

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

Yuling Zhan,) No: 04 M1 23226
Plaintiff)
V.)
Napleton Buick Inc; Ford Motor Company,)
Defendants)

**PLAINTIFF’S OPPOSITION TO THE SECOND MOTION TO DISMISS AND
STRIKE FILED BY NAPLETON BUICK INC.**

The Plaintiff, Yuling Zhan, respectfully submits this opposition to the second motion to dismiss and strike, filed by Napleton Buick Inc. (“Buick”), and claims as follows:

1. The instant suit was filed on December 22, 2004. On January 27, 2005 Buick filed a section 2-615 motion, pursuant a part of 735 ILCS 5/2-603 instead, provided false statement on oath, failed to serve required papers upon plaintiff on time. Even after one Buick’s counsel admitted and argued it was a mistake, and the Honorable Judge had a ruling, another Buick’s counsel, Ms Vorberg, still quibbled about the failure.
2. On May 5, 2005 Plaintiff submitted a proposed Amended Complaint to the Honorable Court. On June 21, 2005, Buick filed the instant 13-page motion to dismiss and strike. Awkwardly drafted, it is rambling, sloppy and evasive, further, it entirely misinterprets the law, provides false statements, and Buick’s core arguments are patently without any merit.

3. Here again, Buick still refuses to recognize there is a relationship between Magnuson-Moss Act (the “Act”), different Federal Statutes, State Statutes and common law. The Illinois Appellate Court already articulated on this issue in detail. See *Vicki v. Ford Motor Company*, No. 1-02-2058, Slip opinion, (Ill. 1st Div. July 31, 2003).
4. Here, Buick still refuses to recognize there are several causes of action under the Act, which include breach of written warranty, implied warranty, service contract and obligations set forth by 15 U. S. C. §2310(d).
5. In its motion, Buick fails to recognize causes of action exist for violations of prohibition or failure to comply with a requirement of the Act or rules under it, for breach of “obligations” under other Federal Statutes, such as disclosure (16 CFR §701), pre-sale availability (16 CFR §702), FTC Used Car Rule (16 CFR Pt. 455), and for breach of “obligations” created by State and common law.
6. It is a question of law, Count I – Count IV in the Amended Complaint (the “Complaint”) all are causes of action under the Act. Buick’s argument at pages 2 and 3 is wrong from the start.
7. In Buick’s comment on Count I, at page 4, claiming pursuant 15 U. S. C §2304(a), Buick spent a great energy setting a standard for Plaintiff to establish any claim under the Act. Buick failed to quote and analyze the Statute; and misinterprets the law completely. According to the holding of the Courts, 15 U. S. C §2304(a) does not apply in the instant case. See e.g. *Sorce v. Naperville Jeep Eagle, Inc.*, 309, Ill. App. 3d 324 (1999).
8. As concisely stated in the Complaint, Buick played trick with the Buyer’s Guide, failed to incorporate it into the contract, changed its content after the sale, had no intention to honor the changed “warranty” as well. Such conduct definitely violates the Act, Illinois UCC, Illinois Consumer Fraud Act and common law.
9. It is noteworthy that some Appellate Court already concluded that the failure to provide a “Buyer’s Guide” was a clear violation of Magnuson-Moss Act. See *Currie v. Spencer*, 772 S. W. 2d 309 (Ark. 1989).

10. As concisely stated in the Complaint, Buick provided false statement in its undated response to the Illinois Attorney General's Office (Exhibit E1 in the Complaint) and falsified a letter addressed to Plaintiff (Exhibit E2 in the Complaint). This must be taken as true for the purpose to review a motion to dismiss. See *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 575 N. E. 2d 548 (1991). Further, Plaintiff will address this issue in the future to convince the Honorable Judge and jury about what Buick did and what Buick failed to do.
11. At pages 4, 5 and 11 of its motion, Buick designates Exhibits E1 and E2 in the Complaint as its own Exhibit A, and contends that these documents demonstrated "Defendant sought to remedy any alleged defects"; "Plaintiff prevented the Defendant from remedying any alleged defect." Here, Buick's logic is absurd, and such argument provides false statements in a court proceeding based on Buick's own deception in the past.
12. Here again, at pages 5 and 12, Buick violates the court rules, by failing to incorporate its Exhibit A and Exhibit B into the instant motion. At Page 12, Buick states "See Motion to Strike and Dismiss attached as Exhibit B." But no one can be sure what is Buick' Exhibit B.
13. At page 5, Buick refuses to recognize Revocation of Acceptance (Count IV) as a cause of action. Plain language of the Act and case law reject Buick's contention. See 15 U. S. C. §2310(d), *Vicki*, (plaintiff filed a three-count complaint, including breach of written warranty, breach of implied warranty, and Revocation of Acceptance under the Act).
14. Buick devoted half of page 5 in its motion, and argued "§2310(d) does not provide a basis for any action, regardless of what facts the Plaintiff has plead." As this Honorable Court can see, Buick is basically suggesting there is no private cause of action at all under the Act. Such incredible argument is not only frivolous, but also scandalous.
15. It is a question of law, under Magnuson-Moss Act, UCC and Illinois Consumer Fraud Act, revocation is available as a remedy for Plaintiff. See 15 U. S. C. §2310(d), 810 ILCS 5/2-601 et. seq. and 5/2-701 et. seq.,

Sciarabba v. Chrysler Corp., 173 Ill. App. 3d 57, 122 Ill. Dec. 870, 527 N. E. 2d 368 (1 Dist. 1988).

16. At page 6, Buick tried hard to quote 810 ILCS 5/2-601 and 701, but failed to read 810 ILCS 5/2-601 et. seq. and 810 ILCS 5/2-701 et. seq. in whole. The issue at hand is revocation; but no one can be sure what Buick was talking about. Buick is wasting invaluable time and resources of this Honorable Court with wanton argument. By claiming Count IV is not a cognizable claim, Buick is denying it has any obligation to respond consumers' request for revocation even in a court proceeding. Further, on the same page, Buick provided another false statement about "any later occurring defects" in the first paragraph.
17. Regarding Count VII, Plaintiff may recover damages for negligent infliction of emotion distress if she can prove that defendant was negligent. See *Corgan v. Muehling* 143 Ill. 2d 306 (1991). To prove negligence, Plaintiff must establish duty, breach, causation, and damages. *Corgan*, 143 Ill. 2d at 306; *Parks v. Kowancki*, 193 Ill. 2d 164.(2000).
18. As clearly stated in the Complaint, Buick had a duty to thoroughly inspect the car before the sale, had an obligation to disclose the car maintenance history and record at consumer's request, Buick had the obligation to disclose the terms of warranty before the sale, also it had the duty to have mechanical check up as it promised, further, it had an obligation to promptly respond to Plaintiff's request. Buick failed all of these.
19. At page 7, Buick is trying to argue stalling at highway speed without a fatal accident cannot cause emotional distress. If Buick and its counsel had such experience, they would certainly know what emotional distress means. Contrary to Buick's argument, according to *Corgan*, 143 Ill. 2d at 312, Plaintiff does not need to prove that the emotional distress manifested itself in a physical symptom such as an injury or illness. Further, whether Plaintiff suffered emotional distress is a question of law and fact, which would be determined by the Honorable Judge and jury.

20. For the same reason, Buick cannot succeed to challenge Plaintiff's Count VIII. As the Complaint shows, Plaintiff has already presented ultimate and material facts to support each element of her claim according to *Doe v. Calumet City*, 161, Ill. 2d 374 (1994) and *Honaker v Smith*, 256 F 3d 477 (7th Cir. 2000). Further, intentional infliction of emotional distress is an ongoing process, In the end, the Honorable Judge and jury will decide at trial whether Plaintiff could prevail on this Count.
21. As the Honorable Court can see, all eight Counts in the Complaint are closely related. Once Plaintiff prevails on one Count, some other will definitely follow. Ultimately, the full panoply of judicial remedies must be available for Plaintiff, as described in the Complaint.
22. As the Honorable Court can see, Buick has failed to present any meaningful argument on the issue of damages in its lengthy, messy and sloppy motion, because it misinterprets the law, fails to analyze the relationship of the Act, State law and common law, it fails to identify what the causes of action are.
23. For example, at page 9, Buick argues that the Magnuson-Moss Act limits damages under 15 U. S. C. §2310(d)(2). Here, Buick fails to realize that State law governs the issue for the instant suit. See *Lara v. Hyundai Motor America*, 331 Ill. App. 3d, 53, 61, 770 N. E. 2d 721, 727 (2002).
24. For example, Buick fails to realize what the cause of action is for Count I: Buick violates the FTC Used Car Rules (16 CFR Pt. 455); there is a private cause of action under the Act. To evaluate damages, we have to follow State Law, such as Consumer Fraud Act and UCC, in which incidental and consequential damages are available.
25. For example, Buick fails to notice UCC shall be liberally administrated to the end that the aggrieve party may be put as good a position as if the other party had fully performed. See 810 ILCS 5/1-106(1).
26. For example, Buick contends, at page 10, Plaintiff cannot recover legal fees even when she prevails on Count II, III and IV. This is plain wrong: Buick might have the power to tow back the car and keep the money, and

could choose to ignore Plaintiff's request for fifteen months and breach its UCC obligations, but it certainly had no liberty to force Plaintiff to file her Complaint pursuant to State Statutes only.

27. For example, also at page 10, Buick argues under UCC Plaintiff is not entitled to recover consequential damages. Buick is wrong again, because its "warranty" did fail its essential purpose beyond any reasonable doubt.
28. For example, at page 11, in its comments on claims in Count V, Buick fails to notice that the Illinois Consumer Fraud Act shall be liberally construed to effect the purpose. 815 ILCS 505/11a. Buick fails to notice the Honorable Court, "in its discretion may award actual economic damages or any other relief which the court deems proper." 815 ILCS 505/10a. As proximate damage, not only the purchase price, but also alternate transportation, other inconvenience should be considered. Also Buick fails to notice actual damages can include loss of use of the car, measured by the reasonable cost of rental. See *Gent V. Collinsville Volkswagen, Inc.*, 451 N. E. 2d 1385 (5th Dist. 1983). Further, Buick fails to notice Plaintiff may recover both compensatory and punitive damages under the Illinois Consumer Fraud Act. See *Black V. Lovino*, 219 Ill. App. 3d 378 (1991); *Check V. Clifford Chrysler Plymouth of Buffalo Grove, Inc.*, 342 Ill. App. 3d 150 (1st Dist. 2003).
29. For example, as the Honorable Court can see, in its comment on Count VI at page 11, Buick's argument is based on its deception in the past. As precisely stated in the Complaint, Exhibit E2 demonstrated Buick created a falsified document in its response to the Illinois Attorney General Office. To say the very least, here again, Buick violates the strict requirement placed on a motion to dismiss to take all facts alleged by Plaintiff as true. Further, in the respect of serving papers, dishonesty from Buick or its counsel has been proven from the beginning of the instant suit.
30. As explicitly stated in Plaintiff's first Opposition to the Motion to Dismiss filed by Buick, Buick simply fails to distinguish facts and legal conclusions. All paragraphs in the Complaint, which Buick contested, are providing

material facts. As comparison, Buick has failed to provide a single piece of facts to challenge Plaintiff's factual allegations. Although trying hard, Plaintiff cannot find anything meaningful in Buick's instant motion except misinterpretation of the law, wanton argument and false statement.

31. As stated in Plaintiff's first Opposition to the Motion to Dismiss, a section 2-615 motion to dismiss attacks the legal sufficiency of a complaint. See *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 710 N. E. 2d 798 (1999).
32. As the Honorable Court can see Plaintiff's Complaint easily meets the pleading standard by providing a fair notice to Buick what the claims are and Plaintiff is definitely entitled to relief. Further, Buick filed a Counterclaim on June 23, 2005, in an attempt to destroy evidence, or, force Plaintiff to repossess a nonconforming car and tolerate its deceptive practice. According to the Code of Civil Procedure, a counterclaim should be a part of an answer. See 735 ILCS 5/2-608. By its recent filing Buick has already admitted that the Complaint is legally sufficient, and all Counts in the Complaint are variable claims.
33. As the Honorable Court can see how many fatal mistakes Buick has made. In a thirteen-page motion, at pages 2, 3, 4, 5, 6, 9, 10, Buick either misinterprets the law, or provides incorrect assertion and wanton argument because of its misinterpretation of the law. There are false statements at pages 4, 6 and 11. And, Buick's contention at pages 7 and 8 has no merit at all.
34. As the Honorable Court can see all paragraphs in the Complaint Buick has challenged are providing factual allegations. Such as in paragraph 18, Plaintiff concisely states that Buick changed the term of a warranty, and it failed to honor the changed "warranty." Buick might deny all of these, but if it does, the denials will constitute a false declaration in a court proceeding. On the other hand, if Buick admits, it would accept liability on the spot. Buick is trying hard to avoid providing direct answers to all these factual allegations by label each of them as "legal conclusion."

35. At page 13, Buick admits: "it is unable to understand and/or answer the purported claims." Buick is in wholesale violations of the law, even if Buick does not know what the law is and what is the relationship between Federal and State Statutes, this cannot be a basis to file a motion to dismiss and strike. As the Honorable Court can see, Buick cannot deny any of the factual allegations in the Complaint, but it refuses to admit all the material facts by filing the instant motion.
36. In sum, Buick's second motion to dismiss and strike must be denied, because it is a complete failure: Buick misinterprets the law, provides false statements, and its core argument is either nonsensical or plain wrong. As the Honorable Court can see, a cause of action will not be dismissed on the pleading unless it clearly appears no set of facts can be proved which will entitle the plaintiff to recover. See *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86, 672 N. E. 2d 1207 (1996). Further, to review the sufficiency of a complaint before discovery, "the issue is...whether the claimant is entitled to offer evidence to support the claims." See *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974)

WHEREFORE, Plaintiff prays the Honorable Court deny Defendant Buick's motion, and consider Plaintiff's opposition to Defendant's motion.

(Plaintiff's Signature)

(Date)

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