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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BRIAN ROSS,

Plaintiff,

-v-

No. 00 024475 NZ

BOB SAKS TOYOTA, INC., a Michigan corporation, ROBY E. ADAIR, an individual, NATIONAL CITY BANK OF MICHIGAN-ILLINOIS, a foreign banking corporation, SPEEDY MOTORS & COLLISION, L.L.C., a Michigan Limited Liability Company, and CONTINENTAL INSURANCE,

Defendants.

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OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT
SPEEDY MOTORS & COLLISION, L.L.C.'S MOTION FOR SUMMARY
DISPOSITION AND GRANTING PLAINTIFF LEAVE TO AMEND COMPLAINT

At a session of said Court held in the Courthouse
in the City of Pontiac, County of Oakland, and
State of Michigan on July 11, 2001.

PRESENT: HONORABLE RICHARD D. KUHN, CIRCUIT JUDGE

This motion is before the Court on Defendant Speedy Motors
& Collision, L.L.C.'s motion for summary disposition. The
parties waived oral argument and the Court took the motion under
advisement.

This action arises out of Plaintiff's lease of a motor
vehicle from Defendant Bob Saks Toyota, Inc (Bob Saks).
Defendant Speedy Motors & Collision, L.L.C. (Speedy) moves for
summary disposition pursuant to MCR 2.116(C) (8) and (10).

Plaintiff leased a 1999 Saturn from Defendant Bob Saks in
October 1999. Plaintiff alleges that soon after, he began to
have trouble with the car. Plaintiff took the car to a
dealership for repairs and was informed that the car had been in
a collision and was no longer covered by the manufacturer's
warranty.

The Saturn was originally owned by Veronica Gulley, and was
involved in a collision on May 4, 1999. At the time of the
collision the vehicle was insured by Defendant Continental
Insurance Company (Continental). The vehicle title was signed

over to Defendant Continental, who did not obtain a salvage title. Defendant Continental transferred the vehicle to Defendant Speedy for the amount of \$5,095.

Defendant Speedy did not obtain a salvage title. Defendant Speedy repaired the vehicle, and sold the Saturn to Defendant Bob Saks in September 1999 for the amount of \$10,500. Defendant Bob Saks leased the vehicle to Plaintiff in October 1999. Plaintiff alleges that Defendant Bob Saks did not inform Plaintiff that the vehicle had been in a collision, and represented that the vehicle was covered by a manufacturer's warranty.

Plaintiff brought suit alleging ten counts. Three counts pertain to Defendant Speedy. Defendant Speedy moves for summary disposition pursuant to MCR 2.116(C)(8) and (10).

The grounds for summary disposition pursuant to MCR 2.116(C)(8) are that "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). Only the pleadings may be considered when ruling on a motion for summary disposition pursuant to MCR 2.116(C)(8). *Horace v City of Pontiac*, 456 Mich 744, 749 (1998). "[A] motion for summary disposition is granted if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Simko v Blake*, 448 Mich 648, 654 (1995).

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Defendant Speedy alleges that Plaintiff has failed to state a claim on which relief can be granted pertaining to Count I, entitled "Fraud and/or Misrepresentation." There are six elements to a claim for fraud: (1) the defendant made a material misrepresentation, (2) the representation was false, (3) when the defendant make the misrepresentation he knew it was false, or made it recklessly without any knowledge of its truth, (4) that defendant made the misrepresentation with the intention that the plaintiff act on it, (5) that the plaintiff acted and relied on the misrepresentation, and (6) the plaintiff suffered damages as a result. *Temborius v Slatkin*, 157 Mich App 587, 597 (1986).

Defendant Speedy argues that Plaintiff did not allege all six of the elements of fraud. Plaintiff argues that the complaint clearly alleges fraud. Plaintiff alleges that Speedy's failure to obtain a salvage title was fraud.

Plaintiff does allege all six elements of fraud in the complaint. The complaint states, "Defendant Speedy thereafter transferred its interest in the vehicle to Defendant Bob Saks, and, in connection with said transfer, executed such title documents as would permit the transfer of the vehicle without disclosure of its salvage condition." (Complaint, ¶ 23.) This paragraph alleges a misrepresentation.

The complaint goes on to state,

The aforesaid transfers of the vehicle were made with actual knowledge or under circumstances from which Defendants knew or should have known that the vehicle was a "salvage" vehicle and/or had sustained major damage so as to void the manufacturer's warranty, and that the true condition of the vehicle would remain undisclosed to subsequent purchasers who were, not in the business of buying, selling or repairing vehicles, thereby benefitting [sic] Defendants.

(Complaint, ¶ 25.)

This paragraph alleges the second, third, and fourth elements of fraud. Paragraphs 27 and 28 of the complaint clearly allege the last two elements of fraud. Accordingly, Defendant Speedy's motion for summary disposition for failure to state a claim for fraud is denied.

Defendant Speedy moves for summary disposition of Plaintiff's claim under the Michigan Consumer Protection Act (MCPA), Count VI. MCL 445.901 et seq. Defendant Speedy argues that none of Plaintiff's allegations in the complaint constitute an "unfair, unconscionable, or deceptive method, act, or practice in the conduct of trade or commerce" as defined in MCL 445.903. Defendant Speedy also argues that the definitions in MCL 445.903 imply that there is a direct relationship between the two parties, and Defendant Speedy did not have direct contact with Plaintiff.

Plaintiff argues that Defendant Speedy is liable to Plaintiff under the MCPA regardless of privity. Only specific definitions in MCL 445.903 require that the wrongdoer be in privity with the Plaintiff, not the entire section. Plaintiff only alleges in his brief that Defendant Speedy committed the prohibited conduct of MCL 445.903(e) and (y), therefore the Court will only address these two sections. Plaintiff sufficiently alleges Defendant violated MCL 445.903(e) by executing title documents in a way that would enable transfer of title without disclosing that the vehicle was in salvage condition.

MCL 445.903(y) prohibits "[g]ross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits." However, Plaintiff does not allege that Defendant Speedy made any oral representations to Plaintiff, or that Defendant Speedy promised benefits.

Defendant Speedy also argues that the alleged conduct is exempt from prosecution under the MCPA because MCL 445.904(1)(a) exempts conduct authorized under statutory authority. Defendant Speedy argues that the transfer of title was done in accordance with MCL 257.233 and was therefore exempt from prosecution. The

conduct Plaintiff alleges is prohibited by the MCPA was not transferring the title, it was transferring the title in such a way as to prevent disclosure of the salvage condition. This conduct is not authorized by statute.

Defendant Speedy's motion for summary disposition is granted with respect to MCL 445.903(y) and denied with respect to MCL 445.903(e).

Defendant Speedy also moves for summary disposition pursuant to MCR 2.116(C)(10). In reviewing a motion for summary disposition under MCR 2.116 (C)(10), the court should consider the affidavits, pleadings, depositions, admissions, and documentary evidence in a light which is most favorable to the non-moving party. The court may grant the motion where the affidavits and other evidence presented show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358 (1996). In responding to the motion, the non-moving party must present evidence creating a genuine issue of material fact for trial. *Smith v Globe Life Insurance Co*, 460 Mich 446 (1999).

Defendant Speedy argues that there is no genuine issue of material fact as to whether Defendant Speedy violated the MCPA. MCL 445.903. As addressed above, Plaintiff alleges that

Defendant's actions were prohibited by MCL 445.903(e). Plaintiff supports his allegation that Defendant Speedy should have obtained a salvage title with an affidavit from Edward Jacques, owner of Auto Tech Collision Center. (Plaintiff's Brief, Exhibit B.) The affidavit raises genuine issues of material fact regarding the cost to repair the vehicle after the collision and the pre-damage value of the vehicle. A genuine issue of material fact exists regarding whether Defendant Speedy violated MCL 445.903(e) by failing to obtain a salvage title. Summary disposition on this issue is denied.

Defendant Speedy also argues that no genuine issue of material fact exists regarding Plaintiff's claims under of MCL 257.217c, Count VII. MCL 257.217c(16) provides a formula to determine when a salvage or scrap title is needed for a distressed vehicle. A distressed vehicle is a vehicle with damage to a major component part "to the extent that the total estimated cost of repairs to rebuild or reconstruct the vehicle, including parts and labor, is equal to or exceeds 75% of the actual cash value of the vehicle in its predamage condition." MCL 257.12a.

A dealer who acquires ownership of a distressed vehicle, without a salvage or scrap title, must apply for a salvage title if "the estimated cost of repair, including parts and labor, is

equal to or greater than 75% but less than 91% of the predamage actual cash value of the vehicle..." MCL 257.217c. A scrap title is needed for cars with a cost of repair that equals or exceeds 91% of the predamage value. *Id.*

Defendant Speedy argues that when they acquired title to the Saturn from Defendant Continental the estimated cost of repair was 70% of the vehicle's predamage value, therefore it was not a distressed vehicle and a salvage title was not required. Plaintiff provided an affidavit from the owner of Auto Tech Collision Center, Edward Jacques, stating that the predamage value of the vehicle at the time of the collision was \$12,800 and the estimated cost to repair the vehicle was \$12,385.35. (Plaintiff's Brief, Exhibit B.) The percentage of the predamage value would therefore be approximately 97%. A genuine issue of material fact exists as to whether the vehicle needed at a minimum a salvage title, or possibly even a scrap title.

Defendant Speedy argues that it relied on Defendant Continental's estimate of repairs and predamage value, and was under no obligation to verify these estimates. It is a familiar principle of statutory construction "that '[e]very word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible.'" *Altman v*

Meridian Twp, 439 Mich 623, 635 (1992) quoting Baker v General Motors Corp, 409 Mich 639, 665 (1980). MCL 257.217c(14) requires the insurance companies to apply for salvage titles following the same formulas for salvage and scrap as stated in MCL 257.217c(16), which applies to dealers. Speedy is a "dealer" as that term is defined by MCL 257.11. Allowing dealers who purchase vehicles from insurance companies to rely on the insurance company or other seller to determine whether a salvage or scrap title is necessary would render MCL 257.217c(16) as surplusage. In order to give MCL 257.217c(16) effect, it must be interpreted to place responsibility on dealers to determine themselves whether a vehicle is a distressed vehicle necessitating a salvage or scrap title.

A genuine issue of material fact exists as to whether the Saturn was a distressed vehicle needing a salvage or scrap title at the time Defendant Speedy acquired title to the vehicle. Defendant Speedy's motion for summary disposition regarding the claim under MCL 257.217c is denied.

Plaintiff asks for leave to amend the complaint pursuant to MCR 2.115(I)(5). MCR 2.115(I)(5) states that "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless evidence then before the court shows that an amendment would not be justified." Plaintiff

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argues that he should be allowed to amend because discovery has revealed facts not available at the time of filing that justify additional claims against Defendant Speedy.

Defendant Speedy argues that Plaintiff should not be allowed to amend the complaint. Defendant Speedy argues that Plaintiff's motion to amend violates the Order to Stay Proceedings. However, the order only stayed the case for 180 days, and has almost expired.

Defendant Speedy also argues that Plaintiff's motion to amend is made in bad faith. Defendant Speedy claims that Plaintiff has had the information relied on for the additional claims since August 2000 and the affidavits since September 2000. Defendant also argues that Plaintiff's proposed amendments are futile because Plaintiff has no proof that Defendant Speedy caused the damage to the car.

Defendant Speedy has offered no support for its claim that Plaintiff moves to amend in bad faith, other than the timing of the motion. An Order to Stay Proceedings for 180 days was entered in January 2001. While Plaintiff could have moved to amend before the stay was ordered, Defendant Speedy does not argue that it will be prejudiced by an amendment at this time.

The amendments proposed by Plaintiff are not futile. Amendments are considered futile if they are legally

insufficient on their face. *McDonald v PKT, Inc*, 233 Mich App 395, 402 (1999). Plaintiff alleges that the Saturn has not been in a collision since Plaintiff leased it. (Complaint, ¶ 15.) It is undisputed that Defendant Speedy rebuilt the vehicle after purchasing it from Defendant Consolidated. The amendments Plaintiff proposes are not legally insufficient and can be supported by the evidence before the Court. Accordingly, Plaintiff is entitled to amend the complaint pursuant to MCR 2.116(I) (5), upon expiration of the stay.

Summary disposition is denied for the fraud claim, the claim under MCL 257.217c, and the claim under MCL 445.903(e) for the above state reasons. Summary disposition is granted regarding MCL 445.903(y). Plaintiff is granted leave to amend the complaint.

~~WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED~~ that Defendant Speedy's motion for summary disposition is granted in part and denied in part as set forth above.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's motion to amend Complaint is granted, and Plaintiff may amend his Complaint upon expiration of the stay.

RICHARD D. KUHN

RICHARD D. KUHN, CIRCUIT JUDGE

A TRUE COPY
G. WILLIAM CADDELL
Oakland County Clerk - Register of Deeds
By *G. Williams*
Deputy