SUPREME COURT OF THE STATE OF NEW YORK
COUNT OF NEW YORK: CIVIL TERM: PART 12

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Vanessa Mercado,
Plaintiff,

- against -

BMW of North America, LLC and
BMW of Manhattan, Inc.,
Defendants.

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Index No. 101725/2006

Decision After Bench Trial

Appearances:

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PAUL G. FEINMAN, J.:

This is an action brought under both the Magnuson-Moss Warranty Act and New York's New Car Lemon Law. More specifically, plaintiff proceeded to trial against defendants on claims for: (i) breach of the written warranty pursuant to the Magnuson-Moss Warranty Act (15 USC § 2301); (ii) breach of the implied warranty under the Magnuson-Moss Warranty Act; (iii) revocation of acceptance under the Magnuson-Moss Warranty Act; (iv) award of costs, fees and expenses under the Magnuson-Moss Warranty Act; and (v) breach of New York's New Car Lemon Law.

This action was tried to the court on September 25 and 26, 2009 and October 23, 2008.

At the close of testimony, the matter was adjourned to November 25, 2008 to permit the parties an opportunity to submit proposed findings of fact and conclusions of law.

Findings of Fact

Vanessa Mercado bought a new BMW 325ci from BMW of Manhattan, Inc. on July 18, 2003 for a purchase price of $34,000.00, plus $2975.00 in sales tax, $120.00 in license fees and $20.00 for an inspection.

Repair 1 by BMW of Manhattan, Inc.

On December 23, 2003, Mercado sought repairs at BMW of Manhattan, Inc. According to the contemporaneous record made by BMW of Manhattan, Inc., the customer stated the vehicle's check engine light was on and the vehicle had 7,546 miles at the time of that repair. Ex. 6. *There is no mention in the invoice of Mercado reporting the vehicle shaking*; there is a statement that the interrogation of the fault memory indicated a misfire on cylinder 5, but according to the paperwork it only misfired once, and after the servicing the problem was no longer present and the car was running smooth and "well within specs." Ex. 6. There was no charge for the repair.

Repair 2 by BMW of Manhattan, Inc.

On February 10, 2004, Mercado took the car, which now had an odometer reading of 9,508 miles, in to be serviced because, as reflected in the invoice, she stated the "brake lining lamp is on." Ex. 7. The brakes were repaired for no charge, as well as a free oil change performed. Then, on March 17, 2004, when the vehicle had only 11,137 miles, Mercado brought the car in again. This time, the invoice reflects that the customer stated "the engine is running very rough and the car is shaking." Ex. 8. The invoice reflected that after checking the coil for

cylinder 5, by "swapping it out" with the coil for cylinder 1, it was determined that the coil for cylinder 5 was defective. It was replaced, and other minor work not relevant to this trial performed. Ex. 8. All the repair work was for no charge.

Repair 3 by BMW of Manhattan, Inc.

On August 3, 2004, when the car had 17,820 miles, Mercado had it towed into BMW of Manhattan. According to the invoice, Mercado stated the "check engine light is on, car runs rough, car shakes more when AC is on." Ex. 9. Once again, the diagnostic testing showed a misfiring of cylinder 5. Ex. 9. There was no charge to the plaintiff for the repairs.

Repair 4 by BMW of Manhattan, Inc.

The car towed in again on December 30, 2004 because, according to Mercado's statement as recorded in the invoice, "all warning lights on dash came on while driving on highway" and the "the vehicle had no power and would not accelerate" when the gas pedal was pressed. Ex. 12. The car's odometer reading was 23,493 miles. Ex. 12. According to the plaintiff, this breakdown occurred on the Long Island Expressway in the midst of a blizzard. After four days, the car was returned to Mercado and she was told it was fixed. There was no charge to plaintiff for the repairs.

Repair 5 by BMW of Manhattan, Inc.

On March 11, 2005, the car broke down again and was towed for a third time to BMW. Ex. 13. This time plaintiff was driving on the Brooklyn-Queens Expressway when it lost power. At this point the car had an odometer reading of 27,230 miles. Ex. 14. As with the previous repair, Mercado stated that "while driving all lights on dash came on, car lost power, would not accelerate, car would restart but was shaking excessively and [would] stall out again." Ex. 14.

Salvatore Rubino[1] an employee of BMW of Manhattan, Inc. testified credibly that for the March 22, 2005 repair, the car came in not running at all and that after BMW got it running they found a misfire. This time it appeared there were problems with cylinders 1 and 6. Ex. 14. There was no charge for the work performed and Mercado was notified to come and pick up the vehicle.

Discovery of Contaminant in Gas Tank and Voiding of Warranty

However, when she went to retrieve the car, Mercado refused to take it. According to a March 23, 2005 invoice, Ex. 15, the car did not leave the building because the check engine light came back on and the car "is shaking bad." As part of the computer diagnostics and repair work, the team supervised by Rubino found that the fuel in plaintiff's car was contaminated. This finding resulted in the fuel system warranty being immediately voided until such time that plaintiff had the vehicle repaired. In the language of the dealer, the car was "red flagged."

Because this model car is a Super Ultra Low Emissions Vehicle or SULEV, its fuel system is not easily repaired. In particular, its fuel pump and filter are sealed within the tank and the tank cannot be properly drained as there is no access. Rather, the tank needs to be replaced. The court specifically credits Rubino's testimony that he extracted a green-tinted water-based contaminant which separated from the gasoline. This contaminant was most likely anti-freeze.

Indeed, as plaintiff admitted, it was later confirmed to her that anti-freeze was found in her fuel tank in April 2005. This fact was confirmed to her by her own independent repair center, Unique Auto Repair. It bears noting that at around the same time, the vehicle was "keyed" or vandalized by someone known to plaintiff.

[1] The court found Mr. Rubino, who was called on both the plaintiff and the defendants' cases, to be a credible witness.

Repair of Gas Tank by Unique Auto Repair

Once the warranty was voided by BMW, plaintiff had the car towed to Unique Auto Repair, which is not an authorized BMW repair service provider. Ex. 17. They removed the gas tank, installed a new gas tank and "clean[ed] up the fuel line & injector." Ex. 17. There then ensued a correspondence between plaintiff and BMW of Manhattan, Inc. and BMW of North America, Inc., including a threat of litigation if they refused to re-instate the warranty. Ex. 18 - 22.

1st Post-Discovery-of-Contaminant Repair by BMW of Bayside

Henri Bock, an employee of non-party BMW of Bayside who had examined plaintiff's car after the warranty was voided, was called by the defendants. He believed the warranty had been reinstated once plaintiff had made the repairs to the gas tank. On June 15, 2005, the car, which now had 29,525 miles, was brought to BMW of Bayside, which found that the check engine light was on and the "vehicle runs rough." Ex. 23. Again, a problem with cylinder 5 was found, but the cause was found to be the work performed at Unique, that is, that their mechanics damaged or dislodged a fuel injector wire.

As George Stanley interpreted Unique's records, the mechanics at Unique removed the fuel injector harness. He opined that they did not replace it correctly. There was support for this opinion in the testimony of Henri Bock.

2nd Post-Disovery-of-Contaminant Repair by BMW of Bayside

On July 13, 2005, with Mercado again complaining that the vehicle's check engine light was on, the vehicle was serviced at BMW of Bayside. Ex. 24. The car now had 30,811 miles on the odometer; and the mechanics found that the rear brakes needed to be replaced. Ex. 24. No

complaint was recorded regarding the ride of the car and no problems with the cylinder or fuel injection system were found upon a diagnostic.

3rd Post-Discovery-of-Contaminant Repair by Rallye BMW

On September 13, 2005, Mercado's car was towed into a BMW dealership in Roslyn. It had an odometer reading of 34,215 miles. Ex. 26. Among other issues, the service indicator light was on. Apparently plaintiff had not had an oil service since 23,493 miles! Although she complained about "no power"and the car hesitating, the service mechanics found "no problem at this time." They did, however, note severe tire and wheel damage which made the car dangerous to drive. Plaintiff did not have these issues repaired by BMW.

October 2005 Accident

In October 2005, the plaintiff's car was involved in a serious accident which required $4,568.00 in repairs. Plaintiff's testimony that she could not recall the accident, even when shown the claims file, strains credulity.

Miscellaneous

The plain language of the warranty exempts from coverage "[d]amage which results from . . . use of . . . contaminated fuel."

By letter dated November 7, 2005, plaintiff, through her counsel, informed defendants, for the first time, of her revocation of acceptance of the vehicle. Ex. 27.

The above findings of fact are primarily gleaned from the documentary evidence. The court has not relied on Ms. Mercado's testimony which was not reliable and at times, in the court's view, purposefully evasive. She was overly defensive and argumentative on cross-examination when confronted with the fact that her co-workers had suggested to her that perhaps

someone she knew had vandalized her car by placing anti-freeze in the gas tank. Her testimony on cross-examination that she could not to recall her prior accident involving the car was troublesome. She conceded that she could not recall any specific repair history and her testimony about the car's problems was conveniently limited to the written repair orders introduced by her lawyer. To characterize her memory as selective would be charitable.

The Expert Testimony

a. Plaintiff's Expert: Darren Manzeri

Darren Manzeri was called by plaintiff as an expert witness. He was not credible. He impressed the court as tailoring his testimony to meet the exigencies of the case. Particularly disturbing to the court was his testimony that he never looked at or examined the car which was the subject of his testimony and never bothered to read the plaintiff's EBT testimony about her complaints and history with the car. Also troubling was his having missed the fact that the car had a Super Ultra Low Emissions Vehicle or a "SULEV," which was on the front page of a manual that he conceded he never looked at. This was not a minor point as explained below. He also conceded that he never fully examined the fuel system draining issue, nor had any idea that the plaintiff had taken a sample of the fuel tank's contents when she was informed that it contained a contaminant.

There were other examples brought out on cross-examination of Manzeri not getting all the available data before rendering his opinion, such as his not reading the warranty manual other than one specially requested page. He did not know that the vehicle was taken to an independent auto repair center by plaintiff in April 2005, where fuel contamination was confirmed and a fuel injector wire damaged. All of this, along with the fact that he has made a cottage industry

testifying in these kinds of cases, were factors the court considered in determining that Manzeri's expert opinion was not worthy of belief.

b. *Defendant's Expert: George Stanley*

George Stanley, a Regional Technical Engineer for BMW of North America, was called as as expert witness who had a particularized knowledge of the SULEV engine system. The court found him to be a credible witness. He reviewed the repair history of the vehicle and, unlike Manzeri, inspected the plaintiff's vehicle. He explained that in August 2004 at 17, 820 miles, all the coils in plaintiff's car were replaced. This eliminates faulty coils as the cause of any shaking, rough running, or misfiring. The court credits George Stanley's testimony that the cause of any shaking and rough running complaints by the plaintiff was the fuel contaminant in the gas tank and that Unique did not properly repair the fuel system. The court found Stanley a credible witnesses, notwithstanding his concession that he had erred in his EBT when he indicated that there was no computer code for contaminant in the fuel system.

Conclusions of Law

I. Breach of the Written Warranty Pursuant to the Magnuson-Moss Warranty Act

The court concludes that defendants did not breach the written warranty pursuant to the Magnuson-Moss Warranty Act. When the dealer was presented with problems not due to the owner's mishandling or vandalism (failure to change oil and brakes in a timely fashion, contaminants in the gas tank, car accident), it repaired the car and replaced parts in a reasonable period of time. The written warranty was not unconditional. It exempted damage resulted from use of contaminated fuel. While the documentary evidence shows that the plaintiff brought in the car for numerous repairs, it also shows that they were not all for the same complaint and were

not all due to problems the manufacturer or dealership created. To the contrary. The court is unpersuaded that the car failed its essential purpose. Indeed, at the time of trial it had an odometer reading in excess of 74,000 miles.

II. Breach of the Implied Warranty under the Magnuson-Moss Warranty Act

Mercado claims she has demonstrated that her vehicle was not merchantable at the time of delivery. Accordingly, Mercado claims she has shown that BMW breached the implied warranty of merchantability, thus causing her damages.

Plaintiff points out that the Uniform Commercial Code, as adopted in New York at UCC 2-314 (2), defines the minimum standards that goods must meet in order to be considered "merchantable." For example, in the instant matter, at the time of purchase the vehicle must have been capable of passing in the new car trade without objection, it must have been of fair and average quality for a vehicle with its mileage and must have been fit for its intended purpose.

It bears noting that the first repair did not involve a complaint of shaking and rough riding. It is not noted on the invoice, and testimony by plaintiff on this and other points was not credible. By the time of the fifth repair, the credible evidence supports a conclusion that many of the car's prior rough riding problems were due to vandalism of the gas tank system with a contaminant. Otherwise stated, the court is unpersuaded by a preponderance of the credible evidence that the fourth or fifth repairs were due to a problem which can be laid at the feet of defendants. The problem with cylinder 5 misfiring diagnosed at the time of the second and third repairs does not rise to the level of demonstrating in this court's view that the vehicle was not *merchantable at the time of delivery.* In short, the testimonial evidence offered by plaintiff was not credible and the documentary evidence, when scrutinized, does not assist her in carrying the

burden of proof regarding the condition of the car at the time of delivery.

III. Revocation of Acceptance Under the Magnuson-Moss Warranty Act

As plaintiff's counsel points out in a post-trial memorandum, a claim for revocation of acceptance has specific elements. Pursuant to the Uniform Commercial Code 2-608, as adopted in New York, a party is entitled to revoke acceptance of goods if: 1) the goods fail to conform to the terms of the warranties; 2) the value of the goods is substantially impaired by the non-conformities; 3) the non-conformities could not have been reasonably detected at the time of delivery; and 4) the revoking party acts within a reasonable time after discovering the grounds for revoking acceptance. Here, plaintiff fails to satisfy prongs 1, 2, and 4 of this test. She has not, as already discussed in sections I and II above, established that the vehicle was non-conforming and that its value was substantially impaired. Furthermore, even if the court were to credit her testimony and that of her expert so as to find that the first five repairs constituted credible proof of a non-conforming car in breach of the defendants' express and implied warranties, it cannot be said that she acted within a reasonable time after discovering the grounds for revoking acceptance. Accepting her view of the facts of the case (which the court does not), the first three repairs all related to a rough ride and a misfiring problem with cylinder 5. This third repair was in August 2004, and revocation was not attempted until November 2005. This is not timely revocation after discovery of the claimed non-conformity.

IV. Award of Costs, Attorney's Fees and Expenses Under the Magnuson-Moss Warranty Act

Inasmuch as plaintiff has not prevailed, she is not entitled to costs, attorney's fees or expenses.

V. Breach of New York's New Car Lemon Law, General Business Law § 198-a

The New Car Lemon Law provides a remedy to consumers whose new cars "do not conform to all express warranties during the first eighteen thousand miles of operation or during the period of two years following the date of original delivery of the motor vehicle to such consumer, *whichever is the earlier date*" (General Business Law § 198-a [b] [1] [emphasis added]). Here, the earlier date is the first 18,000 miles of operation, which limits the court's consideration to the first three repair orders, only two of which specifically note a complaint of rough riding or shaking (Exs. 8 & 9). The statute provides a remedy if a "manufacturer or its agents or authorized dealers are unable to repair or correct any defect or condition which substantially impairs the value of the motor vehicle to the consumer after a reasonable number of attempts" (General Business Law § 198-a [c] [1]).

While the question of what constitutes a "reasonable number of attempts" is ordinarily a question of fact and, as such, turns on the particular circumstances of each case, it bears noting that the statute provides a presumption that if the same nonconformity, defect or condition is the subject of four or more repairs within the controlling period, here the first 18,000 miles, it is presumed that the manufacturer has been given a reasonable number of attempts to fix the problem. (General Business Law § 98-a [d] [1]). Here, the presumption does not apply. There were only three repair orders which were made while the car had less than 18,000 miles; only two show that there was a complaint of shaking or riding rough. Even if the court were to consider the first repair order as evidence of a complaint of rough riding and shaking, which it is not, the plaintiff has failed to show that she is entitled to a remedy under the Lemon Law because there were not a reasonable number of attempts made to allow the manufacturer to fix the problem within the first 18,000 miles and because the problem complained of did not

substantially impair the value of the motor vehicle. While the defendant cannot establish the affirmative defense of abuse and neglect of the vehicle within this period, it was certainly established for the rest of the car's continued use. However, the court need not consider whether defendant established a defense because the plaintiff has not established a right to a remedy under the Lemon Law by a preponderance of the credible evidence.

Conclusion

The plaintiff failed to carry her burden of proof at trial on any of her causes of action. Accordingly, the Clerk of the Court shall be directed to enter judgment dismissing the complaint in its entirety.

This is the decision of the court after trial.

Dated: October 12, 2009

J.S.C

HON. PAUL G. FEINMAN