

Citation: *Mahmoud v. Yukon Nissan*, 2021 YKSM 5

Date: 20211104  
Docket: 20-S0072  
Registry: Whitehorse

**SMALL CLAIMS COURT OF YUKON**  
Before His Honour Chief Judge Cozens

ASHRAF MAHMOUD

Plaintiff

v.

YUKON NISSAN

Defendant

Appearances:

Ashraf Mahmoud

Dominic Larkin

Appearing on his own behalf

Appearing on behalf of the Defendant

**REASONS FOR JUDGMENT**

[1] Mr. Ashraf Mahmoud has filed a Claim against Yukon Nissan (“Nissan”). He seeks \$15,777.30 in damages, plus costs.

[2] The basis of Mr. Mahmoud’s Claim is that on January 5, 2021, he drove his 2009 Nissan Titan (the “Titan”) to Nissan for a scheduled appointment. The appointment was for the purpose of having Nissan look into some issues Mr. Mahmoud was having with the Titan’s transmission.

[3] Mr. Mahmoud asserts that at some point after he dropped the Titan off, Nissan either deliberately or negligently damaged his transmission in order to either sell him a new transmission or a new vehicle.

[4] He also asserts that, while he agreed to allow Nissan to conduct a transmission and drive line service, he did so under duress and on the basis of misinformation provided by Nissan, and that he should not be responsible for the costs Nissan seeks in its Counterclaim for the flush and drive line service.

[5] Nissan's position as set out in the Counterclaim is that Nissan did nothing either intentionally or negligently to damage the Titan, and that Nissan should be reimbursed for the costs of the initial inspection, as well as the transmission flush and drive line service. Nissan seeks \$1,099.69 plus costs. In addition, Nissan seeks storage fees of \$20 per day from January 22, 2021, to the date the Titan is ultimately removed from their property.

### **Summary of the Evidence**

[6] Mr. Mahmoud was the only witness for his Claim and his defense to the Counterclaim. Dominic Larkin, the General Manager for Nissan, testified in Nissan's defence and in support of the Counterclaim, as did Service Advisor, Gordon Scheepbouwer, and former Service Technician, Travis Lohner.

[7] Filed as exhibits were:

- Estimate for new transmission;
- Invoice dated January 6, 2021;
- Email exchanges between Mr. Mahmoud and Mr. Larkin dated April 23 and 24, 2021;
- Hand-drawn map;
- Statement of Gordon Scheepbouwer, undated;

- Phone call log dated January 4 and 5, 2021; and
- Statement of Travis Lohner, dated January 20, 2021.

[8] It is clear from the evidence that on January 5, 2021, Mr. Mahmoud was experiencing transmission problems with the Titan, in particular when it was in automatic mode, but also when the transmission was engaged manually. This is why he had the scheduled appointment for that day.

[9] I also accept that Mr. Mahmoud had driven the Titan to Nissan on January 5, 2021. There was no evidence adduced as to whether Mr. Mahmoud did or did not experience any transmission problems while driving the Titan to Nissan that morning.

[10] The Titan was subsequently inspected by Mr. Lohner. A transmission and drive line service was proposed as an option for Mr. Mahmoud to consider. Mr. Mahmoud then authorized Nissan to perform the transmission flush and drive line service, which they did.

[11] Mr. Mahmoud subsequently refused to pay the invoice provided by Nissan and, as a result, the Titan remains on the Nissan lot.

### **Burden of Proof**

[12] As the Plaintiff, Mr. Mahmoud bears the burden of proof to establish on a balance of probabilities that he is entitled to the judgment he seeks. With respect to the Counterclaim, Nissan bears the same burden.

## **Analysis of the Evidence**

[13] I do not intend to review or set out the evidence in detail. Portions of the evidence were irrelevant and not of assistance in resolving the issues. There is some dispute and differences between the witnesses. This includes Nissan's witnesses with respect to exactly what was communicated between them and when these communications took place.

[14] Some of these differences are irrelevant to the issues to be resolved, while others potentially may be so.

[15] One aspect of the evidence that is a matter of contention is the assertion by Nissan that the Titan needed to be pushed, rather than driven, into the shop.

Mr. Lohner testified that he attempted to drive the Titan into the shop, but was having difficulty in doing so as the transmission was disengaging. In the end, he decided to obtain the assistance of another Nissan employee, Andrew Nemeth, and they pushed the Titan into the shop, as Mr. Lohner felt this to be a better approach.

[16] Mr. Mahmoud disputes that this occurred, stating that he saw Mr. Lohner driving the Titan towards the shop area while he was waiting in the service lobby. However, the area where Mr. Lohner states that he decided to push the Titan into the shop was located where it was not able to be viewed from the lobby, an assertion that Mr. Mahmoud does not dispute.

[17] I find Mr. Lohner to be a credible witness who provided reliable evidence. He is no longer an employee of Nissan and has "no stake in the game" so to speak. His

demeanour and the manner in which he presented his evidence gave me no cause to doubt his credibility and the reliability of his evidence. To the extent that his evidence may have differed from that of other witnesses, I find that these differences are not significant enough to impact upon his credibility and the reliability of his evidence.

[18] In saying this, I appreciate that Mr. Lohner initially testified that he started the Titan and left it to warm up for a few minutes. In cross-examination, however, when challenged on this point, Mr. Lohner stated that he may have been mistaken and that he may have started another vehicle rather than the Titan. Mr. Lohner was quite confident and clear, however, as to what occurred when he attempted to drive the Titan into the shop.

[19] Mr. Lohner was under no duty to take notes of everything that he did that day in respect of his dealings with the Titan, and his recollection and acknowledgement of possibly being mistaken as to which vehicle he started that morning and left running to warm up, is reasonable in the circumstances.

[20] I am satisfied that, while Mr. Lohner initially attempted to drive the Titan into the shop, due to problems with the transmission disengaging he and Mr. Nemeth pushed the Titan from a location out of sight of Mr. Mahmoud into the shop.

[21] With respect to the evidence of Mr. Scheepbouwer on this point, I believe that he was mistaken when he said that Mr. Mahmoud had left the waiting area in Nissan before Mr. Lohner drove the Titan. It makes much more sense to me from the evidence that Mr. Mahmoud was waiting for his ride to work, and that he observed Mr. Lohner driving the Titan from where Mr. Mahmoud had parked it in order to take it into the shop.

[22] Further, with respect to the overall evidence of Mr. Scheepbouwer, there were other instances where his testimony, at least initially, conflicted with that of the other witnesses, such as whether there were two phone calls with Mr. Mahmoud and himself at approximately 10:00 a.m. and 10:30 a.m., whether the in-person meeting with Mr. Lohner, Mr. Mahmoud, and himself was before or after lunch, and whether this meeting occurred in the shop or outside of it.

[23] Mr. Scheepbouwer was also not under any duty to make detailed notes of all the circumstances involving his dealings with the Titan that day. Further, as he testified, he was dealing with many vehicles and customers that day besides Mr. Mahmoud.

[24] I find, with respect to the more peripheral details, that the inconsistencies or lack of specific recall of Mr. Scheepbouwer do not undermine his testimony on the matters that are of significance in this case.

[25] These are, in particular, whether the Titan was damaged and rendered inoperable by any actions of Nissan, whether Mr. Mahmoud was provided options for proceeding that included the flush and drive line service, including what the potential was for this being a solution to the transmission problem, and whether Mr. Mahmoud authorized Nissan to proceed with the flush and drive line service.

[26] On these issues, the evidence of Mr. Scheepbouwer was straightforward, and accorded with that of Mr. Lohner and Mr. Larkin.

[27] I note that much of the evidence of Mr. Larkin is hearsay evidence from speaking, in particular, with Mr. Scheepbouwer. As the General Manager of Nissan,

Mr. Larkin was not directly involved with the servicing of the Titan. It was only after the initial service inspection and the extent of the problem further involved Mr. Mahmoud, that Mr. Larkin became involved. Mr. Larkin did have direct evidence from his actual interactions with Mr. Mahmoud, and testified that he, based on what Mr. Lohner had said, recommended to Mr. Mahmoud that he not proceed with what was unlikely to be an unsuccessful endeavour.

[28] I find that Mr. Larkin was a credible witness who provided reliable evidence. There is nothing in his testimony and the manner in which he testified that causes me to believe that he was being anything other than truthful. There was nothing in his testimony, or in that of Mr. Scheepbouwer and Mr. Lohner, that would seem to be outside of the normal auto servicing procedure when a customer brings a vehicle in due to having some problem with the vehicle.

[29] Mr. Mahmoud asserts that he has proven Nissan damaged the Titan, because he drove the Titan to Nissan, and it is not probable that it subsequently became almost immediately not drivable. Therefore, he submits, the evidence of Nissan that the Titan had to be pushed into the shop is untrue and is part of Nissan's plan to either sell him a new vehicle, or cause him to incur significant costs to replace the transmission of the Titan.

[30] Mr. Mahmoud points to areas of the evidence where his evidence differs from that of Nissan's witnesses, or their testimony differs from each others, such as where he met with Mr. Lohner and Mr. Scheepbouwer again, whether this was inside or outside the shop, whether he was or was not told about the Titan not being drivable during this

meeting, whether he was initially told he could drive the Titan from Nissan, and then subsequently told it was not drivable, as being evidence of Nissan having damaged the Titan. Additionally as being sufficiently damaging to Nissan's case, and the credibility and reliability of the witnesses for Nissan, that he should be granted the judgment he seeks.

[31] Mr. Mahmoud also points to statements on the invoice, such as: "ONLY HAS REVERSE NO FORWARD GEARS", to show that the Titan was drivable. Mr. Lohner, when asked about this, stated that in his opinion, while the Titan moved better in reverse than forward, it was not operating properly in reverse. He provided an explanation as to how the clutch plates engage when in reverse as compared to forward for why this was the case.

[32] What is glaringly absent from the evidence Mr. Mahmoud presents in support of his Claim, is evidence from a qualified mechanic as to the nature of the Titan's transmission problems, including the time frame over which any such damage could have occurred. Mr. Mahmoud says that he was unable to obtain any such evidence because Nissan would not allow the Titan to be removed from their property by Mr. Mahmoud in order to be taken to a mechanic. Although Nissan had offered to allow a mechanic of Mr. Mahmoud's choosing to inspect the Titan in the Nissan shop, Mr. Mahmoud said that he did not want to do that because he did not consider it to be appropriate.



[33] I note in this regard that Nissan was entirely within its rights under the *Garage Keepers Lien Act*, RSY 2002, c. 99, not to release the Titan until its account had been satisfied, or other arrangements made.

[34] Therefore, I have no independent expert evidence to assess Mr. Mahmoud's claim that the Titan was drivable against Nissan's assertion that it was not, including to what extent the vehicle may have, in fact, been "drivable".

[35] It is certainly of some interest to me that Mr. Mahmoud was able to drive the Titan, even with the transmission issue, to Nissan, from wherever the Titan had been situated, to so shortly afterwards it being considered to be not drivable to the extent that a decision was made to push it into the shop. However, my interest in this regard cannot be satisfied on the evidence.

[36] What I have is the evidence of Mr. Lohner that the Titan was not drivable, to the point that he decided to push it into the shop, and that, for mechanical reasons he described, it was more drivable in reverse.

[37] With respect to the evidence of Mr. Mahmoud, in general I found him to be a witness who was recounting events as he honestly believed them to have occurred. There was no indication that he was being untruthful or attempting to mislead the Court. I accept that he honestly believes that Nissan damaged his Titan, either deliberately or negligently, and that they were trying to get him to either purchase a new vehicle or authorize the expensive transmission replacement.

[38] I am not so naïve as to believe that such events never happen at auto repair shops. They may. However, in order for Mr. Mahmoud to transform his subjectively held belief into something that I can make a finding on in this case, he needs to either provide direct evidence, or sufficient circumstantial evidence that supports his belief.

[39] He has not done so. The fact that Mr. Mahmoud drove the Titan to Nissan, and that it was shortly thereafter determined by Nissan to be not drivable, is not direct evidence that Nissan's actions caused the Titan to become not drivable. It is, at best, some circumstantial evidence that could be considered with any other evidence that was, or could have been adduced.

[40] However, even with all the other evidence adduced in this case, I find that there is an insufficient evidentiary basis, direct and/or circumstantial, to find that Mr. Mahmoud has proven his Claim on a balance of probabilities. His Claim is founded on very limited evidence which he is attempting to turn into more through nothing other than conjecture, speculation, and the concept of probabilities. I find that the portions of the evidence that Mr. Mahmoud states "prove" his Claim, while subjectively that may be the case to him, do not on any objective standard do so.

[41] Mr. Mahmoud should have taken steps to have his Titan examined by a qualified auto mechanic who would have perhaps then been able to testify in support of his Claim. If he was unwilling to have an auto mechanic do such an examination at Nissan, he could have paid the outstanding invoice and had the Titan towed, or driven if it could be, off Nissan's property to where the auto mechanic could examine the Titan. He could have attempted to recover any such payment in his Claim. He chose not to do so.

Nissan was not required to allow Mr. Mahmoud to remove the Titan until he paid the invoice, or made suitable arrangements with Nissan.

[42] It is undisputed that the Titan's transmission was not operating properly when he made the appointment and brought the Titan into Nissan for servicing. Mr. Mahmoud had not previously had the Titan serviced at Nissan, although I understand he purchased it there, having decided to have any servicing done elsewhere. As I understand the evidence, there had been no specific transmission servicing done since he purchased the Titan.

[43] If Mr. Mahmoud wished to prove Nissan damaged the Titan, he needed to call sufficient evidence to prove his Claim. He did not, and the Plaintiff's Claim is dismissed.

[44] With respect to the Counterclaim, I am satisfied that the Plaintiff is liable for the costs associated with the initial servicing and for the flush and drive line service. While I accept that Mr. Mahmoud was making decisions in a condensed time frame and somewhat unexpectedly, given the results of the inspection as communicated to him, I am satisfied that he was not "forced" or "coerced" into doing so. I also accept, as Mr. Mahmoud also stated in his testimony, that he was advised before authorizing the flush and drive line service, that it was not given a high chance of solving the problem. The explanation provided by Mr. Lohner that he initially thought this might be a feasible option, was premised on the low mileage of the Titan, which was inconsistent with there being a significant transmission issue. I accept that Mr. Lohner's reconsideration of the likelihood of success was reasonable, and that Mr. Mahmoud was aware of this likelihood prior to authorizing the work to be done.

[45] I decline, however, to order the amount claimed for pushing the Titan into and out of the shop. I accept that this happened, but am not satisfied in the circumstances that Mr. Mahmoud should be required to pay it.

[46] I also decline to award Nissan damages for storage fees to the date of trial. There was no prior agreement for storage fees to be paid and the simple reality is the presence of the Titan on the lot is not causing Nissan to incur any costs or creating any difficulties for them.

[47] Therefore the Plaintiff's Claim is dismissed. On the Defendant's Counterclaim, I award damages of \$993.

[48] I decline to order any prejudgment interest or costs. Post-judgment interest is awarded pursuant to the *Judicature Act*, RSY 2002, c. 128, commencing December 1, 2021.

[49] Storage fees of \$15 per day for the Titan are awarded, commencing December 1, 2021. This should provide Mr. Mahmoud with sufficient time to pay the invoice and have the Titan removed.

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COZENS C.J.T.C.