NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2981-21

ALVIN SINGER,

Plaintiff-Appellant,

v.

TOYOTA MOTOR SALES,
U.S.A., INC., d/b/a LEXUS,

Defendant-Respondent.

_____

APPROVED FOR PUBLICATION
June 30, 2023
APPELLATE DIVISION

Argued May 2, 2023 – Decided June 30, 2023

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3543-20.

Bertram Siegel argued the cause for appellant (Siegel and Siegel, attorneys; Bertram Siegel, of counsel and on the brief; Jeffrey Zajac, on the brief).

Michael J. Wozny argued the cause for respondent (Lavin, Cedrone, Graver, Boyd & DiSipio, attorneys; Michael J. Wozny, of counsel and on the brief; Jo E. Peifer, on the brief).

The opinion of the court was delivered by

BERDOTE BYRNE, J.S.C. (temporarily assigned)

Plaintiff, Alvin Singer, appeals from an order granting summary judgment to defendant, Toyota Motor Sales, U.S.A., Inc., d/b/a Lexus, dismissing with prejudice his complaint alleging defendant failed to make a timely repair following a recall notice of his leased vehicle pursuant to New Jersey's Lemon Law statute, N.J.S.A. 56:12-29 to -49. We are asked to consider — for the first time — whether the existence of a recall notice alone is sufficient to satisfy the non-conformity element required to establish a Lemon Law claim. We affirm the summary judgment dismissal of plaintiff's claims and conclude evidence demonstrating a vehicle is subject to a recall notice, without more, is insufficient to satisfy the "nonconformity" element required by N.J.S.A. 56:12-30.

Plaintiff had a practice of trading in a leased Lexus every two years in exchange for a new vehicle. On October 30, 2018, plaintiff entered into a new lease agreement with Lexus of Englewood for a Lexus LS 500 (the Lexus). The monthly payment on the lease was $1,440. At deposition, plaintiff testified he used the Lexus mostly for business purposes: selling insurance and visiting clients.

In December 2019, plaintiff traveled to Florida, intending to remain there for the winter and return to New Jersey in April. On December 15, 2019, plaintiff shipped the Lexus from New Jersey to Florida.

On January 13, 2020, Toyota issued safety recall 20LA01, which encompassed plaintiff's Lexus. The recall stated:

> The subject vehicles are equipped with a low-pressure fuel pump which may stop operating. If this were to occur, warning lights and messages may be displayed on the instrument panel, and the engine may run rough. This may result in a vehicle stall, and the vehicle may be unable to be restarted. If a vehicle stall occurs while driving at higher speeds, this could increase the risk of a crash.

An authorized Lexus dealer was to replace the fuel pump free of charge. The recall notice provided a timetable estimating the date it would be able to carry out the recall repairs due to unavailability of parts at the time the recall was issued. The estimated date for plaintiff's vehicle was "[l]ate May 2020."

Plaintiff became aware of the recall shortly after its issuance and contacted a Lexus dealer, JM Lexus near Boca Raton. Because the remedy for the recall was not yet available, plaintiff left the vehicle with JM Lexus and was provided a loaner vehicle.

In March 2020, plaintiff returned to New Jersey and planned to ship the Lexus from JM Lexus in Florida to Lexus of Englewood in New Jersey. Toyota contends substantial delays in obtaining the requisite parts resulted from the COVID-19 pandemic. Nonetheless, the Lexus arrived at Lexus of Englewood in March 2020, and the fuel pump was replaced on June 24, 2020, within a month after the date scheduled in the recall notice. Plaintiff was

supplied with a loaner vehicle during that time. A Lexus representative contacted plaintiff in June and informed him the fuel pump was replaced and the Lexus was ready for pickup. Plaintiff refused to pick up the vehicle, claiming it was a "lemon."

In December 2020, Lexus repossessed the vehicle because plaintiff had ceased making lease payments since February 2020. Before it was repossessed, defendant's expert inspected the vehicle and found it working properly, including the replaced fuel pump. Plaintiff provided no reason for failing to meet his financial obligations pursuant to the lease other than he had not been in possession of the car since January 2020.

Plaintiff filed a complaint in the Law Division, asserting Lemon Law, N.J.S.A. 56:12-29 to -49, breach of warranty, and Consumer Fraud Act, N.J.S.A. 56:8-1 to -227, claims. Following discovery, Judge Robert C. Wilson granted Toyota's motion for summary judgment, dismissing plaintiff's complaint with prejudice.

Judge Wilson rejected plaintiff's Lemon Law claim.[1] In a written decision, he noted the occurrence of whether a recall is sufficient to satisfy the

[1] Because plaintiff failed to include or brief any aspect of the trial court's rulings pertaining to the breach of warranty or Consumer Fraud Act claims, the only issue before us is plaintiff's Lemon Law claim. See N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) ("An

"nonconformity" element of a Lemon Law claim, pursuant to N.J.S.A. 56:12-30, was an issue of first impression in New Jersey. In finding plaintiff failed to bring a cognizable Lemon Law claim, the judge analogized from a case from the Southern District of California,[2] finding plaintiff could not make a Lemon Law claim because he failed to present any evidence, beyond the recall notice itself, demonstrating he experienced any defect with his vehicle, or any symptom of the recall issue, and thus could not demonstrate a nonconformity, much less one the defendant failed to repair. The trial court found the language of the California statute identical to the New Jersey Lemon Law statute. It further found, even if the Lemon Law statute applied, the unavailability of parts was a condition out of the defendant's control and defendant had overcome the presumption of timely repair in the statute.

On appeal, plaintiff argues because the vehicle was out of service for an "unreasonable amount of time," the manufacturer was required to give him a new vehicle or refund the full purchase price as well as other charges and fees. He further argues, because the vehicle was out of service for more than twenty

---

issue that is not briefed is deemed waived upon appeal."); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("It is, of course, clear that an issue not briefed is deemed waived.").

[2] See McGee v. Mercedes-Benz USA, LLC, 612 F. Supp. 3d 1051 (S.D. Cal. 2020).

days, a presumption existed that the repair was not done within a reasonable time. We are unpersuaded by plaintiff's arguments and conclude the Lemon Law does not apply in this situation.

When reviewing a motion for summary judgment, we employ the same standard of review as the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Pursuant to Rule 4:46-2(c), a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." In making this determination, "the motion judge [must] consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In deciding whether the motion court's interpretation of the law was correct, we apply no deference and review the judge's conclusions de novo. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 231 (App. Div. 2006).

In enacting the New Jersey Motor Vehicle Warranty Act, N.J.S.A. 56:12-29 to -49, the Legislature recognized "the purchase of a new motor

vehicle is a major, high-cost consumer transaction and the inability to correct defects in these vehicles creates a major hardship and an unacceptable economic burden on the consumer." N.J.S.A. 56:12-29. The Lemon Law is intended "to require the manufacturer of a new motor vehicle[] . . . to correct defects originally covered under warranty which are identified and reported within a specified period" and "to expeditiously resolve disputes" arising between the consumer and manufacturer. Ibid.

The Lemon Law provides procedural and substantive remedies for a lessee or purchaser of a motor vehicle in the event the vehicle contains a "nonconformity." Christelles v. Nissan Motor Corp., U.S.A., 305 N.J. Super. 222, 226 (App. Div. 1997). To assert a Lemon Law claim, the lessee must first prove the existence of a "nonconformity" in the subject vehicle. Berrie v. Toyota Motor Sales, USA, Inc., 267 N.J. Super. 152, 156-57 (App. Div. 1993). "Nonconformity" is defined as "a defect or condition which substantially impairs the use, value or safety of a motor vehicle." N.J.S.A. 56:12-30. Whether the defect causes substantial impairment is both an objective and subjective standard. Berrie, 267 N.J. Super. at 157. "[T]he facts must be examined from the viewpoint of the buyer and his circumstances" bearing in mind "what a reasonable person in the buyer's position would have believed." Gen. Motors Acceptance Corp. v. Jankowitz, 216 N.J. Super. 313, 335 (App.

Div. 1987). Additionally, "whether the nonconformity 'shakes the buyer's confidence' in the goods" is another factor to be considered. Berrie, 267 N.J. Super. at 157 (quoting Jankowitz, 216 N.J. Super. at 338).

Once a nonconformity exists, manufacturers must repair substantial defects within a reasonable period, and a plaintiff will meet its burden by illustrating "the nonconformity 'continues to exist' after the specified number of repairs or time out of service." Fedor v. Nissan of N. Am., Inc., 432 N.J. Super. 303, 313-14 (App. Div. 2013) (quoting DiVigenze v. Chrysler Corp., 345 N.J. Super. 314, 324 (App. Div. 2001)). In the event the manufacturer cannot repair the vehicle within the proscribed timeframe, the plaintiff "is entitled to a full refund of the purchase price of the vehicle in addition to 'any other charges or fees' associated with the ownership of the vehicle." Id. at 313 (quoting Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 254 (2005)). The plaintiff may elect to obtain a replacement vehicle if one is offered but is free to reject that option and obtain a refund. See N.J.S.A. 56:12-32(a)(3).

The trial court correctly determined there was no genuine issue of material fact and Toyota was entitled to judgment as a matter of law. Plaintiff failed to demonstrate the Lexus contained a "'[n]onconformity' . . . which substantially impair[ed] the use, value or safety of" his vehicle. N.J.S.A.

56:12-30. We decline to extend the Lemon Law's application to include recalls in situations where plaintiff has not demonstrated that its specific vehicle was affected in the manner that prompted the recall and conclude a plaintiff cannot rely solely on a recall notice to establish a cognizable nonconformity within the meaning of the statute. To rule so would lead to the absurd result that all vehicles subject to a recall notice are "lemons" pursuant to our statute. See N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 592-93 (2020) ("Statutes cannot be construed to lead to absurd results. All rules of construction are subordinate to that obvious proposition." (quoting Sun Life Assurance Co. of Can. v. Wells Fargo Bank, N.A., 238 N.J. 157, 174, n.3 (2019))).

Further, we need not consider the California statute as a plain reading of our New Jersey statute forecloses plaintiff's argument. "'The overriding goal is to determine as best we can the intent of the Legislature, and to give effect to that intent.' To that end, we look to the plain language of the statute as the best indicator of the intent of the Legislature. 'If the plain language leads to a clear and unambiguous result, then our interpretive process is over.'" Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 385 (App. Div. 2015) (internal citations omitted) (quoting Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007)).

First, plaintiff has failed to provide any proof of a cognizable defect, nor does he argue there was any issue with the vehicle, mechanical or otherwise, aside from the existence of the recall. At his deposition, plaintiff conceded from the time he obtained the car until he returned it to JM Lexus, he experienced no issues and stated he "was very satisfied with the Lexus until [Toyota] recalled it." Thus, by plaintiff's own admission, his vehicle did not contain a nonconformity that substantially impaired the value, use, or safety of the car. Plaintiff's failure to prove the existence of a nonconformity is fatal to his Lemon Law claim. See N.J.S.A. 56:12-40.

In addition, plaintiff's complete reliance on his fear the defect described in the recall notice would manifest itself is insufficient to satisfy his burden. While plaintiff's confidence in the vehicle may have been shaken due to the recall, this is but one factor to be considered and is not dispositive to showing a nonconformity exists. See Berrie, 267 N.J. Super. at 157. Plaintiff failed to put forth an expert to show the Lexus suffered from any deficiency, either before or after the fuel pump was replaced. Toyota presented an expert who opined the fuel pump was properly replaced and functioning as it should. At best, the low-pressure fuel pump was a potential defect, one that never came to fruition.

Plaintiff also argues the trial court erred in granting Toyota summary judgment because he was entitled to a presumption defendant was unable to repair the vehicle within a reasonable time as it was out of service for more than twenty days. See N.J.S.A. 56:12-33(a). A plaintiff is entitled to a presumption the manufacturer was unable to correct a nonconformity if the manufacturer or dealer is unable to do so in three or more attempts or the vehicle "is out of service by reason of repair for one or more nonconformities for a cumulative total of [twenty] or more calendar days." N.J.S.A. 56:12-33(a)(1)-(2). Because plaintiff has failed to prove the existence of a nonconformity despite any perceived presumption, this argument also fails.

Finally, we note even if plaintiff had proven a nonconformity with the Lexus such that he would have been entitled to a remedy under the Lemon Law, his claim is still not cognizable because he primarily utilized the Lexus for business purposes. Indeed, the statute distinguishes passenger automobiles and commercial automobiles, excluding the latter from coverage. See N.J.S.A. 56:12-30; N.J.S.A. 39:1-1. In determining whether a vehicle is commercial or personal in nature, courts look to types of insurance and whether the vehicle was claimed on personal tax returns. At his deposition, plaintiff testified most of his use of the Lexus was for business purposes: "I think it was mostly for, you know, business, for . . . selling insurance and going to clients — visiting

clients." On appeal, plaintiff does not argue his vehicle was used for personal purposes, nor does he dispute he primarily used the Lexus for business purposes. Further, he admitted he took business deductions or credits on his income taxes for the Lexus. Accordingly, because the Lexus was used mostly for commercial purposes, plaintiff cannot utilize the Lemon Law's remedies irrespective of his inability to demonstrate a cognizable Lemon Law claim.

Affirmed.