

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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August 23, 2011

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Re: *Kimmel & Silverman, P.C. v. American Honda Motor Co., Inc.*;
C.A. No. S10C-09-018
Kimmel & Silverman, P.C. v. Toyota Motor Sales USA, Inc.;
C.A. No. S10C-10-023

On Defendants' Motions to Dismiss: GRANTED

Date Submitted: July 14, 2011
Date Decided: August 23, 2011

Dear Counsel:

Pending before the Court are two separate cases, *Kimmel & Silverman, P.C. v. American Honda Motor Co., Inc.*, and *Kimmel & Silverman, P.C. v. Toyota Motor Sales USA, Inc.*, which raise an identical legal issue. For that reason, the cases have been consolidated

for the purpose of the pending Motions to Dismiss. The Motions to Dismiss filed on behalf of American Honda Motor Co., Inc. (“Honda”) and Toyota Motor Sales USA, Inc. (“Toyota”) are hereby granted for the reasons stated herein.

Factual & Procedural Background

The facts of the cases are strikingly similar. Dawn Nielsen (“Nielsen”) purchased a new 2009 Honda Odyssey in February of 2009 and Aimee Hastings (“Hastings”) purchased a new 2008 Toyota Sienna in September of 2008. Both vehicles were covered by limited express warranties that provided for informal arbitration of unresolved claims involving vehicle defects.

Nielsen’s Honda was sold with a New Vehicle Limited Warranty that identifies a forum called the “BBB AUTO LINE” program for resolving consumer/manufacture disputes. The warranty states:

We encourage you to use [the BBB AUTO LINE program] before, or instead of, going to court. It is informal, free of charge to you, and generally resolves problems much faster than the court system. Lawyers are usually not involved in the resolution of claims through the BBB, although you may obtain one at your own expense if you choose.¹

The warranty provides further, “Please note that laws in some states may require that you file a claim with BBB AUTO LINE before you can proceed to a state-operated

¹ This language is found in a pamphlet entitled “Warranties” that was given to Nielsen at the time she purchased her vehicle. Plaintiff’s Answering Brief in Support of Its Opposition to Defendant American Honda Motor Co., Inc.’s Motion to Dismiss, Exhibit A.

dispute resolution process or the court system.”²

Hastings’ vehicle was subject to a warranty that provided for unresolved disputes between Toyota and the consumer to be handled by a “Dispute Settlement Program”. The warranty states, “The purpose of the Dispute Settlement Program is to resolve disputes through arbitration – a process by which two parties authorize an independent third party to hear and resolve a dispute. The program is informal and free of charge.”³ The warranty further notes, “You must use the Dispute Settlement Program ... before seeking remedies through a court action pursuant to the Magnuson-Moss Warranty Act. You may also be required to use the Dispute Settlement Program ... before seeking remedies under the ‘Lemon Laws’ of your state.”⁴ Delaware’s Lemon Law requires consumers to use an alternative dispute mechanism before filing suit in court against the manufacturer only if said mechanism has been approved by Delaware’s Division of Consumer Protection.⁵ Neither Honda’s BBB AUTO LINE nor Toyota’s Dispute

² *Id.*

³ This language appears in the Owner’s Warranty Information pamphlet that Hastings received when she purchased her vehicle. Plaintiff’s Answering Brief in Support of Its Opposition to Defendant’s Motion to Dismiss, Exhibit B.

⁴ *Id.*

⁵ Delaware’s Lemon Law provides, in relevant part:

If a manufacturer has established an informal settlement procedure that has a certificate of approval by the Division of Consumer Protection, the remedies provided by this chapter shall not be available to any consumer

Settlement Program is a recognized alternative dispute mechanism in Delaware.

who has not first resorted to such procedure. In the event a manufacturer's informal dispute settlement procedure does not have a certificate of approval from the Division of Consumer Protection, a consumer may immediately and directly seek the remedies provided by this chapter.

6 *Del. C.* § 5007(a).

Nielsen and Hastings began experiencing problems with their respective automobiles and each separately retained Kimmel & Silverman, P.C. (“K&S”) to assist them in pursuing an appropriate remedy. K&S, per standard practice, accepted the cases on a no-fees-to-be-paid-by-the-consumer basis. Both Nielsen and Hastings participated in, respectively, Honda and Toyota’s informal dispute resolution programs. Each was awarded a replacement vehicle by the informal dispute resolution arbitrator and given the option of accepting or declining the award. Both Nielsen and Hastings accepted the award offered, binding themselves thereto. By accepting the awards, Nielsen and Hastings explicitly waived their rights to file suit in court against the auto manufacturers on any claim that had been resolved via the arbitration. Neither award provided for attorney’s fees. Subsequently, both Nielsen and Hastings assigned any remaining rights they had to file suit against Honda and Toyota, respectively, to K&S. K&S filed the pending actions in Superior Court, claiming violations of Delaware’s Lemon Law, the Magnuson-Moss Warranty Act, the Delaware Consumer Fraud Act, the Delaware Deceptive Trade Practices Act, and common law fraud. K&S seeks a judgment for attorney’s fees and costs.

Honda and Toyota filed Motions to Dismiss the complaints. The parties have fully briefed the issues before the Court and the Court has heard oral argument. The matter is ripe for decision.

Discussion

Standard of Review

It is well settled under Delaware law that a complaint will not be dismissed for failure to state a claim unless it appears reasonably certain “that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action.”⁶ In considering the sufficiency of the complaint, all well-pleaded allegations are accepted as true, and all reasonable inferences are construed in favor of the plaintiff.⁷ “A complaint[,] attacked by a motion to dismiss for failure to state a claim[,] will not be dismissed unless it is clearly without merit, which may be either a matter of law or of fact.”⁸ In sum, the test for sufficiency is a broad one. It is measured by whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.⁹ If the plaintiff may recover, the motion must be denied.

Merits

Nielsen and Hastings assigned their remaining rights, if any, to K&S. K&S, in turn, seeks attorney’s pursuant to Delaware’s Lemon Law, which provides:

⁶ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998); *see also Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985).

⁷ *Havens v. Attar*, 1997 WL 55957, at *5 (Del. Ch. Jan. 30, 1997).

⁸ *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52, 58 (Del. 1978).

⁹ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).

In any court action brought under this chapter by a consumer against the manufacturer of an automobile ... *based upon the alleged breach of an express warranty* made in connection with the sale of such automobile, the court, in its discretion, *may* award the plaintiff's costs and reasonable attorney's fees or, if the court determines that the action is brought in bad faith or is frivolous in nature, may award reasonable attorney's fees to the defendant.¹⁰

K&S points to a Wisconsin case, *Kiss v. General Motors Corp.*,¹¹ in support of its position. In that case, the plaintiff filed a Lemon Law claim with BBB Autoline, General Motor's Wisconsin-certified informal dispute settlement procedure. The dispute settlement tribunal issued a decision in the plaintiff's favor and ordered General Motors to replace the plaintiff's vehicle within thirty days of the plaintiff's acceptance of its decision. The plaintiff accepted the tribunal's decision but General Motors failed to provide a comparable new vehicle within the delineated time frame. The plaintiff then filed suit against General Motors seeking double damages, attorney's fees, and costs under Wisconsin's Lemon Law. General Motors argued the plaintiff's acceptance of a dispute settlement award barred suit under the Wisconsin's Lemon Law. In essence, General Motors attempted to pigeonhole the plaintiff into seeking relief pursuant to Wisconsin's Arbitration Act, which provides only for the enforcement, vacation or modification of an arbitration award. The Wisconsin Court of Appeals observed that the Arbitration Act does not provide any additional relief, *i.e.*, attorney's fees, costs, or double damages, to a

¹⁰ 6 *Del. C.* § 5005 (emphasis added).

¹¹ 630 N.W.2d 742 (Wis. Ct. App. 2001).

party who is aggrieved by the failure of the other party to comply with an arbitration decision, whereas Wisconsin's Lemon Law does provide for this more complete relief. Emphasizing this distinction between the two avenues of appeal, the Wisconsin Court

of Appeals held that the plaintiff was entitled to seek enforcement of the settlement decision through a Lemon Law claim under Wisconsin law.

In the case at bar, Nielsen and Hastings do not seek to enforce the arbitration awards. Therefore, the *Kiss* decision is clearly distinguishable from the present action. K&S acknowledged as much during oral argument before the Court.

There are several problems with K&S's argument that it is entitled to file suit for attorney's fees under Delaware's Lemon Law under the present circumstances. In the first instance, the consumers were not required to pursue arbitration through the auto manufacturer's informal dispute settlement procedures because neither procedure had been certified by the Division of Consumer Protection. That is, the consumers could have forgone the informal and expedient procedures provided by the auto manufacturers and opted to pursue their claims in court. The auto manufacturers are not improperly curtailing consumers' access to the courts by providing them with informal alternative dispute programs. Even if Nielsen and Hastings had pursued their claims in court, however, they were not *entitled* to recover attorney's fees under Delaware's Lemon Law. Section 5005 clearly states that the court *may*, "at its discretion", award fees in breach of warranty actions.¹² Further, the statute is not implicated because K&S does not allege that

¹² 6 *Del. C.* § 5005.

Honda or Toyota breached any warranty.¹³ Presumably, K&S did not do so because the auto manufacturers did, in fact, fulfill their obligations pursuant to the arbitration awards. Moreover, the actions are not for *reimbursement* of attorneys fees because neither Nielsen nor Hastings paid a dime for attorney's fees because these cases were taken on by K&S on a no-fees-to-be-paid-by-the-consumer basis. Specifically, the retainer agreements contained the following language:

For your peace of mind, we wish to again confirm our representation is being provided 100% free, using the fee-shifting provisions of the Lemon Law, Magnuson-Moss Warranty Act and/or Consumer Fraud Act, which allow recovery of attorney fees and costs from the manufacturer and/or dealership (hereinafter "defendant") as part of your claim. More specifically, [K&S] can represent consumers completely free of charge because both the Federal and State Legislatures have enacted laws that make the defendant responsible for the consumer's attorney fees and costs as part of the claim. **As long as you participate in your case, you will never be responsible for any part of our bill.**¹⁴

Because Nielsen and Hastings had nothing to recover, they had no right of recovery to assign to K&S.

In sum, the facts of the pending cases do not implicate Delaware's Lemon Law. Rather, the parties engaged in arbitration pursuant to agreement. As K&S conceded

¹³ See *General Motors Corp. v. Sanchez*, 16 So. 3d 883 (Fla. Dist. Ct. App. 2009) (holding an action for attorney's fees was not an action for "damages" and therefore the state's Lemon Law, which provided for the mandatory award of attorney's fees in an action for damages, did not apply).

¹⁴ Plaintiff's Answering Brief in Support of Its Opposition to Defendant's Motion to Dismiss, Exhibit A, ¶ 1 (emphasis in original).

during oral argument, the informal arbitration procedures did not provide for the award of attorney's fees. K&S's assertion that it may file an independent action for attorney's fees under Delaware's Lemon Law is without merit.

At oral argument, K&S sought an advisory opinion from the Court regarding whether, under circumstances not presented to the Court at this time, it could recover attorney's fees under the Magnuson-Moss Warranty Act.¹⁵ The Court declines to issue such an opinion but observes that an award of attorney's fees under the Magnuson-Moss Warranty Act is also discretionary.¹⁶

K&S has withdrawn its claim under Delaware Deceptive Trade Practices Act.

Finally, K&S argues it may maintain its actions under the Consumer Fraud Act and common law fraud because K&S pled "damages". Although K&S did, indeed, reference "damages" in addition to attorney's fees and costs in the body of the complaints filed against Honda and Toyota, the enumeration of damages sought specified only attorney's fees and costs. As K&S concedes, attorney's fees may not be awardable under either the Consumer Fraud Act or the doctrine of common law fraud. Moreover, K&S's complaints allege that a cause of action under the Consumer Fraud Act exists as a derivative claim under Delaware's Lemon Law. As previously discussed, K&S does not

¹⁵ 15 U.S.C. § 2310.

¹⁶ 15 U.S.C. § 2310(d)(2).

have a claim under Delaware's Lemon Law. As for common law fraud, K&S has clearly failed to plead with particularity any facts that would give rise to even a suggestion that fraud has taken place. Moreover, Nielsen and Hastings have failed to suffer any damages: each received a replacement vehicle pursuant to the informal dispute mechanisms in place and neither incurred any fees associated with the procurement of her replacement vehicle.

As far as the Court is concerned, K&S gambled when it adopted its practice to take informal arbitration cases on a no-fees-to-be-paid-by-the-consumer basis. K&S has no grounds for filing suit and seeking the attorney's fees it incurred in so doing. The complaints must be dismissed as a matter of law.

Conclusion

For the reasons set forth above, Toyota and Honda's Motions to Dismiss are GRANTED.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

cc: Prothonotary