

Canela v Mercedes-Benz USA, LLC

2010 NY Slip Op 32784(U)

October 5, 2010

Supreme Court, New York County

Docket Number: 112165/2008

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 112165/2008
CANELA, PAULINO
 vs.
MERCEDES-BENZ
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

^{is}
~~motion and cross-motion~~ are decided in accordance
 with accompanying memorandum decision.

This constitutes decision and order of the Court.

FILED

OCT 07 2010

NEW YORK
 COUNTY CLERK'S OFFICE

Dated: October 5, 2010

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
 FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
PAULINO CANELA,

Plaintiff,

Index Number 112165/2008
Submission Date July 28, 2010
Mot. Seq. No. 002
DECISION and ORDER

-against-

MERCEDES-BENZ USA, LLC
Defendant

-----X

Appearances: For Plaintiff :
Sadis & Goldberg LLP
By David M. Kasell, Esq.
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New York, New York 10176
212-947-3793

For Defendant:
McManus Collura & Richter, P.C.
By Scott C. Tuttle, Esq.
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Papers considered in review of this petition to vacate arbitration award:

Seq 001

Papers	Numbered
Notice of Mot. and Affirm. in Supp of S.J. Mot.....	1
Memo. of Law in Supp. of S.J. Mot.....	2
Affirm. in Opp.....	3
Canela's Affid. with Att.....	4
Memo. of Law in Opp.....	5
Reply Affirm.....	6

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HON SALIANN SCARPULLA, J.:

Plaintiff Paulino Canela ("Canela") brings this action against defendant Mercedes-Benz USA, LLC ("Mercedes") under the federal Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, and the New York Lemon Law, General Business Law § 198-a, to revoke acceptance of a motor vehicle GL-500 ("the vehicle") Canela purchased from non-party dealership Helms Bros., Inc. ("Helms Brothers") in July, 2005 and to recoup the

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costs and expenses, including appropriate attorney's fees, incurred in the prosecution of this action.

Canela alleges that, in the two years following the purchase of the vehicle, and before reaching the eighteen thousand mileage mark, he experienced numerous technical malfunctions that required repeated visits to the authorized repair shop for warranty service. As a result, Canela lost confidence in the vehicle and notified Mercedes in writing that he was revoking acceptance of the vehicle on February 20, 2008. Mercedes rejected Canela's revocation of acceptance and refused him either a refund or replacement. Canela argues that he is entitled to relief under GBL § 198-a (d)(2) because the vehicle was in the repair shop and out of service for a cumulative period of fifty-five days within the two-year period.

Mercedes now moves to dismiss the action pursuant to CPLR 3212. Mercedes argues that whenever a need for repair arose, Canela received necessary warranty repair at no charge, which corrected any and all technical malfunctions. In addition, Mercedes submits the repair time sheets and invoices that it alleges conclusively establish that the vehicle spent fewer than thirty days in the repair shop for warranty service. Mercedes explains that any additional time the vehicle spent in the repair shop was due to the non-warranty repair of a broken bumper and a windshield. GBL § 198-a(d)(2) thirty-day period does not account for this non-warranty service, for which Canela paid out of his own pocket.

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Mercedes also moves on its affirmative defense under GBL § 198-a(c)(3)(i), that alleged non-conformities, defects or conditions do not substantially impair the value of the vehicle. In support, Mercedes submits an expert affidavit by Daniel Leary, “Technical Specialist of the Eastern TAC Hub for Mercedes-Benz USA, LLC d/b/a Mercedes-Benz.” Leary affirmed that he performed a vehicle inspection on Canela’s vehicle on September 24, 2009. He tested and found the vehicle to be operating as designed without abnormality. The vehicle passed a “maximum load brake test,” to ensure the brakes operated as designed. Leary also found no problems with the vehicle’s stability.

Leary also reviewed the records of the Helms Brothers repair department and found that while there was a malfunction of the air-matic pump in the suspension, that issue was fully resolved by Helms Borthers. Leary concluded that at no point was the vehicle operating in an unsafe manner, and none of the alleged problems impaired the use, value and safety of the vehicle.

Discussion

Pursuant to CPLR § 3212(b), summary judgment “shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” To warrant a court’s directing judgment as a matter of law, it must clearly appear from the evidence submitted in an admissible form that no material issue is presented for

trial. *Daliendo v Johnson*, 147 A.D.2d 312, 317 (2nd Dep't 1989). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is an issue of fact requiring a trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); see also *Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep't 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

GBL § 198-a obligates manufacturers to repair, without charge, any new motor vehicle which fails to conform to all express warranties during the first 18,000 miles of operation or for two years immediately following delivery of the vehicle, whichever comes first. GBL § 198-a(b)(1). If, within this time frame, a manufacturer is unable to correct a defect that “substantially impairs” the value of the vehicle “after a reasonable number of attempts,” the manufacturer—at the consumer’s option—must either replace the vehicle or accept the return of the vehicle in exchange for a refund of the purchase price. GBL § 198-a(c)(1).

A presumption that the consumer has met the “reasonable number of attempts” requirement arises in two circumstances: (1) if the same defect has been subject to repair four or more times, but continues to exist, commonly termed as “repair presumption,” or (2) if the vehicle has been out of service for a total thirty days or more, referred to as

* 6] .
“days-out-of-service presumption.” GBL § 198-a(d)(1) and (d)(2); *see also Matter of Daimler Chrysler Corp. v Spitzer*, 7 N.Y.3d 653, 661 (2006).

The triggering of either the “repair presumption” or “the days-out-of-service presumption” does not ensure that a consumer will recover. A manufacturer may rebut the presumption and is afforded an affirmative defense when it can show either that the defect “does not substantially impair” the vehicle’s value or that the condition resulted from “abuse, neglect or unauthorized modifications or alterations of the motor vehicle.” GBL § 198-a(c)(3)(i) and (ii). The condition of the vehicle at the time of the filing of the summons and complaint, or at any time thereafter, is not relevant to the court’s analysis regarding the existence of either presumption. *See Matter of Daimler Chrysler Corp.*, 7 N.Y.3d at 662 (allowing an action to proceed when the vehicle was repaired subsequently to a demand for relief under the Lemon Law).

Here, both parties agree that the relevant standard is the “days-out-of-service presumption.” Mercedes concedes that on separate occasions the vehicle spent twenty-four days in the repair shop for warranty service. At the heart of the dispute is the interpretation of part of the repair records from September 5, 2006 and June 18, 2007, which together account for an additional thirty-one days that the vehicle spent in the repair shop. Mercedes argues that while the September 5, 2006 and June 18, 2007 repair orders indicate that the vehicle was in the repair shop for fifteen and sixteen days respectively, only the total of three days should be credited, because the remaining

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twenty-eight days concerned non-warranty repair work to the damaged bumper and windshield. Mercedes concludes that “without these twenty-eight days, plaintiff is left with a mere twenty-seven days (27) out of service, and falls short of entitlement under the New York Lemon Law.”

Mercedes, however, has failed to submit any affidavit by a representative of Helms Brothers, the dealership that generated and stored the repair records, to interpret the repair records. Further, the parties have not stipulated in writing to have the records admitted into evidence, nor has Canela admitted to such pursuant to CPLR 3123(a).¹ Mercedes has also not submitted a deposition transcript of anyone from Helms Brothers repair department, who would be authorized to testify on the meaning of very cryptic repair and time/date notations. Without such testimony, the Court cannot conclusively glean from the repair orders what portion of the vehicle’s September 5, 2006 and June 18, 2007 out-of-service stays was attributable to warranty service, and what portion to the non-warranty repairs.

Mercedes’ entire summary judgment motion is based on its counsel’s interpretation of the notations made in the repair records, despite the fact that the counsel does not claim to have first hand knowledge of how the notations were generated and their meaning. Mercedes has not established prima-facie entitlement to summary judgment, because the

¹In his opposition, Canela disputes Mercedes’ interpretation of the September 5, 2007 and June 18, 2007 repair orders.

repair records were offered in an inadmissible form, and, absent requisite testimony, there is a remaining issue of regarding their meaning. *See PRA III, LLC v Ganzolez*, 54 A.D.3d 917, 918 (2nd Dep't 2008)(requiring authentication of accounting documents in compliance with CLPR 4518(a) when including them in a motion for summary judgment); *see also Vaughan v 1720 Unico, Inc.*, 30 A.D.3d 315, 316 (1st Dep't 2006) (finding attorney's affidavit insufficient to warrant summary judgment in the absence of client's affidavit or deposition testimony on keeping recording of complaints regarding its elevator).

Mercedes' relies on Leary's expert affidavit to show that the defects were remedied and did not "substantially impair" the vehicle's value. While Leary concluded that at the time of the testing, the vehicle was free of any malfunctions, this assessment was made on September 24, 2009, well after the most recent repair to the braking and steering systems was finished at a different dealership (Silver Star Motors) on August 30, 2010. As such, Leary's testing did not shed any light on the condition of the vehicle during the relevant time frame.²

²In enacting GBL § 198-a, the State Legislature intended that a consumer who is burdened with a new car which requires lengthy or repeated repair work be given an opportunity to put an end to his or her inconvenience. Therefore, the consumer is entitled to the rescission of the purchase contract even if the vehicle is eventually repaired by the time of trial, as long as one of the presumptions arises. *See Matter of Daimler Chrysler Corp.*, 7 N.Y.3d at 662.

[* 9] .

Also, Leary asserted that none of the malfunctions (including, suspension, steering and brakes) jeopardized the vehicle's safety, or otherwise detracted from the vehicle's value. That these alleged non-conformities did not substantially impair the value of Mercedes GL-500 appears merely a conclusory assertion, because Leary did not provide any substantive explanation of how he arrived at that conclusion. Such conclusory expert allegations do not raise a prima facie entitlement to the summary judgment, let alone permit Mercedes to prevail on GBL § 198-a(c)(3)(i) defense, on which it bears the burden of proof. *See Kandel v Hyundai Moto America*, 51 A.D.3d 729, 730 (2nd Dep't 2008). The issue as to whether the subject non-conformities substantially impaired the value of Canela's Mercedes GL-500 is an issue of fact to be determined at trial. *See id.*

In accordance with the foregoing, the Court finds that Mercedes has not established a prima facie case of entitlement to summary judgment dismissing Canela's complaint. It is therefore

ORDERED that the motion for summary judgment brought by defendant Mercedes-Benz USA, LLC is denied in its entirety; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision and order upon all parties and upon the Clerk of Trial Support (60 Centre St., Rm. 158) who shall schedule this matter forthwith for a date in Part 40 for trial.

This constitutes the decision and order of the court.

Dated: October 5, 2010

New York, New York

ENTER:

Saliann Scarpulla
Hon. Saliann Scarpulla, J.S.C.

FILED
OCT 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

