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

Yuling Zhan,	)	No: 04 M1 23226
Plaintiff	)	
V.	)	
Napleton Buick Inc.	)	
Defendant	)	

OPPOSITION TO THE RENEWED MOTION TO STRIKE

PLAINTIFF'S AFFIRMATIVE DEFENSES

The Plaintiff, Yuling Zhan, respectfully submits this Opposition to the Renewed Motion to Strike Plaintiff's Affirmative Defenses, and states as follows:

I. Defendant's Motion Must be Stricken, Because It Is Rife With False Statements, And Defendant Fails to Comply with the Stricture of a Section 2-615 Motion

1. A motion to strike an affirmative defense admits well-plead facts constituting the defense, only attacking the legal sufficiency of the facts. See *International Insurance Company v. Sargent and Lundy*, 242 Ill. App. 3d 614, 630-31, 609 N. E. 2d 842, 852-854 (1st Dis. 1993)
2. As defendant and its counsel are fully aware of, the legal sufficiency for plaintiff's Affirmative Defenses XI-XVII has already been established in this case.
3. On May 5, 2005, Plaintiff filed an Amended Complaint and on June 21, 2005, Buick submitted its motion to dismiss and strike. For several months, seeking a ruling in their favor, defendant's counsel Ms. Elaine S.

Vorberg ("Vorberg") and Mr. Ryan Haas filed the same motion twice in Court and presented it to three Honorable Judges. There were already two written orders on defendant's motion to dismiss, it was either stricken or denied.

4. By attacking Affirmative Defenses XI-XVII, defendant and its counsel are, knowingly and willingly, looking for some other ruling on the same issue from a different trial Judge. Such practice will bring the legal profession into disrepute, and it shall be prohibited, and defendant's motion should be stricken with prejudice in whole.
5. When reviewing a motion to strike, all factual allegations in the pleading under attack have to be taken as true. See *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 575 N. E. 2d 548 (1991).
6. Worse than departure from the strictures of a Section 2-615 motion, defendant provided deliberate false statement in order to challenge plaintiff's Affirmative Defenses. As an example, for a single used car, defendant created three version of a Buyer's Guide: one was displayed at sale, only WARRANTY box was checked, defendant purposely did not incorporate it into the contract; one stamped version defendant faxed to plaintiff after she drove the car home with 50/50 warranty and SERVICE CONTRACT box unchecked (Exhibit A); and recently defendant pops up another handwriting version with SERVICE CONTRACT box checked (Exhibit B). Defendant refuses to provide any information on who the authors were and what were the creation dates. At Motion ¶25, defendant and its counsel provide fraudulent and wanton argument by contending Exhibits A and B "contain the same information." Without question, defendant did have a duty to explain why more than one version of a Buyer's Guide was needed, but it failed. As such, defendant's instant motion should be stricken in whole as a form of sanction.
7. Furthermore, plaintiff incorporates Amended Complaint and all Exhibits therein into her Affirmative Defenses. Therefore, It is patently without any

merit for defendant to challenges the sufficiency of facts in plaintiff's pleading

II. Defendant Fails to Evaluate What Is An Affirmative Defense

8. At Motion ¶10, defendant misplaces case law, and it confuses defense with claim. As such, Motion ¶15 should be stricken because the case law defendant cited is not on point.
9. At Motion ¶¶ 15, 16, 21, and 31, defendant asserts Affirmative Defenses I, II, VII and XVII are claims. That is not correct.
10. At Motion ¶¶ 22, 24 and 31, defendant complaints plaintiff's Affirmative Defenses VIII, X and XVII lacking of cause of action. Defendant's contention is completely wrong. An Affirmative Defense is not a claim or a counterclaim. It is unlikely that defendant was confused by the basic definition of defense and claim; any such nonsensical argument from defendant must be stricken as a matter of law.
11. At Motion ¶31, defendant labels "Estoppel" as a claim, and at Motion ¶¶ 21 and 31, defendant argues "Fraud" and "Fraud upon Tribunal" are not Affirmative Defenses. Defendant is wrong again. The affirmative defenses enumerated in 735 ILCS 5/2-613(d) constitute a non-exhaustive list, and estoppel and fraud are indeed on the list.
12. As well known, <u>any new matter</u>, including a fact or argument, constitutes an affirmative defense that, if true, it will defeat a claim or a counterclaim even if all allegations in the claim or counterclaim are taken as valid. See *Vroegh v. J & M Forklift*, 165, ILL. 2d 523, 651 N. E. 2d 121, 126 (1995); *People v. Community Landfill Company*, PCD 97-193, slip op. at 3 (Aug. 6, 1998); 735 ILCS 5/2-603(d).

13. As the Honorable Court can see, all plaintiff's Affirmative Defenses are affirmative in nature, and they belong to two or three categories:
    a. In Affirmative Defenses I and II, plaintiff presents facts and arguments: defendant cannot sue anybody on its way without a cause of action. With minor changes in the text of its Counterclaim, defendant might tow every car on the street, and then, sue all the vehicle consumers for storage fees, that would be legally wrong. It is well established that, to file a lawsuit, cause of action, facts and causation are a must, not an option.
    b. Affirmative Defenses III-V raise legal arguments: no party can expect compensation by defying Court Orders, violating Illinois Codes of Civil Procedure and Supreme Court Rules.
    c. Affirmative Defense VII, Fraud Upon Tribunal as a more serious form of fraud, is traditionally considered as affirmative under common law;
    d. Affirmative Defenses VIII and IX, like Affirmative Defenses III-V present similar legal arguments;
    e. Affirmative Defense X, Laches is traditionally considered as affirmative in nature under common law;
    f. Affirmative Defenses XI-XVII raise legal arguments: no party can be award of anything for violation of law. It is contrary to the principles of law to suggest defendant deserves any compensation for "service" from its victims of wrongdoings.
    g. Affirmative Defenses XVIII and XIX are traditionally considered as affirmative in nature under common law
14. In Motion ¶¶16, 23 and 28, defendant argues that plaintiff provided "evidence" to refute properly pleaded fact in its counterclaim. That is not a correct statement of fact, as defendant cannot elaborate where and how.
15. At Motion ¶¶ 17-19, defendant complaints Affirmative Defenses III-V are incomprehensible or hard to understand. It is hard to believe defendant does not know what a Court Order, a specific State statute and Supreme

Court Rule meant. Such argument presented by defendant and its counsel is patently without any merit.

16. At Motion ¶¶ 21, 26, 29 and 32, defendant contended Affirmative Defenses VII, XII, XV and XVIII are not affirmative, that is plain wrong.

III. Defendant's Motion Must Be Stricken or Denied Because It failed to Apply Illinois Pleading Standards

17. When evaluating a pleading, Illinois liberal pleading standards and fact-pleading requirements have to be considered simultaneously. In this respect, defendant's motion is a complete failure.
18. 735 ILCS 5/2-603 states; "Pleadings shall be liberally construed with a view to doing substantial justice between the parties."
19. 735 ILCS 5/2-612(b) provides: "No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet."
20. In applying these mandates to affirmative defenses, the Illinois Supreme Court emphasis that the language of section 2-613(d) requires that facts be pled only where "***would be likely to take opposite party by surprise***." (Emphasis added). An affirmative defense described in earlier pleadings (although not specifically pled) does not prejudice or surprise the plaintiff and is therefore, not bad in substance. See *Fitzpatrick v. City of Chicago*, 112 Ill. 2d 211, 218, 492 N. E. 2d 1292, 1295 (1986).
21. Section 2-613(d) explicitly shows "The fact constituting any affirmative defense, *** ***which is not expressly stated in the pleading, would be likely to take the opposite party by surprise*****,** must be plainly set forth in the answer or reply." (Emphasis added).
22. As the Honorable Court can see, when quoting or citing 735 ILCS 5/2-613(d), defendant purposely omits the essential part, and changes the meaning of a statute at Motion ¶ 12. Therefore, Motion ¶¶ 19 and 30 should be stricken because defendant misinterpreted the law for an improper purpose. Defendant uses the same technique in interpreting

and citing case law in Motion ¶11, for the same reason, Motion ¶ 20 should be stricken as well.

23. In *Fitzpatrick*, the plaintiff in that case asserted error in the defendant's pleading, arguing that "defendants failed to assert or incorporate even one fact" in support of their affirmative defense. Applying a liberal construction of pleadings pursuant to Illinois Statutes, the court rejected plaintiff's arguments because plaintiff was not "unfairly surprised" by the defense. Thus the court held that "defendants' pleading is sufficient."
24. At Motion ¶ 20, defendant complains that plaintiff refers a letter written by its counsel Ms. Vorberg but did not attach it to her Affirmative Defense VI. The drafter of defendant's instant motion is Ms. Vorberg, who chose not to provide her printed name on it. As the Honorable Court can see, the letter demanded by defendant, attached or not, will certainly not surprise defendant and its counsel.
25. At Motion ¶ 30, defendant complains that plaintiff refers websites, but the websites had not been attached in the Affirmative Defense. Here, defendant fails to cite any Statute or case law in support of such a demand.
26. At Motion ¶ 31, defendant contends the following statement is a factual conclusion: "defendant definitely knew what the terms of the warranty were when the subject car was sold". Here, defendant's assertion is not correct. The sentence is a statement of fact. It would be absurd if defendant would go one step further, and demand such a fact should be attached to a pleading.
27. It is an improvement that, for the first time, defendant notice that Illinois is a fact-pleading jurisdiction. And plaintiff is quite sure defendant would agree there are no different pleading standards for different parties. As the Honorable Court can see, all of plaintiff's Affirmative Defenses meet the Illinois pleading standard. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will

prevail, the defense should not be stricken." See *International Insurance*, 242 Ill. App. 3d at 631, 609 N. E. 2d at 854.

IV. Conclusion

In sum, defendant fails to comply the stricture of a Section 2-615 motion, provides deliberate false statements to attack plaintiff's pleading; in the instant renewed motion, defendant recycles its argument on the same issue which has already been rejected by two written Court Orders from two Honorable Judges; and defendant misstates the law for improper purposes as its routine practice. As a result, defendant's instant motion must be stricken or denied as a matter of law.

WHEREFORE, Plaintiff prays the Honorable Court strike or deny defendant's motion, and grant plaintiff additional relief that this Court deems just and proper.

_____ _____

(Plaintiff's Signature) (Date)

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