evidenced by an undated paper containing two sentences and Plaintiff's witnessed signature. The written agreement gave Defendant a lien on the car until Plaintiff repaid the $1,300, which Plaintiff promised to do by May 25, 2008. Plaintiff also agreed that Defendant could repossess the car if he failed to pay on time. Defendant relies on a paper that appears identical to Plaintiff's, except Defendant's paper includes an extra promise by Plaintiff to pay $100 a week. Defendant claims that Plaintiff fell behind on the weekly payments, which justified her having repossessed the car on January 14, 2008.

II.

Taking everything into consideration, Plaintiff's verison of the loan is more believable. At trial, the court accepted copies of documents. That informality is common because it is so rare for litigants to submit conflicting versions of the same document. Because the trial's timing and informality were exceptional, however, the court left the record open and, by letter, it asked Defendant to submit the original agreement. In response, Defendant submitted an affidavit claiming that Plaintiff must have the only original because she mistakenly gave it to him. (This is an example of several problems Defendant has had with the paper record. Defendant

contends that she repossessed the car the day after Plaintiff made a partial payment. Defendant, however, signed a receipt showing that the payment immediately before repossession was in the agreed upon amount.)

In light of the above, Defendant jumped the gun when she repossessed the car. Plaintiff was only obligated to pay Defendant $1,300 by May 25, 2008, and Defendant was not entitled to possession before then. (Even under Defendant's version of the agreement, it is not clear that Defendant had the right to take the car when she did.) And so, at the time of trial, Plaintiff was entitled to replevin.

Now, however, the payment deadline has clearly passed and Plaintiff is in arrears. Thus, the current situation has become more complicated. Plaintiff claims that Defendant's premature repossession of the car left him without transportation. Therefore, the money that he would have used to repay the loan went to an alternate way to get to work. Be that as it may, as to the car's possession, Plaintiff is in arrears and the loan agreement gives Defendant the car. Furthermore, Defendant points to the parts and repairs her husband put into the automobile and she claims Plaintiff misused the old car while he had it.

The case was presented as a replevin.[1] While this dispute might concern breach of contract or conversion claims and damages, the parties clashed over the car, rather than money. Had it been asked to decide the ancillary matters, especially damages, it is unlikely that the court would have held a trial on the spot.[2] In effect, the court considers any damage claim or counterclaim as waived. Accordingly, the court is only deciding the question squarely presented: Who gets the car?

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[1] 2 Victor B. Woolley, *Woolley's Practice in Civil Actions* §1524 (1906).

[2] *Id.* at §1549.

III.

As discussed above, when the case went to trial, the deadline for final payment had not passed and Defendant wrongfully possessed the car. Therefore, the court excuses Plaintiff for not making final payment when due in May.

If, within one week of this Order's date, Plaintiff deposits the balance due, with full credit for the disputed payment in January, Defendant must turn over the car or pay Plaintiff $1,300.[3] If she does that voluntarily, the parties will bear their own costs. If a further order is necessary, costs shall be awarded to Plaintiff. If, on the other hand, Plaintiff fails to deposit the balance due, replevin will be denied and the case will be closed without further notice or opportunity to appear.

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS:mes
oc: Prothonotary (Civil)

[3] *Id.* at §1556.