

Citation: *Whitehorse Wholesale Auto Centre Ltd. v. Clark*, 2007 YKSM 2

Date: 20070906
Docket: 07-S0004
Registry: Whitehorse

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

Whitehorse Wholesale Auto Centre Limited

Plaintiff

v.

Ben Clark

Defendant

Appearances:
Ed Woloshyn
No one

On behalf of Whitehorse Wholesale Auto Centre Ltd.
Appearing for the Defendant

REASONS FOR JUDGMENT

[1] This matter is before the Court today for the purpose of assessing damages, the Claimant having been granted a default judgment on the 28th of August, 2007 due to the failure of the defendant to appear for a pre trial conference. In its claim, Whitehorse Wholesale Auto Centre Ltd. seeks 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 pursuant to the terms of a Conditional Sale Agreement between the parties dated the 18th of June, 2004 and marked as Exhibit 1 in this hearing.

[2] The subject matter of the Conditional Sale Agreement is a 2004 GMC truck, the original sale price of which was \$54,000.00. That vehicle, 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.

[3] The terms of the sale are on the reverse side of Exhibit 1. One of those terms, #6 provides that if payments under the contract are not paid when due (which clearly is the case here) the claimant seller may:

- (a) take possession of all or part of the Property, ... or
- (b) sue ...for any amount owing.

[4] The operative word there is “or”. If possession is taken of the vehicle there is no right to sue and conversely if the seller sues, he forfeits the right to repossess the vehicle.

[5] This provision of the contract merely reflects the law as set out in section 53 of the *Consumers Protection Act*, R.S.Y. 2002, c. 40, s. 53(1) which says in part:

... if a seller under a time sale repossesses the goods comprised in the time sale, ... no action is thereafter maintainable by the seller to recover the balance or any part thereof.

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

[7] This case is complicated by the fact that the claimant had recovered a default judgment. The matter was set down only for assessment of damages. However, where it appears on the assessment hearing that the claim is unfounded in law, it would be an abuse of the process of the Court to allow the action to continue. I am satisfied that I could on my own motion set aside the judgment. However, I will in this case simply find that the claimant has suffered

no damages thereby achieving the same result in so far as the parties are concerned.

[8] There is therefore a finding that the claimant has suffered no loss and I fix the damages at zero dollars.

Overend T.C.J.