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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, DANA J. LOWE, 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 CONTINENTAL INSURANCE COMPANY'S MOTION
FOR SUMMARY DISPOSITION

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland, and State of Michigan on August 1, 2001.

PRESENT: HONORABLE RICHARD D. KUHN, CIRCUIT JUDGE

This matter is before the Court on Defendant Continental Insurance Company's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). This Court heard oral argument and took the motion under advisement.

This action arises out of Plaintiff's October 1999 lease of a Saturn motor vehicle from Defendant Bob Saks Toyota, Inc (Bob Saks). 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, which 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 Continental, claims for fraud/misrepresentation, violation of the Michigan Consumers Protection Act (MCPA), and violation of MCL 257.217(C). Defendant Continental 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).

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

The complaint alleges that Defendant Continental "executed such title documents as would permit the transfer of the vehicle without disclosure of its salvage condition." (Complaint, ¶20.) It also states that Defendant transferred the vehicle to Defendant Speedy Motors & Collision in the same way. (Complaint, ¶21.) These two paragraphs allege the first element of fraud. 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 benefiting 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.

Defendant Continental also argues that there is no allegation the Defendant Continental made any representations directly or indirectly to Plaintiff. However, Defendant does not dispute that each owner in the chain of title who fails to make proper disclosure upon transfer of title may be held liable to the ultimate purchaser, regardless of privity. "[W]here a party makes false representations to another with the intent or knowledge that they be exhibited or repeated to a third party for the purpose of deceiving him, that third party can maintain a tort action against the party making the false statements for the damages resulting from the fraud." *Cormack v American Underwriters Corp*, 94 Mich App 379, 386 (1979). Plaintiff sufficiently alleged a claim for fraud/misrepresentation against

Defendant Continental. Accordingly, Defendant Continental motion for summary disposition on the fraud claim is denied.

Defendant Continental next argues that Plaintiff failed state a claim on which relief can be granted in the claim for violation of the Michigan Consumers Protection Act (MCPA). MCL 445.901 et seq. Defendant Continental contends that the allegations contained in the complaint do not fit within the definition of what is an "unfair, unconscionable, or deceptive method, act, or practice in the conduct of trade or commerce" contained in MCL 445.903. Defendant Continental also argues that the definitions in MCL 445.903 imply that there must be a direct relationship between the two parties, and Defendant Continental did not have direct contact with Plaintiff.

Plaintiff specifically mentions MCL 445.903(e) and (y) in his brief. MCL 445.903(e) prohibits "[r]epresenting that goods or services are of a particular standard, quality or grade... if they are of another." Plaintiff clearly alleges that Defendant Continental violated this section by transferring the vehicle without a salvage title, when it was salvage. Summary disposition is denied with respect to the claim for violation of MCL 445.903(e).

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." Plaintiff does not allege that Defendant Continental made any oral representations to Plaintiff, or that Defendant Continental promised any benefits. Summary disposition is granted with respect to the claim for violation of MCL 445.903(y).

Defendant Continental 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. MCL 445.904(1)(a) provides that the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Defendant Continental argues that the transfer of title was done in accordance with MCL 257.217c and MCL 257.233 and was therefore exempt from prosecution.

It is undisputed that the requirements for titling a vehicle are controlled by the Michigan Motor Vehicle Code (MMVC), which is administered by the Secretary of State. MCL 257.204(1). However, an issue exists as to whether the conduct Plaintiff alleges violated the MCPA is specifically authorized by the MMVC.

In *Smith v Globe Life Ins Co*, 460 Mich 446, 465 (1999), the court stated that it is "whether the general transaction specifically authorized by law, regardless of whether the misconduct alleged is prohibited." The court went on to determine that the sale of credit life insurance was specifically authorized by law and exempt from the MCRA. *Id.* In *Attorney General v Diamond Mortgage*, 414 Mich 603, 617 (1982) the court found that the defendant's conduct was not specifically authorized by law, and therefore was not exempt from the MCRA.

The term "authorized" is not defined within the MCRA, nor does case law define the term. The common meaning of authorize is "to endow with authority or effective legal power, warrant, or right...". Webster's Third New International Dictionary, Unabridged Edition (1981). "Authorize indicates endowing formally with a power or right to act, usu[ally] with discretionary privileges...". *Id.*

MCL 257.217c(14)(a)(ii) requires an insurance company that acquires a vehicle through payment of a claim to apply for a salvage title if the estimated cost of repair is equal to or more than 75% but less than 91% of the predamaged cash value of the vehicle. If the cost of repair is 91% or greater, then the insurance company must apply for a scrap title. MCL 257.233(8)

requires that the owner of a vehicle indorse a certificate title in a specific manner.

MCL 257.217c and MCL 257.233 do not authorize conduct, the mandate conduct. Defendant Continental was required to c specific acts under both statutes, it was not given discretion to act. Under MCL 257.217(14)(a)(ii), if the vehicle met th criteria for a salvage title, Defendant Continental was mandate to apply for a salvage title. Under 257.233(8), Defendant Continental was mandated to indorse the title in a specific manner, without discretion.

The present case is distinguishable from *Globe Life*, because there, the conduct was actually authorized by statute, and the Defendant had discretion whether to sell credit life insurance. *Globe Life*, 460 Mich at 465.

Diamond Mortgage dealt with whether mortgage writing was specifically authorized by statute. 414 Mich at 617. While the court determined that the conduct was not specifically authorized by statute, because mortgage writing was not specifically authorized under defendant's real estate broker's license, whether to perform the conduct of mortgage writing would still be discretionary. *Id.* The conduct in the present case is not specifically authorized by statute, is not discretionary and is not exempt from the MCPA.

Defendant Continental also asks for summary disposition of the claims 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 that 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 Continental seeks summary disposition of the claim for violation of MCL 257.217c. MCL 257.217c(14)(a)(ii) provides a formula to determine when a salvage or scrap title is needed for a vehicle acquired through payment of a claim. The statute provides that when "the estimated cost of repair, including parts and labor, is equal to or more than 75% but less than 91% of the predamaged actual cash value of the vehicle..." the insurance company shall apply for a salvage title. MCL 257.217c(14)(a)(ii). A scrap title is needed for vehicles with a cost of repair that equals or exceeds 91% of the predamage.

value. *Id.* The statute also states that the insurance company is not to sell the vehicle without first receiving the scrap or salvage title, which should then be assigned to the buyer. *Id.*

Defendant Continental does not dispute that it sold the vehicle to Defendant Speedy without a salvage title. Defendant Continental argues that when it obtained the vehicle the estimated cost of repair was \$10,239.21 and the predamaged actual cash value was \$14,700, a ratio of 69.65%.

Plaintiff submitted 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, a ratio of 97% (Affidavit of Edward Jacques.)

Defendant Continental argues that the estimate of Mr. Jacques is not the estimate it had at the time it made their decision not to obtain a salvage title. However, the predamage actual cash value at the time is to be objectively determined pursuant to MCL 257.217c(35). Mr. Jacques determined that the predamage actual cash value of the vehicle was \$12,800. (Affidavit of Edward Jacques.) Using the estimated cost of repair supplied by Defendant Continental, \$10,239.21, and the predamaged actual cash value supplied by Plaintiff, \$12,800, results in a ratio of 80%. A genuine issue of fact exists as to

whether the vehicle needed at a minimum a salvage title, o
possibly even a scrap title.

Defendant Continental asks for summary disposition of the fraud claim. Defendant Continental argues that there is no genuine issue of material fact that the representations made could not be misrepresentations since it complied with statutory obligations when it did not obtain a salvage title. Plaintiff contends that Defendant Continental committed silent fraud when it failed to obtain a salvage title. A genuine issue of material fact exists regarding whether Defendant Continental committed fraud by failing to obtain a salvage title, since a genuine issue of material fact exists regarding whether it were obligated to obtain a salvage title.

Defendant Continental argues for summary disposition of the MCPA claim pursuant to MCR 2.116(C)(10) as well. As stated above, Plaintiff only mentions MCL 445.903(e) and (y). Plaintiff failed to state a claim for MCL 445.903(y). Plaintiff did state a claim for MCL 445.903(e), and the Court will therefore address the (C)(10) motion for summary disposition with respect to this claim.

As discussed above, MCL 445.903(e) prohibits representing goods to be of a standard, quality, or grade that they are not. Plaintiff alleges that Defendant Continental represented that

the vehicle was not salvage by failing to obtain a salvage title when the vehicle was salvage. However, as discussed above, a genuine issue of material fact exists regarding whether the vehicle required a salvage title. A genuine issue of material fact therefore exists regarding whether Defendant Continental represented the vehicle to be of a standard, quality, or grade that it was not.

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

RICHARD D. KUHN

RICHARD D. KUHN, CIRCUIT JUDGE

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