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Clearinghouse 41256

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

TAMMY JONES	:	
PLAINTIFF	:	
-vs-	:	Case No. 82CV-12-7321
SWAD CHEVROLET, INC., et al.	:	JUDGE THOMAS V. MARTIN
DEFENDANTS	:	

TERMINATED

JUDGMENT ENTRY

This matter is before the Court for determination of the objections filed to the Referee's report. Upon consideration of the transcript of the proceedings and all memoranda filed, the Court finds the objections are not well taken and the same are hereby overruled.

The Court further finds that the findings of fact, conclusions of law, and recommendation of the Referee are supported by reliable, probative, and substantial evidence and in accordance with the law. The Court will not substitute its judgment for that of the Referee on issues of fact, since the matters of credibility and weight of testimony is within the province of the trier of fact. The Court consequently, approves the report of the referee, and it incorporates the same herein.

The Court grants judgment in favor of plaintiff, Tamara Jones, against Swad Chevrolet, Inc., in the amount of $2,187.73. The Court further awards plaintiff as against this defendant her reasonable attorney's fees pursuant to R.C. §1345.09(F), the amount of which shall be determined by the Referee pursuant to Ohio Civil Rule 53.

The Court further grants judgment in favor of defendant, Bank One of Columbus, NA, against defendant, Swad Chevrolet, Inc., in the amount of $14,155.11, plus interest from March 25, 1983.

The Court further orders that defendant, Bank One of Columbus, N.A., is entitled to possession of the 1982 Camero. Said defendant shall arrange to have the car picked up at the residence of the plaintiff provided that said defendant give

plaintiff reasonable notice of the date and time that it will pick up the vehicle.

The Court dismisses the counterclaim of defendant, Swad Chevrolet, Inc., against plaintiff, Tamara Jones.

The Court dismisses the cross-claim of defendant, Swad Chevrolet, Inc., against defendant, Bank One of Columbus, N.A.

The Court further assesses all the costs of this action against defendant, Swad Chevrolet, Inc.

JUDGE MARTIN

APPROVED:

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

TAMMY JONES :

Plaintiff :

vs. :

SWAD CHEVROLET, INC., :

et al

Defendants :

Case No. 82CV-12-7321

REFEREE'S REPORT

TO THE HONORABLE THOMAS V. MARTIN,

JUDGE, FRANKLIN COUNTY COURT OF COMMON PLEAS

This cause came on for trial before this Referee pursuant to Rule 53, Ohio Rules of Civil Procedure. The parties were present in court and represented by counsel. From the evidence presented, this Referee makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. At the outset, the parties presented several stipulations as to facts and exhibits, which are accepted by this Referee.

2. On or about November 15, 1982, Plaintiff purchased a 1982 Camaro from Defendant Bill Swad (see Plaintiff's Exhibits 1-15). The transaction was not accomplished without some difficulties. On her second visit to defendant Swad's dealership she found a car which interested her, a white Camaro with 6259 miles which had been a salesman's demonstator. (Plaintiff was informed of this fact.) She was unable to take that car for a test drive, but did drive another Camaro; the salesman, Mr. Dick Jordan, told her that the white car would

drive just like the blue one she tested.

Plaintiff signed a purchase agreement (Plaintiff's Exhibit 1), filled out a loan application for Huntington National Bank, and gave Mr. Jordan a check for $225.45. (Plaintiff's Exhibit 2). A week later, on November 10, 1982, Mr. Jordan called Plaintiff and wanted $200.00 more; Plaintiff took him a second check. The only receipt she received for these two deposits was plaintiff's Exhibit 3. On that occasion, Mr. Jordan told Plaintiff (giving her plaintiff's Exhibit 20) that her payments would be either $210 per month, for a five year loan, or $296 per month for a four year loan.

Plaintiff learned that the Huntington had rejected her loan application; on November 13, 1982, she told Mr. Jordan to "forget it," cancelling the whole deal. Later that day she was called by Mr. Ron Barnes, finance officer of defendant, Swad, who endeavored to ressurect the transaction, telling her that more money down would close the sale with financing by Defendant Bank One. On November 15, 1982 plaintiff returned to the dealership with a third check (Plaintiff's Exhibit 6) and completed the paperwork to purchase the white Camaro demonstrator. Plaintiff received only a copy of the Installment Purchase Agreement with Bank One (Plaintiff's Exhibit 5-A).

3. In completing the Installment Purchase Agreement, Mr. Barnes told Plaintiff that Bank One <u>required</u> her to purchase credit life and disability insurance. This Referee finds as a matter of fact that this was an inaccurate statement and a knowing misrepresentation of Bank One's requirements by Defendant Swad's employee. Plaintiff reasonably relied upon the statement

of Mr. Barnes and agreed to pay for the credit insurance which raised her monthly payment from $296.00 to $331.50 for 48 months. Defendant Swad placed the credit insurance with Voyager Life Insurance Co. of Jacksonville, Florida, for which it is an agent and receives a fee for each policy sold.

A few days later, Defendant Swad had Plaintiff execute Plaintiff's Exhibit 5-B as a "corrected" substitute for Plaintiff's Exhibit 5-A. At that time, she received copies of Plaintiff's Exhibits 1, 9, 10, 11, 13, and 5-B; she never was given copies of Plaintiff's Exhibits 14 and 24.

4. Defendant Swad's standard purchase agreement form, used for this transaction (Plaintiff's Exhibit 1), contains in the column of various charges the pre-printed item of "NADW Customer Services ... $97.50." This was a packet of coupons exchangeable for various automotive services. When Mr. Jordan filled out this form for Plaintiff, he added in the $97.50 in calculating the "Total Balance Due" of $11,625.45. This Referee finds as a matter of fact that Mr. Jordan did not fully explain the NADA packet to Plaintiff, nor did she agree to purchase or pay for the packet.

Nevertheless, Defendant Swad included the $97.50 in the final sale price and the amount which was financed without Plaintiff's understanding or agreement. This Referee further finds that after all this, Defendant failed to deliver the NADW packet to Plaintiff.

5. Plaintiff began to experience serious operational difficulties with the white Camaro shortly after taking delivery from Defendant Swad. The car would shimmy and pull to the right

when the brakes were applied, made grinding noises, and shook at highway speeds. This Referee finds as a matter of fact that Defendant Swad's employees had failed to disclose these defects; instead, they had misrepresented to plaintiff that the car would run exactly like the blue Camaro which they had her test drive. Such was not the case.

Plaintiff brought the car to Swad's facility two or three times (within a couple of weeks of purchase) requesting that the above-noted defects be repaired. (Plaintiff's Exhibits 16, 17, and 18). Although Defendant's employees performed some work, the problems were not alleviated. On December 2, 1982, she took it to B. F. Goodrich and received an estimate (Plaintiff's Exhibit 19) for repairs still needed.

Plaintiff made efforts to talk to the owner of Defendant Swad dealership about the problems with the car; having made the sale, he was unavailable and her requests were rebuffed.

On December 6, 1982, Plaintiff returned the white Camaro to Defendant Swad's dealership, tendered the keys to the manager, and informed him of her election to rescind the transaction. Plaintiff's Exhibit 8, a letter from plaintiff's attorney setting forth the reasons for the rescision, was mailed to defendant Swad on December 6, 1982, and was received by defendant. However, the manager did not then accept rescision, refused to accept the keys, and told plaintiff that if she left the car on the lot they would not be responsible for any theft or damage. Intimidated, Plaintiff took the car with her. The white Camaro then had 6,774 miles on its odometer.

6. This lawsuit was filed two days later, again notifying

defendant Swad of plaintiff's decision to rescind the transaction. For the next six months plaintiff did not drive the car; through January, 1984, she drove it to work, the grocery, etc. only as needed. She returned to Columbus in the car from her home in Atlanta, Georgia, for the court-ordered arbitration hearing at that time, thinking that she would be returning the car to Swad as a result of that hearing. It appears that, following defendant Swad's appeal of the Arbitrators' decision, plaintiff has increased her use of the Camaro which had 36,000 miles on it as of the date of trial.

No evidence was presented, however, to indicate that Plaintiff's use of the car was unreasonable; her testimony was that her use of the car, even after January of 1984, was for work and other necessities. She has not been financially able to purchase a second car. This Referee finds as a matter of fact that plaintiff's post-revocation use of the white Camaro was not unreasonable. Plaintiff has had routine maintenance performed on the car.

7. Plaintiff's Exhibit 24 is the Federal Odometer Mileage Statement and Ohio Seller's Affidavit filled out and executed by defendant Swad's employee for the white Camaro. This Referee finds as a matter of fact that plaintiff did not sign this document and that the writing on the buyer's signature blank is not her signature. Further, Defendant Swad failed to give Plaintiff a copy of this document at the transaction closing.

8. Following the troubles with the white Camaro's operation, Plaintiff stopped payment on her third check (Plaintiff's Exhibit 6) to Defendant Swad. She was allowed

$4,000.00 on her trade-in, with a balance due (on her loan for that car) of $2,237.72. Thus, her down payment to Defendant Swad totaled $2,187.73. Plaintiff made no further payments on the car to either Swad or Bank One.

Defendant Bank One paid $11,718.19 to Defendant Swad for Plaintiff's car (Plaintiff's Exhibit 5-A), and has spent subsequently $1,743.00 on automobile insurance. Plaintiff has also maintained insurance on the car, as required by the loan agreement; however, she failed to keep Defendant Bank One apprised of this fact. Defendant Bank One's Exhibit B is a copy of Plaintiff's automobile insurance policy; Defendant Bank One is not shown as a loss payee on the policy as required.

8. This Referee finds as a matter of fact that Defendant Bank One made no misrepresentations of any kind to Plaintiff. Defendant Bank One performed fully its obligations to Plaintiff and also to Defendant Swad pursuant to the contract between the Defendants (Defendant Bank One's Exhibit A).

CONCLUSIONS OF LAW

1. This Referee concludes as a matter of law that Defendant Swad violated the Ohio Consumer Sales Practices Act, O.R.C. §1345.01, et seq, in several regards during the sales transaction with Plaintiff. This was undeniably a consumer transaction as defined in O.R.C. §1345.01(A). The misconduct by Defendant Swad's employees consisted of misrepresentations concerning the white Camaro's operation and the bank's requirement for credit life and disability insurance, misrepresenting the amount of the monthly payment, charging for the service coupon package which was neither requested nor received by plaintiff, failure to

comply with the requirements concerning disclosure on the receipt for Plaintiff's deposits, and failure to correctly execute the Federal Odometer Statement.

2. This Referee concludes as a matter of law that Defendant Swad committed an unfair and deceptive sales act in violation of O.R.C. §1345.02(A) and (B)(1) by misrepresenting the performance characteristics of the white Camaro. Defendant Swad's employee steered Plaintiff to test-driving a different car, which contained none of the defects of the car he was trying to sell to her.

Defendant Swad's employees continued the unfair and deceptive practices after the sale by misrepresenting to Plaintiff that the white Camaro's defects did not exist or had been corrected.

3. This Referee concludes as a matter of law that Defendant Swad committed an unconscionable sales act in violation of O.R.C. §1345.03 (A) and (B)(6) by knowingly misrepresenting to Plaintiff that Defendant Bank One required her to purchase credit life and disability insurance. This was also a deceptive act in violation of O.R.C. §1345.02(A). Plaintiff reasonably relied upon the statement of Defendant Swad's finance officer in agreeing to purchase such insurance from Defendant Swad as agent for Voyager Life Insurance Co. of Florida (for which Defendant Swad received a commission).

When Plaintiff agreed to purchase the white Camaro she had been told by Defendant Swad's salesman that her monthly payment would be $296 per month (on a four year loan), which may have reasonably entered into her decision to go ahead and buy the car.

Then upon being informed that the "required" insurance would increase her monthly payment to $331.50 per month, the natural tendency for Plaintiff (or any other consumer) was to go ahead with the transaction. It is extremely difficult for someone to back out of a transaction at such a late stage, a fact obviously relied upon by Defendant Swad's employees, as they wait to reveal information which might terminate a transaction if disclosed up front. This Referee concludes that such practice is unfair, deceptive, and unconscionable.

4. Defendant Swad's practice of using pre-printed sales forms which already have the $97.50 charge for the NADW coupon packet printed in the column of charges to be included in the total sales price coupled with, as here, the failure to explain this charge to Plaintiff, the failure to inform her of the option to forego purchasing this service, and the inclusion of the $97.50 charge without Plaintiff's agreement or authorization, is an unfair and deceptive practice in violation of O.R.C. §1345.02(A). This Referee further concludes that Defendant Swad's failure to actually supply the coupon packet to Plaintiff after having received payment for it from Defendant Bank One was additional unfair and deceptive practice.

No evidence was presented to suggest that $97.50 was not a fair and reasonable charge for the service coupons, if a customer should, being fully informed, decide to purchase the NADW packet.

5. This Referee concludes as a matter of law that Defendant Swad failed to comply with Admr. R. 109:4-3-07 (A) (2), in that upon giving Defendant Swad a deposit for the white Camaro, which was accepted, Plaintiff was not provided with a dated receipt stating the time during which the option was binding, and whether

and under what conditions the deposit was refundable.

The pattern of practice demonstrated by Defendant Swad in this case is exactly the sort of conduct that this rule is designed to help prevent: Plaintiff was not allowed to test drive the car being considered for purchase, then late in the transaction Plaintiff learned that her monthly payment would be $35.50 higher than the salesman had said it would be. Without having been informed that her deposit was refundable, Plaintiff was intimidated from walking away from the deal. This Referee concludes that Defendant Swad's violation of the deposit rule was an unfair and deceptive practice.

6. This Referee concludes as a matter of law that the wrongful execution of the Federal Odometer Statement (having someone other than plaintiff sign her name) by Defendant Swad was an unfair and deceptive act in violation of O.R.C. §1345.02(A). Defendant Swad further failed to provide Plaintiff with a copy of the statement, as required by law.

There was no evidence that the information contained in the document was inaccurate.

7. This Referee concludes as a matter of law that Defendant Swad did not give Plaintiff an implied warranty of merchantability pursuant to O.R.C. §1302.27(A) on November 3, 1982. On that date, the parties executed--and Plaintiff received a copy of--Plaintiff's Exhibit 1, which specifically and conspicuously informed Plaintiff that the white Camaro was covered by the "manufacturer's warranty only." The manufacturer's warranty was posted in defendant Swad's dealership and Plaintiff timely received a copy (Plaintiff's Exhibit 9). This complied

sufficiently with the exceptions set forth in O.R.C. §1302.29.

On November 15, 1982, Defendant Swad had Plaintiff execute a disclaimer of warranties (Plaintiff's Exhibit 41). Not only would this document have been ineffective pursuant to the rule of law set forth in Harthcock v. Graham Ford, Case No. 81AP-935 (Fr. Co. Ct. Ap., 1982), it did not actually purport to change the relationship between the parties, stating again that the car Plaintiff was buying was covered by the manufacturer's warranty and that warranty only.

Accordingly, this Referee concludes that there was no breach of implied warranty; therefore, the Magnuson-Moss Warranty Act, 15 U.S.C. §1301 et seq., has no application to this case.

8. This Referee concludes as a matter of law that pursuant to O.R.C. §1345.09(A) Plaintiff is entitled to the requested remedy of rescision due to defendant Swad's various violations of O.R.C. §§ 1345.02 and .03. Further, under O.R.C. § 1345.09(A) and under O.R.C. §1302.85(A), Plaintiff was entitled to rescision on December 6, 1982 (that being a reasonable time following the purchase) when she returned the white Camaro to Defendant Swad, notified the manager of her election of that remedy, and was wrongfully refused.

Further, this Referee concludes that Plaintiff's use of the car after the rescision was reasonable. McCullough v. Bill Swad Chrysler-Plymouth, 5 Ohio St. 3d 181 (1983). Defendant Swad, which rejected the tendered rescision both on December 6, 1982 and following the January, 1984 arbitration, is in a poor position to claim that her subsequent use of her only car as necessary transportation was unreasonable.

Accordingly, this Referee concludes that the Court should

order rescision of the transaction with Plaintiff returning the white Camaro to Defendant Swad and Defendant Swad returning her down payment, which consisted of $425.45 in cash and $1,762.28, as the net trade-in value of her old car, for a total of $2,187.73. No setoff should be allowed to defendant Swad for Plaintiff's reasonable use of the car following her rescision of the transaction on December 6, 1982. McCullough, supra.

9. O.R.C. §1345.09(F) provides in part:

> The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:
>
> * * *
>
> (2) The supplier has knowingly committed an act or practice that violates this chapter."

Defendant Swad is without question a supplier, as that term is defined in O.R.C. §1345.01(C). This Referee concludes as a matter of law that the violations of O.R.C. §1345.02 and .03, as set forth in Conclusions of Law 2, 3, 4, 5, and 6, were knowingly committed by Defendant Swad's employees. It is not required that these employees knew that these practices violated the law, only that they knowingly committed the acts. There is no question that Defendant Swad's employees knowingly misrepresented the operating characteristics of the white Camaro (requiring her to test drive a different car), knowingly misrepresented that Defendant Bank One required credit life and disability insurance, knowingly misrepresented the amount of Plaintiff's monthly payments, knowingly included the cost of the NADW coupon packet in the price on the contract without Plaintiff's knowledge or authorization, and knowingly signed Plaintiff's name to the Federal Odometer Statement without her knowledge or

authorization. Defendant Swad's other failures may well have been inadvertent or oversight.

Accordingly, this Referee concludes that Plaintiff should be awarded reasonable attorney's fees for the work performed and to be performed on this case, to be assessed against Defendant Swad pursuant to O.R.C. §1345.09(F)(2), to be determined at a subsequent hearing.

10. This Referee concludes as a matter of law that the evidence failed to support Plaintiff's allegations of violations of the Federal Truth In Lending Act (Regulation Z, §226.4) by Defendant Bank One. Defendant Swad exceeded the scope of its authority as agent of Bank One in misrepresenting to Plaintiff that the bank required her to purchase credit life and disability insurance; this was done in order to sell insurance for Voyager and receive a commission.

This Referee further concludes that Defendant Bank One made no violations of Ohio's consumer statutes with regard to this transaction with Plaintiff. Judgment should be granted to Defendant Bank One on all issues involving it raised in Plaintiff's Complaint.

11. The contract between Defendants (Defendant Bank One Exhibit A) requires Defendant Swad to repurchase the loan and note where, as here, a buyer has established defenses to the note. Defendant Swad has failed and refused to do so, in breach of its agreement with Defendant Bank One.

Accordingly, this Referee concludes as a matter of law that Defendant Swad is liable to Defendant Bank One on its Cross-Claim. Provident Bank v. Barnhart, 3 Ohio App. 3d 316

(Ham.Co.Ct.Ap., 1982), is of no help to Defendant Swad. Defendant Bank One made reasonable efforts to have the car returned, whereas Defendant Swad wrongfully refused rescision when tendered and, thereby, failed to mitigate damages. Defendant Bank One has suffered damages directly as a result of Defendant Swad's breach of contract, and should be granted judgment on its Cross-Claim in the amount of $14,155.11.

RECOMMENDATIONS TO THE COURT

1. This Referee recommends that the Court find and decide that judgments shall be granted consistent with the Findings of Fact and Conclusions of Law reported herein;

2. Reasonable attorney fees to be awarded to the Plaintiff against defendant Swad shall be assessed at a subsequent hearing;

3. Cost of court shall be assessed against Defendant, Swad.

Respectfully Submitted,

Stewart Roberts

STEWART ROBERTS, REFEREE

Appearances:

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Attorney for Plaintiff

Henry Maser

Attorney for Swad Chevrolet, Inc.

James C. Lewis, III

Attorney for Bank One