

Citation: *Whitehorse Wholesale Auto Centre Limited v. Tyerman*, 2012 YKSM 2

Date: 20120126
Docket: 11-S0064
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Luther

BETWEEN:

WHITEHORSE WHOLESALE AUTO CENTRE LIMITED

Plaintiff

AND:

JUDY TYERMAN

Defendant

Appearances:

Edwin Woloshyn
Judy Tyerman

Appearing on behalf of the Plaintiff
Appearing on her own behalf

REASONS FOR JUDGMENT

[1] LUTHER T.C.J. (Oral): The plaintiff is suing the defendant for the amount of \$19,879.67, plus pre and post-judgment interest.

[2] On April 15, 2005, the defendant purchased a used Ford F150 pickup from the defendant [sic] for the purchase price of \$17,000. She paid \$2,000 down and, because of her First Nation status, paid no GST. The conditional sale agreement was a written document duly executed by both parties. The defendant had previous dealings with the plaintiff.

[3] On May 20, 2005, the plaintiff, at the request of the defendant, installed a hitch and canopy at a cost of \$1,380. To have entered this amount into the bookkeeping records was acceptable and appropriate. Interest was agreed at 9.5 percent per annum to be calculated monthly. The defendant agreed to pay \$376.85 on the 20th day of each month, commencing May 20, 2005.

[4] From May 2005 to November 2006, the defendant made ten payments, nine of which were \$380, one of which was \$376.85, and one for \$560. In August and September of 2007, she paid \$1,513.70. Thus, for 2005, 2006 and 2007, she paid a total of \$5,870.55.

[5] In the summer of 2008, the defendant fell on hard times. For some time she had no residence in Whitehorse and lived in a cabin out in the country. The vehicle broke down on the highway. Eventually, she arranged through her daughter to have it towed to the plaintiff's property without having notified the plaintiff. Edwin Woloshyn, owner of Whitehorse Wholesale Auto Centre Limited, did not discover the vehicle for some time, perhaps a couple of weeks, because it was in a back area near a dumpster amongst a number of older vehicles being kept for spare parts.

[6] There appeared to be considerable difficulty on the part of the plaintiff in contacting the defendant. The defendant claims to have been talking to Edwin Woloshyn's wife, Shirley, who unfortunately passed away in the summer of 2011. Edwin Woloshyn informed us that he and his wife worked long hours and closely together in their small business seven days a week. It is highly unlikely that any specific instructions were given by the defendant to Shirley Woloshyn as to what to do

with the vehicle. It is interesting to note that the defendant's mailing address on the contract remains the same. There is no evidence that the plaintiff tried to contact her through Canada Post.

[7] Given the irregular pattern of payments, that is 12 over the first 20 months, the equivalent of about four payments in 2007, and no payments since September of 2007, and given the lack of communication, the plaintiff ought to have taken steps very quickly after the 20-day waiting period, as set out in Term 6 of the terms of sale contained in the conditional sale agreement. Term 6 in its entirety reads as follows:

The balance of the Amount Financed and accrued Cost of Borrowing will become payable immediately if any of the following happens and, except where the Buyer is a corporation, continues for 15 days; if I do not pay any amount when due, or if I breach any of my other obligations under this Agreement, or if the Property is about to be sold or removed from Canada without your consent, or if proceedings are started by or against me under any insolvency, bankruptcy or winding-up law, or if anything else happens which you believe endangers the Property or affects my ability to pay the amounts that may become payable under this Agreement. In any such case you may from time to time:

- (a) take possession of all or part of the Property, wherever it is, and store, sell or lease it or
- (b) sue me in Yukon T. (whether or not I am ... living there) or elsewhere for any amount I owe.

Where not prevented by law or if the Buyer is a corporation you may do both (a) and (b) in any order. You may also exercise any other rights you may have.

If I have paid at least 2/3 of the Total Amount Payable you will not take possession of the Property without a court order unless the Buyer is a corporation.

If the Buyer is not a corporation, you will not sell or lease the Property for at least 20 days after you take possession.

Sale or lease proceeds may be applied to the amount I owe, including the expenses mentioned in paragraph 9 below, and I will pay you any amount still owing unless you are prevented by law from suing me.

Any judgment obtained by you will not affect my obligations under this Agreement.

[8] The plaintiff under such circumstances ought to have mitigated its loss by selling this vehicle, certainly no later than the end of the year 2008. *Black's Law Dictionary*, 9th edition, defines repossession as the act or an instance of retaking property, especially a seller's retaking of goods sold on credit when the buyer has failed to pay for them.

[9] In *Whitehorse Wholesale Auto Centre Limited v. Ben Clark*, 2007 YKSM 2, a decision by Judge Overend, the plaintiff sought to recover from the defendant the sum of \$21,337.84 as the amount of arrears alleged to be owing on the 10th of April 2007. The subject matter of the conditional sale agreement in that case was a 2004 GMC which:

... in November of 2006, was delivered to the premises of the claimant and in the evidence of Edwin Woloshyn, on behalf of the claimant, was "abandoned on our lot with the keys under the mat". While unsuccessfully attempting to contact the defendant after the truck was left on its lot, the claimant does not deny that it had accepted the truck's return nor that it has retained possession of the vehicle since that date.

[10] In the present case, Edwin Woloshyn claims the plaintiff did not accept the truck, yet held onto it for three years.

[11] After an analysis of the Territorial legislation, the judge in the 2007 case

concluded:

Therefore, Whitehorse Wholesale Auto Centre's claim for an amount owing under the *Consumers Protection Act* is barred by statute.

[12] In another decision, *Whitehorse Wholesale Auto Centre Ltd. v. Terry Hanson (now Terri-Lynn Kowalchuk)*, 2010 YKSM 3, the defendant brought the car back to the plaintiff's lot.

The plaintiff agreed to take the car back but insisted that the defendant sign a promissory note for the balance then owing, less \$2,800, which the plaintiff reckoned to be the value of the car at the time.

No payments were made under the note and ultimately the plaintiff sued the defendant. The defendant failed to take any steps whatever to defend the action and the plaintiff received default judgment, which was for the amount of the note plus interest then owing. Thereafter, the now judgment debtor, the former defendant, commenced making payments on the judgment. The judgment was obtained in early 2007, April I believe, and the judgment debtor has made payments since then totalling \$3,900.

After more than two years had gone by, the defendant belatedly became aware of the provisions of the *Consumers Protection Act*, R.S.Y. 2002 c. 40, which, in her view, provided her with a defence to the claim. Up until that time, she had done nothing whatever to determine what her legal position or rights were.

Further on in the decision, the judge noted:

It seems to me that if the car lot in this case has the car brought back to them and they agree to take it back, that the provisions of the *Act* would apply.

[13] What happens if the plaintiff does not agree to take back the vehicle but has it secretively hidden on his back property, goes to differentiate this case somewhat. But

the reality is that the plaintiff clearly had possession of the vehicle, once it was discovered, and once it obtained the keys.

[14] In my opinion, the defendant was, in a less than open and forthright manner, trying to take advantage of the *Consumers Protection Act*. The plaintiff was strategically attempting to avoid being taken advantage of and receiving another unfavourable judgment in court. It is certainly arguable that the plaintiff repossessed the goods comprised in the time sale, but he clearly did possess them by the latter part of 2008. The conditional sale agreement and s. 53 of the *Consumers Protection Act*, in my view, allowed him to sell the vehicle obtained, as it was in the peculiar circumstances of this case, and to recover the balance owing at the end of 2008, but no amounts thereafter. No action is therefore maintainable by the seller to recover the balance or any part thereof.

[15] My interpretation of s. 53 for the facts of this case prevent the plaintiff from recovering any indebtedness accruing after the end of 2008. As Richard J. observed in *Guerin v. Whitehorse Wholesale Auto Centre*, 2001 YKSC 522, at paragraphs 9 and 10:

In my view, it is regrettable that the parties were not able to resolve this dispute by mediation rather than bringing the matter to Court.

However, the matter is here now and the Court will do what it deems to be just and equitable between the parties.

[16] Edwin Woloshyn, referring to his January 2012 black book, has told us that this model of F150 would have the following values:

	<u>Wholesale</u>	<u>Retail</u>
2000 year	\$3,450 to \$4,600	\$7,325
2003 year	\$7,225 to \$8,800	\$12,000
2004 year	\$6,750 to \$8,125	\$11,250

We do not have in evidence the value of this F150 2000 in December of 2008, but by examining the figures above it would not be unreasonable to put the wholesale value at approximately \$8,000 and the retail value at about \$11,000.

[17] The plaintiff's calculations put the indebtedness at about \$15,500 at the end of 2008, whereas the defendant's calculations come in at about \$13,500, plus the cost of the canopy and hitch which, with interest, would be about another \$1,600, for a total of \$15,100, not significantly different from the plaintiff's number.

[18] Because the plaintiff did nothing for three years, the ruling of this Court is that the plaintiff will keep the vehicle and be entitled to judgment in the amount of \$15,500, less \$10,000, that is a value between the imputed wholesale and retail price as at the end of 2008, for the sum of \$5,500 plus pre-trial interest only. Costs will be awarded in the amount of \$202.50.

LUTHER T.C.J.