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

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

PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSE

NOW COMES the plaintiff, YULING ZHAN, in support of her motion to strike defendant's affirmative defense, states as follows:

I. INTRODUCTION

On December 22, 2004, plaintiff filed the instant lawsuit against a car dealership Napleton Buick Inc. ("Buick"), and raised a variety of claims. On May 5, 2005, Plaintiff filed an Amended Complaint. One month later on June 21, 2005, Buick submitted its motion to dismiss and strike. For months, a single motion, Buick filed it twice, presented to three Judges on four occasions, there were one oral ruling, two written orders. On November 28, 2005, finally, Buick filed an Answer. The answer contains five purported affirmative defenses at pp 21-23. A copy of the affirmative defense is attached and incorporated as Exhibit 1. Issues raised by the counterclaims will be addressed in the instant motion; other problems in the Answer will be discussed in a separate filing.

II. LEGAL STANDARD

A. Test for affirmative defense

When asserting an affirmative defense, "the test is whether the defense gives color to the opposing party's claim and then asserts new matters by which the apparent right is defeated." See *Condon v. American Telephone and Telegraph Company, Inc.*, 201 Ill. App. 3d 701, 709, 569 N. E. 2d 518, 523 (2nd Dist. 1991), citing *Womer Agency v Doyle*, 121 Ill. App. 3d 219, 222, 459 N. E. 2d 633, 635 (4th Dist. 1984). In other words, an affirmative defense essentially admits the allegations in the complaint, and then asserts a new matter, which defeats a plaintiff's right to recover. See *Vroegh v. J & M Fortlift,* 165 Ill. 2d 523, 651 N. E. 2d 121, 126 (1965)

B. Pleading standard for affirmative defense

Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2202), is instructive, providing that "[t]he facts constituting any affirmative defense *** must be plainly set forth in the answer or replay."

An affirmative defense must do more than offer evidence to refute properly plead facts in a complaint. See *Pryweller v Cohen*, 282 Ill. App. 3d 89, 668 N. E. 2d 1144, 1149 (1st Dist. 1996), appeal denied, 169 Ill. 2d 588 (1996); *Heller Equity Capital Corp. v Clem Environmental Corp.*, 272 Ill. 3d 173, 178, 598 N. E. 2d 1275, 1280 (1st Dist. 1993)

Facts establishing an affirmative defense must be pled specifically, in the same manner as facts in a complaint. See *International Ins. Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 609 N. E. 2d 842, 853 (1st Dist. 1993)

III. DEFENDANT'S AFFIRMATIVE DEFENSES ARE FACTUALLY INSUFFICIENT

Illinois is a fact pleading, not a notice pleading jurisdiction. See *Teter v. Clemens*, 112 Ill. 2d 252, 492 N. E. 2d 1340 (1986). It is not sufficient to merely state conclusion of law and conclusion of fact. See *Knox College v. Celotex*, 88 Ill. 2d 407, 430 N. E. 2d 976 (1981).

Each of the defendant's affirmative defenses is pled as a notice pleading, with simple legal conclusions, most of which misstate the law, and no, or very few, accompanying conclusions of fact, some of which constitute false statement. As a result, all of the affirmative defenses are factually insufficient.

All allegations in the affirmative defenses as conclusion of fact are vague; if such practice is allowed, plaintiff will be surprised and prejudiced, since it has been proven that defendant and its counsel change their position from time to time in and out of the Court

Defendant's all affirmative defenses fall entirely short of establishing affirmative defenses. A properly pled affirmative defense would establish the defense if all of the facts are ultimately proven. If the facts as pled and taken as true would not establish the defense, the affirmative defense has not been sufficiently pled. Simply providing conclusions of law and conclusion of fact, whether they are correct or not, does not meet the pleading standard for affirmative defense. The affirmative defense filed by defendant fall short of this requirement, and should be stricken.

IV. DEFENDANT'S AFFIRMATIVE DEFENSES ARE LEGALLY INSUFFICIENT OR IMPROPER

A. Defendant's first affirmative defense misstate the law

Here, defendant and its counsel are attacking the legal foundation for a private cause of action under Magnuson-Moss Act; this is not an affirmative defense, not any defense at all.

In ¶ 1, defendant fails to realize there is a relationship between Magnuson-Moss Act, State law and common law. In ¶ 2, defendant is suggesting there is no independent cause of action under Magnuson-Moss Act; the contention is frivolous and scandalous. In ¶¶ 3 and 4, defendant is suggesting there is no private cause of action under Illinois UCC; the contention is equally frivolous and scandalous. Defendant fails to read 810 ILCS 5/2-601 et. seq. and 5/2-701 et. seq. in whole.

Defendant is recycling an old legal argument contained in its motion to dismiss and strike, originally filed on June 21, 2005, plaintiff concisely addressed this issue in her opposition to the motion filed on July 12, 2005. Defendant and its counsel presented the same contention to three Judges on four occasions, it was repeatedly denied and stricken.

Revocation of acceptance is a viable cause of action under Magnuson-Moss Act, Illinois UCC and Illinois Fraud Act. Therefore, defendant's affirmative defense should be stricken as a matter of law

B. Defendant second affirmative defense is improper

Here, in ¶5, defendant is challenging the legal and factual sufficiency of the complaint; this is not an affirmative defense.

Playing tricks with a Buyer's Guide is a per se violation of Magnuson-Moss Act; Oral presentation from Buick's salesmen consistent with the original Buyer's Guide is enforceable under 810 ILCS 5/2-313 in the State of Illinois; Changing the term of warranty is a material breach of the contract; Revocation of acceptance is an available remedy under

Magnuson-Moss Act, Illinois UCC, Illinois Fraud Act and common law fraud. Further, plaintiff requested defendant to respond in writing by fax in three days to solve the problem in one week, defendant failed to fulfill its duty from the very beginning. A party who materially breaches a contract cannot take advantage of the terms of the contract that benefit him. See *Goldstein v. Lustig*, 154 Ill. App. 3d at 599, 507 N. E. 2d at 168 Therefore, defendant's affirmative defense fails to pass the well-established test, fails to challenge plaintiff's Complaint, it should be stricken.

C. Argument on damage and relief does not constitute affirmative defense

An affirmative defense must raise a defense to liability to be proper. Defendant's third affirmative cannot pass the test and does not meet the standard.

In ¶6, defendant's position is squarely contradicted by the Magnuson-Moss Act, Illinois UCC and Illinois Fraud Act. On July 12, 2005, plaintiff already addressed the same issue in ¶¶23-28 of her opposition to defendant's motion to dismiss

D. Defendant's fourth affirmative defense misstate the law

As already stated, whenever defendant and its counsel are attacking the legal foundation for plaintiff's claims; it is not an affirmative defense, not any defense at all.

The federal Magnuson-Moss Act imposes limitations on disclaimers of implied warranty. See 15 U. S. C. § 2308. The implied warranty of merchantability recognizes the purchasers of vehicles have expectations for the performance of their vehicles. See *Blankenship v Northtown Ford, Inc.*, 95 Ill. App. 3d 303, 420 N. E. 2d 167 (4th Dist.). In

¶ 7, defendant misinterprets the law, attacks the legal foundation of plaintiff's claims. This is not an affirmative defense. Therefore, it should be stricken.

E. Defendant's fifth affirmative defense is overly vague and improper

Here, in ¶8, defendant is trying to challenge well-pled factual allegations in the Amended Complaint, it is well established that it is not a right way to purport an affirmative defense See e. g. *Pryweller, Heller Equity Capital Corp.*

At best, the phrase "misuse the car", as a conclusion of fact, is overly vague; plaintiff would be surprised and prejudiced, if defendant can change their position from time to time. At worst, it is a fraudulent statement. The present position from defendant and its counsel is in contradiction with defendant's action and inaction in the past; also it is irreconcilable with defendant counsel's statement in the Court.

On April 4, 2005, during a hearing presided by Honorable Judge Healy, plaintiff claimed she did not misuse the car, defendant's counsel, Ms. Elaine S. Vorberg, just received the car keys and was excited, concurred immediately "That is right."

Further, in its Answer to Amended Complaint, defendant basically copies the Amended Complaint, then put one of the labels such as "admitted", "denied" "lacks information" to each paragraph. There is no fact in defendant's Answer to support the affirmative defense.

Under 735 ILCS 5/2-613(d) (2002), defendant's affirmative defense should be stricken.

V. CONCLUSION

For the reasons stated in this Motion, the affirmative defenses filed by the defendant are each legally or factually deficient or improper, and should be stricken.

WHEREFORE, for the reason stated, plaintiff request that the Court issue an Order striking all five affirmative defenses.

Respectfully submitted,

_____ _____

(Plaintiff's Signature) (Date)

Yuling Zhan
3121 S. Lowe Ave
Chicago, IL 60616
Tel: (312) 225-4401