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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

CHERYL S. JOHNSEY,  
Plaintiff,

vs.

L. C. DAILEY,  
d/b/a DAILEY MOTORS,  
Defendant.

CIVIL ACTION

FILE NO. C75-103

10986  
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BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

On April 28, 1975, defendant sold plaintiff a certain 1975 Ford automobile, serial number GA18327. In conjunction with the sale, the defendant contends that he presented plaintiff with a document a copy of which is hereunto attached as Exhibit "B". Plaintiff denies receipt of that document, but submits that even accepting defendant's contention, she is entitled to summary judgment as that document itself fails to comply with the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §1981 et seq.

Defendant is a person engaged in the business of selling retail used automobiles, and has been so engaged at all times relevant to this complaint.

The above mentioned automobile was sold by defendant to plaintiff strictly for her personal consumer use.

Jurisdiction and venue are admitted by virtue of defendant's answers to paragraphs one and two of plaintiff's complaint.

Plaintiff seeks judgment against defendant in the amount of \$1,500.00 plus reasonable attorney's fees and court costs, pursuant to 15 U.S.C. §1989.

ARGUMENT

The Act provides, in pertinent part, that the Secretary of Transportation shall prescribe rules

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requiring any transferor to give the following written disclosure to the transferee in connection with the transfer of ownership of a motor vehicle:

- (1) Disclosure of the cumulative mileage registered on the odometer.
- (2) Disclosures that the actual mileage is unknown, if the odometer reading is notably different from the number of miles the vehicle has actually travelled. 15 U.S.C. §1988.

Section 408(a) also provides the rules shall prescribe the manner in which the information shall be disclosed. Section 408 makes it a violation of the Section for any transferor to violate any rules under Section 408, or to knowingly give a false statement to a transferee in making any disclosure required by the rule.

The rules promulgated by the Secretary are found in 49 CFR §580 (38 FR 2978, January 31, 1973). The pertinent portions of the Regulations are found in §580.4, and read, in pertinent part as follows:

- (a) Before executing any transfer of ownership document, each transferor of a motor vehicle shall furnish to the transferee a written statement signed by the transferor, containing the following information:
  - (1) The odometer reading at the time of transfer; and unless otherwise provided for elsewhere in the transfer document integral with the odometer disclosure,
  - (2) the date of transfer;
  - (3) the transferor's name and address; and
  - (4) the identity of the vehicle, including the make, model, and body type, its vehicle identification number, and its last plate number.
- (b) In addition to the information provided for under (a), the statement shall refer to the motor vehicle information and costs savings act and shall state that incorrect information may result in civil liability under it.
- (c) In addition to the information provided under (a) if the transferor knows that the odometer reading differs from the number of miles the vehicle has actually travelled, and that the difference is greater than that caused by odometer calibration error, he shall include a statement that the actual mileage is unknown.

In this case, the seller made absolutely no disclosure of the odometer disclosure to plaintiff. Clearly, then, the Act itself was violated.

The question that next arises, then, is whether the plaintiff is entitled to the civil penalty for failure to provide the information with "intent to defraud". In Ortiz v. Marietta Dodge,

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Inc., C.A. No. C74-1861A (N.D. Ga., 1975, Edenfield, J.), a copy of which is hereunto attached, the court ruled that the mere fact that the car dealer failed to comply with all of the requirements of the Act without reasonable excuse was sufficient to impose liability. In that case, as in this one at this point, there was absolutely no evidence that the defendant had actually altered the odometer of the automobile.

To plaintiff's knowledge, there are only two other cases which even mention the Odometer Disclosure Act. The first involved a Michigan statute under which a criminal conviction was had for altering odometer readings on motor vehicles offered for sale. People v. Jack Dystra Ford, Inc., 52 Michigan App. 337, 217 N.W.2d 99 (1974). Because of an exculpatory clause, not found in the Federal Statute involved herein, the conviction was reversed. In doing so, the court noted:

There is absolutely no doubt that somebody turned the odometer back... somebody violated the plain terms of the Act. We add, again gratuitously, that this was no prank. *If it was done by the dealer or his agent, it was done with the guilty purpose of deceiving a used car buyer.* (Emphasis supplied). 217 N.W.2d 99 at 102.

In making this statement the court was recognizing what a reasonable man know to be true, that is, that no one would deliberately fail to comply with the Act's requirements unless he wanted the potential buyer not to be aware of a fact which would be revealed if compliance were made. There can be no other reason for this attitude than an attempt to defraud. Thus, when defendant did not furnish plaintiff with the information mandated by the Act and Regulations, it clearly intended to deceive the plaintiff. Defendant could easily have conformed to the actual requirements even by merely stating that it did not know the mileage on the vehicle. Obviously, defendant did not want to say what federal law required him to say because it was not in defendant's interest.

The only other reported case is Dearly v. Hearn Ford, 373 F.Supp. 791 (D.C.S.C., 1974). In that case, it was held that

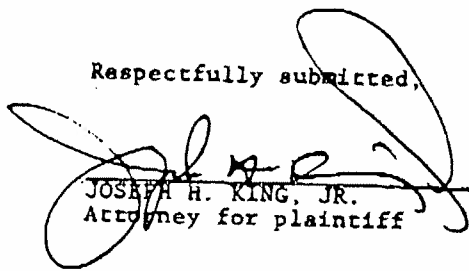
a dealer could be liable under the Act even though the buyer was the previous owner of the automobile. The court further stated:

All that is required of a purchaser before recovery will be allowed is that a change in the odometer reading has occurred, and the seller has failed to disclose the change. An intent to defraud arises when proof of the foregoing in the absence of an explanation of the odometer change. 383 F.Supp. 791 at 976.

For the foregoing reasons, then, plaintiff submits that she is entitled to judgment as a matter of law, and, as she is able to show any actual damages in excess of \$500.00, the appropriate penalty in this case is \$1,500.00, as prescribed by the Act.

WHEREFORE, plaintiff respectfully moves that this court grant her judgment against defendant in the amount of \$1,500.00 plus costs on Count Two of her complaint, and that a hearing be held at the earliest opportunity to determine reasonable attorney fees.

Respectfully submitted,

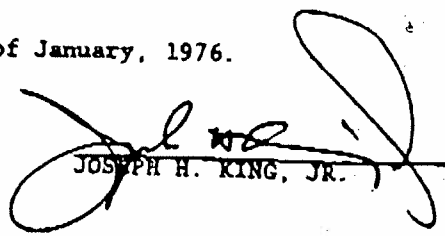
  
JOSEPH H. KING, JR.  
Attorney for plaintiff

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Atlanta, Georgia 30303  
(404) 577-7001

CERTIFICATE OF SERVICE

This is to certify that I have this day served B. J. Smith Esq. with a copy of this motion and brief by mailing him the same at Suite 310, 125 Trinity Place, Decatur, Georgia 30030, first class, postage prepaid.

This 22 day of January, 1976.

  
JOSEPH H. KING, JR.

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 NATIONAL CLEARINGHOUSE  
 FOR LEGAL SERVICES

*F - Odometer*

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 BEN H. CARTER, C  
 By: *BS*  
 Deputy

THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF GEORGIA  
 ATLANTA DIVISION

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CHERYL S. JOHNSEY §  
 v. § CIVIL ACTION FILE NO.  
 L. C. DAILEY, § C 75-1032 A  
 d/b/a DAILEY MOTORS §  
 § ORDER

The complaint in this action was filed on June 2, 1975 and alleges in Count I violations of the federal Truth-in-Lending Act, 15 U.S.C. §1601, et seq., and in Count II violations of the federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §1981 et seq. Pursuant to Local Court Rule 250 the Truth-in-Lending allegations of Count I were submitted to a Special Master for findings of fact and conclusions of law.

The Special Master filed his report on January 29, 1976 and recommended that plaintiff's motion for summary judgment as to Count I be granted. The Court has carefully reviewed this report and agrees with the Special Master's conclusions. Accordingly, plaintiff's motion for summary judgment as to Count I is GRANTED. Plaintiff is entitled on Count I to receive \$100.00 statutory damages plus \$250.00 as reasonable attorney's fees.

On January 12, 1976, plaintiff filed a motion for summary judgment as to Count II of the complaint. Defendant has chosen not to file any papers in opposition to this motion, and consequently, the Court must assume the facts as stated in plaintiff's motion are correct and that defendant does not oppose the granting of the motion. Local Court Rules 91.2 and 91.7.

Title IV of the Motor Vehicle Information and Cost Savings Act provides for a civil penalty for failure to provide certain information relative to the odometer reading of a vehicle with "intent to defraud." In the instant case defendant made no disclosure of the required odometer information to plaintiff when plaintiff bought the vehicle from defendant. It appears that "intent to defraud" may be inferred from the mere fact that the car dealer failed to comply with all of the requirements of the Act and Regulations without providing a reasonable excuse. Such conduct is sufficient to impose civil liability. Ortiz v. Marie Dodge, Inc., C74-1861A (N.D. Ga. July 30, 1975). See also Delay v. Ford, 373 F.Supp. 79 (D.S.C. 1974).

It therefore appears that on the present record, without a response from defendant to plaintiff's motion, summary judgment should be granted in favor of plaintiff. It further appears that plaintiff is entitled to statutory damages in the amount of \$1,500.00 and that defendant is liable for reasonable attorney's fees. Plaintiff's motion for summary judgment as to Count II is GRANTED. Counsel for plaintiff is directed to file with the Clerk within 10 days of the date of this order, an affidavit in support of his claim for attorney's fees. In addition, the Court will reconsider the granting of this motion on its merit upon the filing by defendant, within 10 days of the date of this order, of papers in opposition to the motion.

SO ORDERED, this 24<sup>th</sup> day of March, 1976.

JAMES C. HILL  
United States District Judge