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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

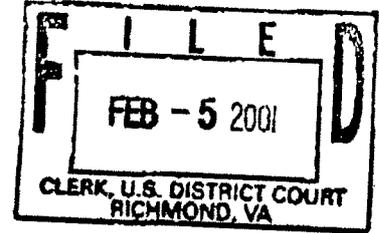
STEVEN SCOTT HARRIS
and MARY R. HARRIS,

Plaintiffs

v.

UNIVERSAL FORD, INC.
and FORD MOTOR CREDIT
COMPANY,

Defendants.



Civil Action No. 3:00CV693

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

This matter is before the Court for its Report and Recommendation as to the resolution of the Defendant Ford Motor Credit Company's (Ford Credit) Motion to Dismiss Count III (actual and constructive fraud) and Count IV (breach of Virginia Consumer Protection Act) (VCPA) pursuant to Fed. R. Civ. P. 12(b)(6). Ford Credit does not challenge the legal sufficiency of Count I (Federal Odometer Act violations)¹ and it is not named in the remaining Count II (warranty claim) against the other Defendant, Universal Ford, Inc. (Universal), which has not joined in Ford Credit's motion.

Motion To Dismiss

Ford Credit's position as to the facial insufficiency of the allegations in Counts III and IV

¹Counsel for both the Plaintiffs and Ford Credit suggest that Count I may be withdrawn in any event, depending on the results of ongoing discovery. The Court has analyzed the relevant issues (including pendant jurisdiction over state law claims) in light of such a possibility, the result being the same for the reasons stated, *infra*, with or without Count I's "survival."



can be summarized as follows:

1. The basic requirements for sustaining a claim of fraud against it (Count III) cannot be sustained under controlling Virginia law because there was no relationship between Ford Credit (essentially in the position of a wholesaler) and the Plaintiffs who admitted in discovery that they did not even know of Ford Credit's involvement and therefore did not rely on any false representations from it to their detriment;
2. Ford Credit cannot be considered a "supplier" involved in a commercial transaction as required to sustain any alleged violation under the VCPA (Count IV);
3. This Court should decline federal jurisdiction in any event as to both Counts III and IV because they only involve issues of state law and are based on operative facts (alleged fraud) that are materially different from those of Count I (odometer tampering) which provides the only basis of federal jurisdiction to "keep" Ford Credit in the case; and
4. The Plaintiff's claim for punitive damages should be stricken in any event as a matter of law because there is no set of facts under which relief could be granted especially where Ford Credit and the Plaintiffs did not have any direct commercial relationship.

Factual Allegations

The following factual allegations are made by the Plaintiffs in their Complaint (or are reasonably inferred from that which is specifically plead) which must be considered as true pursuant to the applicable standard, discussed *infra*, for purposes of the resolution of the motion:

1. Ford Credit owned the subject vehicle before selling it at auction to Universal. (Compl. ¶¶ 6-7);
2. The vehicle frame had been significantly damaged during Ford Credit's ownership and before its sale to Universal. (Compl. ¶ 9);
3. Ford Credit was aware of the damage to the vehicle before selling it to Universal. (Compl. ¶¶ 9, 11-12);
4. Ford Credit failed to notify Universal of any damage to the vehicle before selling it to Universal. (Compl. ¶¶ 12, 15, 16);

5. Ford Credit provided Universal with some documentation after the sale which disclosed some damage to the vehicle, but not the true extent of the damage (including the frame damage). (Compl. ¶¶ 18, 24);
6. Universal sold the vehicle to the Plaintiffs representing that it had never been damaged or repaired and was otherwise in excellent, "cherry" condition. (Compl. ¶¶ 19, 20, 21, 23); and
7. The Plaintiffs discovered the true extent of the damage to the vehicle only after they purchased it and the damage significantly reduced its value,² also rendering it at least less safe to operate. (Compl. ¶¶ 29-31, 34).

Rule 12(b)(6) Standard

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is a challenge on the face of the pleadings to the effect that even accepting as true all non-conclusory factual allegations in the complaint and drawing all reasonable inferences in favor of the non-moving party, the plaintiff cannot prevail as a matter of law. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Adams v. Baun*, 697 F.2d 1213, 1216 (4th Cir. 1982); *Puerto Rico ex Re. Quiros v. Alfred L. Snapp & Sons*, 632 F.2d 365, 367 (4th Cir. 1980); *Johnson v. Mueller*, 415 F.2d 354, 355 (4th Cir. 1969); *Mackethan v. Peat Marwick, Mitchel & Co.*, 439 F.Supp. 1090, 1094 (E.D. Va. 1977).

Analysis

Fraud - Actual or Constructive

The essence of Ford Credit's position on the fraud allegation (Count III) is that it could never be found to be liable because it did not have any "special relationship" with the Plaintiffs who could therefore not claim to have been misled by Ford Credit on the basis of any

²Alleged to be \$5000 on a total purchase price of \$13,622.02. (Compl. ¶ 29-30).

misrepresentation.³ In support of its position, Ford Credit urges upon the Court Virginia trial court precedents, namely, Samuels v. Fredericksburg Motorcars, 1997 WL 1070463 (Va. Cir. Spotsylvania County 1997), and Darden v. Vinton Car Connection, Inc., 41 Va. Cir. 465 (City of Roanoke 1997), for the proposition that Virginia law requires privity⁴ between the alleged offending party and the victim to constitute fraud. The Court in Samuels did hold in a factually-similar scenario that a prior individual owner of a vehicle could not be held liable to an ultimate purchaser under a theory of constructive fraud for failing to designate a vehicle as "salvage" due to non-repairable damage because there was no actual or foreseeable "special relationship" (including any communication) between the parties. Likewise, in Darden, another Virginia trial court sustained a demurrer in favor of one of the defendants, an automobile inspection service, holding that it could not be held to be liable to the purchaser of a used car with whom "they had no contact" for failing to disclose damage to the vehicle which it inspected prior to its resale by another party to the plaintiffs.

Ford Credit also asserts that this Court (United States District Court, Eastern District of Virginia, Norfolk Division) has ruled similarly in requiring that "[o]ne of the elements of a misrepresentation claim is that the party asserting the claim be the party to whom false

³Plaintiffs have apparently acknowledged in discovery that they did not even know of Ford Credit's involvement before the purchase.

⁴Counsel for Ford Credit correctly notes that though commonly used in discussing the issue, it is not strictly correct to refer to the concept as one requiring privity as that term may be confused with what is involved in a formal contractual sense. Rather, it is more accurate to refer to the concept as requiring a direct relationship between the parties of whatever nature ("special relationship") which would allow for fulfillment of the multiple aspects of fraud (reliance on purposeful misrepresentation, etc.). The Court concurs, but will nevertheless utilize the term for convenience sake with the understanding that it incorporates the correct concept.

representations were made." (Mem. in Supp. of Ford Motor Credit Co.'s Mot. to Dismiss at 7) (Def.'s Mem.) (citing Unlimited Screw Products, Inc. v. Malm, 781 F. Supp. 1121, 1126 (E.D. Va. 1991)). Ford Credit asserts that there is no Virginia authority to the contrary and that its position is well-taken "particularly when it is recalled that Plaintiffs admit in their Complaint that Ford Credit did disclose the 'damage' to the Vehicle to Universal." Id. at 10.

The Plaintiffs respond that Ford Credit knew or should have known (foreseen) that the vehicle would be resold to a consumer and that Virginia law (as well as the law of numerous other jurisdictions) does allow for a cause of action for fraud under such circumstances without there being the "special relationship" between the parties as Ford Credit asserts is required. (Mem. of Law in Resp. to Demurrer of Ford Credit Co. at 6-13) (Pl.'s Resp. Mem.). Furthermore, the Plaintiffs emphasize that they have, in fact, plead that Ford Credit made affirmative false statements regarding the true nature and extent of the condition of the vehicle *before* its ultimate sale to them, an assertion (with the corresponding requirement of the Court to consider it as true at this stage) that the Court finds is contained within the Complaint. (Compl. ¶¶ 12, 15-16).

It is sufficient for purposes of resolving the issue (and without dissecting each and every authority cited by Ford Credit) to simply observe that the Virginia Supreme Court has, in fact, addressed the central issue and that its resolution, of course, controls over any lower Virginia court decision. Indeed, the Virginia Supreme Court in Blair Const., Inc. v. Randy Weatherford, T/A W. S. Const., 253 Va. 343, 346, 485 S.E.2d 137, 138 (1997), has recently cited with approval its prior decision in Mortarino v. Consultant Eng. Services, 251 Va. 289, 295, 467 S.E.2d 778, 782 (1996), for the basic proposition that:

... constructive fraud requires clear and convincing evidence that one has represented as true what is really false, in such a way as to induce a reasonable person to believe it, with the intent that the person will act upon this representation.

Accord Henderson v. Henderson, 255 Va. 122, 126, 495 S.E.2d 496, 499 (1998) (citing Mortarino for the proposition that "a finding of constructive fraud requires proof that a false representation of a material fact was made innocently or negligently, and that the injured party suffered damage as a result of his reliance on the misrepresentation").

None of the relevant parties in Mortarino or Blair Const. had any "special relationship," at least any more or less than Ford Credit and the Plaintiffs here, as Ford Credit asserts to be necessary to maintain an action for constructive fraud. Moreover, it is clear from the non-conclusionary allegations of the Complaint (taken as true) that Ford Credit had to know that the vehicle would be subject to resale to "a reasonable person" and that it made affirmative false statements to promote (and protect) the inevitable transaction.⁵ To the extent that Mortarino addresses the evidentiary burden at trial necessary to sustain an ultimate finding of constructive fraud, it provides even stronger support for the proposition that no "special relationship" has to be plead, let alone proven, as long as all the elements of fraud are asserted. 251 Va. at 295, 467 S.E.2d at 782.

Furthermore, the Plaintiffs cite another Virginia trial court decision⁶ that reaches a different conclusion than the trial court in Samuels and provides further support for reliance on

⁵Such non-conclusionary allegations (and reasonable inferences therefrom) culminating in and justifying the conclusionary claim set forth in paragraph 19 of the Complaint.

⁶Eubank v. Amherst Motors, Inc. & Ford Motor Credit Co., No. CL5213 (Amherst Co. Cir. Ct., Nov. 2000) (Pl.'s Resp. Mem., Ex. A).

the Mortarino precedent. The case involved the same defendant, Ford Credit, which demurred as to the legal sufficiency of the subject claim based on the same essential arguments it makes here. The trial court sustained the demurrer, but granted leave to the Plaintiff to file an amended motion for judgment to allege that Ford Credit "knew or had reason to know that the purchaser would rely upon the [false condition report]." The court cited Mortarino as authority for the proposition that such an allegation would survive a challenge to the legal sufficiency of the pleadings. Plaintiffs make such an allegation in the present case and therefore the case cited by the Plaintiffs (Eubank) is supportive of the Plaintiff's position. (Compl. ¶ 19).

Ford Credit's reliance on the prior decision of this Court in Unlimited Screw Products, Inc. is also unavailing. Not only did the court rely on pre-Mortarino state precedent (and the decision has been "disfavored" in subsequent cases as a result), but it is also distinguishable on its face because the court based its reliance on what it thought to be Virginia law in part on the factually-distinguishable circumstance that the offending party had no basis to anticipate that the aggrieved party would rely on the former's alleged misrepresentations. Such is not the case here. To accept Ford Credit's argument would insulate all parties who are one-step-removed from a transaction or activity, but who have to know the possible consequences of their fraudulent actions. Such is not the law in Virginia.⁷

VCPA

As Ford Credit correctly notes:

⁷Ford Credit's reference to case authority involving the economic loss rule is also misplaced as at least concerns fraud which constitutes a separate and distinct tort actionable in its own right. Ward v. Ernst & Young, 246 Va. 317, 435 S.E.2d 628 n.2 (1993); City of Richmond v. Madison Management Group, Inc., et al., 918 F.2d 438, 447 (4th Cir. 1990).

The VCPA prohibits fraudulent acts or practices committed by "suppliers" in connection with "consumer transactions," as those terms are defined by the VCPA. The term "supplier" is defined by the VCPA as "a seller or lessor who advertises, solicits or engages in consumer transactions, or a manufacturer or distributor who advertises and sells or leases goods or services to be resold or leased by other persons in consumer transactions." Va. Code Ann. § 59.1-198(4). The term "consumer transaction" is defined by the VCPA to include, *inter alia*, the "advertisement, sale, lease or offering for sale or lease, of goods or services to be used primarily for personal, family or household purposes. . . ." Va. Code Ann. § 59.1-198(1).

Ford Credit goes on to assert that since the sale of the vehicle to Universal was one between merchants and wholesalers, and where Ford Credit did not otherwise participate as seller, lessor, manufacturer or distributor of the vehicle in the sale to the Plaintiffs, it cannot be considered to be a "supplier" within the meaning of VCPA. As Ford Credit notes, there is no Virginia Supreme Court case that is dispositive, although a Florida appellate decision and a Virginia trial court decision are cited in support of its argument. United Pacific Ins. Co. v. Berryhill, 620 So.2d 1077, 1079-80 (Fl. Dist. Ct. App. 1993) (holding that to read privity into its car dealers bond statute would debase the "scope and intended purpose" of requiring a bond and that wholesale transactions between auto dealers are not consumer transactions). (Def.'s Mem. at 12-13).⁸

The Plaintiffs argue that the VCPA must be liberally construed because it is remedial in nature and Ford Credit is a "supplier" that is covered by the Act because, as defined by Virginia statute, it is an entity that sells goods and services (vehicles and credit) primarily for "personal, family or household use" and/or sells such goods and services to be resold by others. (Pl.'s Resp.

⁸Cited by Defendants for only the latter proposition.

Mem. at 16-17). The Plaintiffs also cite authority from other jurisdictions and an opinion from the Attorney General of Virginia supportive of the basic proposition that a failure to disclose vehicular damage and repairs is violative of the VCPA. *Id.* at 18 (citing authority).

Ford Credit, consistent with its position as to Count I, argues that liability under the VCPA is precluded because of the lack of any "special relationship" between it and the Plaintiffs that would make it a direct "supplier" of consumer goods or services. The Court resolves the present issue concerning the viability of a claim as alleged under the VCPA in the same fashion – by incorporating the rationale it utilized in addressing the arguments raised in regard to Count I whereby it found that no special relationship is required, rather only "reasonable foreseeability."⁹ Certainly Ford Credit, in the business of selling used cars, had to foresee that the vehicle in question would end up back in the hands of a consumer as is alleged. The Court otherwise concludes that the plain meaning of the relevant portion of the statute defining "supplier" in the context of a "consumer transaction" includes foreseeable resale to consumers. Contrary to the holding in the single Virginia trial court case that arguably supports Ford Credit's position (*Samuels*), all the other relevant authority requires there to be no "special relationship" to plead fraud or violation of the VCPA under these facts.

Pendant Jurisdiction

The allegations of Counts III and IV are state law claims. As of this point in time, the only basis for federal jurisdiction involving Ford Credit is the allegation in Count I asserting a violation of the Federal Odometer Act. The parties suggest the claim may be voluntarily

⁹Perhaps another term of art appropriated by the Court, but intended to capsulize the issue that the alleged offending party need not have a "special relationship" with the specific victim.

withdrawn by the Plaintiffs upon further discovery, but even if it is, the Court recommends that federal jurisdiction be retained. (Pl.'s Resp. Mem. at 4).

The question of whether a federal court should maintain supplemental jurisdiction over state law claims is committed to the exercise of the court's sound discretion as measured by the strictures of 28 U.S.C. § 1367 and relevant case law. The essential considerations for purposes of resolving the present issue are whether the claims are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. If so, should the federal court nevertheless decline jurisdiction because: (1) novel or complex issues of state law are involved that should be first resolved by the state court based on principles of comity; (2) the state law claims predominate over the claim or claims providing for original federal jurisdiction; (3) the federal court has dismissed all claims over which it had original jurisdiction; and (4) there are other "exceptional circumstances" mitigating against maintaining federal jurisdiction? 28 U.S.C. § 1367(a), (c).¹⁰

Obviously, the allegations in the Complaint against Ford Credit are inexorably related to the claims against Universal. Ford Credit would necessarily be brought back into the case by Universal either as a third party defendant or as a reluctant source of evidence even if the Court were to decline to maintain federal jurisdiction and dismiss Ford Credit in its present capacity. Given the Court's assessment of the issues involving the VCPA that have not yet been addressed by the Virginia appellate courts and the core allegation of the litigation is one of fraud in violation of state law, the Court could recommend that the matter be dismissed without prejudice against Ford Credit so that it could be pursued in the state system. However, in exercising its

¹⁰Section 1367(b) is inapplicable because jurisdiction is based on a federal question..

discretion, the Court concludes it is in the interest of judicial economy that all related issues involving both Universal and Ford Credit should be resolved in a single proceeding in the same forum. The claims against Universal will remain in federal court and this Court has consistently ruled it does not desire to have matters tried piecemeal as much out of respect for the state courts as anything else in not unnecessarily adding to their burden

Punitive Damages

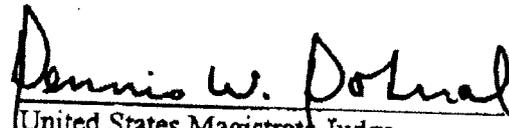
The Plaintiffs have alleged a set of facts against Ford Credit which, if proven, establish a pattern and practice of corporate fraud fueled by corporate greed – if true, the very type of corporate misbehavior for which punitive damages are appropriate in order to punish and deter. It may well be that the Plaintiffs will not be able to sustain their burden of proof on the issue at trial. They may not even be able to sustain it sufficient for the issue to even be considered by the factfinder, presently scheduled to be a jury. However, such a determination of legal (or, ultimately, factual insufficiency) is properly reserved for resolution on the merits.

Conclusion

For the reasons stated, it is this Court's recommendation that the Defendant Ford Motor Credit Corporation's Motion to Dismiss be DENIED in all respects.

Let the Clerk forward a copy of this Report and Recommendation to the Honorable Robert E. Payne, United States District Court Judge, and all counsel of record.

It is so ORDERED.


United States Magistrate Judge

Richmond, Virginia
Date: 5 FEB 2001