

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 DEFENDANT’S MOTION TO STRIKE PLAINTIFF’S REPLY  
TO DEFENDANT’S AFFIRMATIVE DEFENSES II AND IV**

The Plaintiff, Yuling Zhan, respectfully submits this Opposition to Defendant’s Motion to Strike Plaintiff’s Reply to Defendant’s Affirmative Defenses II and IV, and states as follows:

1. Defendant’s motion must be stricken or denied because it is patently without any legal and factual ground.
2. Defendant’s affirmative defenses II and IV attempt to attack legal and factual allegations in plaintiff’s Complaint. By definition, they are not affirmative in the first place.
3. Under Magnuson—Moss Act (“Act”), whenever there is any written warranty, implied warranty cannot be disclaimed, it only can be limited. Defendant rigorously argues the subject car was not under any implied warranty, so under the Act defendant really means that the subject car was actually sold “as is.” This is a per se violation of written and implied warranty.
4. Warranty is a part of a contract. Under the contract law, a party in breach may not enforce the contract. See *Goldstein v. Lastig*, 154 Ill. App. 3d 595, 599; 507 N. E. 2d 164, 167-167 (1987). A party seeking to enforce a contract has the burden of proving he has substantially complied with all

- material terms of the agreement. See *Goldstein*, 154 Ill. App. 3d at 599, 507 N. E. 2d at 168. A party who materially breaches a contract could not take advantage of the terms of the contract that benefit him, nor can he recover damage from the other party of the contract. See *Goldstein* 154 Ill. App. 3d at 599, 507 N. E. 2d at 168.
5. Thank to defendant's recent effort, plaintiff has seen three versions of the Buyer's Guide for the subject car: At the dealership, only warranty box had been checked, this was consistent with salesman's statement that the car was under full warranty, one-hundred-percent warranty. After plaintiff drove the car home, defendant faxed her the front page of a Buyer's Guide with 50/50 warranty. See Exhibit A. After the car stalled at highway speed on the first day plaintiff drove to and from work, the car became under no warranty at all, for fifteen months defendant ignored plaintiff's request of revocation; after the lawsuit was filed, defendant even intended to charge "storage fees" from the first day they towed back the car. And in response to Request for Production, defendant popped up another version of the Buyer's Guide with SERVICE CONTRACT box checked. See Exhibit B. At Request for Admission ¶5, plaintiff demands defendant to admit it should know the exact terms of warranty, defendant's response is "it calls for legal conclusion and calls for speculation." As such, defendant has no defense for a warranty breach claim, let alone a basis for an Affirmative Defense.
  6. When responding to Interrogatories ¶4, defendant states: after it acquires automobiles, "Defendant then conducts thorough check on all vehicles." When answering plaintiff's Complaint ¶14, defendant claimed: "Napleton admitted that a mechanical check was performed on the automobile." But defendant argues "Defendant does not have any document in its possession any such document" at Request for Production ¶15. At the dealership, salesman told plaintiff "Mechanical check is done. It is a good car, safety is guaranteed." But when plaintiff drove it on the first day to and from work, engine stalled at highway speed, fatal accident could happen.

As such, defendant has no defense for a warranty breach claim, let alone a basis for an Affirmative Defense.

7. After the lawsuit was filed, when defendant's counsel Ms Elaine S. Vorberg ("Vorberg") asked for the car keys, while providing false statement, she wrote that defendant had demanded car keys "on several occasions." And another counsel Mr. Ryan A. Haas presented the same letter as key "evidence" to the Arbitration Panel. When responding to plaintiff's first set of request for admission ¶¶31, defendant and its counsel change their tone, provide another story, and quibble that Buick "attempted response [to plaintiff] by telephone." But at Response to Production ¶7, defendant refused or failed to submit any record for proof. As such, defendant has no defense for a warranty breach claim, let alone a basis for an Affirmative Defense.
8. In its motion, defendant purposely cited only several words from 735 ILCS 5/2-602, but failed to show how its filing was permitted under the same statute. At the moment, as it did for months, defendant is still repackaging and recycling its argument, which was denied or stricken by two Honorable Judges on three occasions. Any attempt to delay the case further should be sanctioned.

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

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(Plaintiff's Signature)

Yuling Zhan

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( Date )