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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4529-09T4

KIMBERLY ADAMS,

Plaintiff-Appellant,

v.

AMERICAN SUZUKI MOTOR
CORPORATION,

Defendant-Respondent.

Argued January 25, 2011 - Decided April 7, 2011

Before Judges Carchman, Graves, and Waugh.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-1305-09.

Fred E. Davis argued the cause for appellant (Kimmel & Silverman, P.C., attorneys; Jacqueline C. Herritt, on the brief).

Douglas D. Suplee argued the cause for respondent (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys; Mr. Suplee, on the brief).

PER CURIAM

Plaintiff Kimberly Adams appeals the dismissal on summary judgment of her complaint against defendant American Suzuki Motor Company (Suzuki). We affirm.

I.

We discern the following facts and procedural history from the record on appeal.

Adams purchased a 2006 Suzuki Grand Vitara from the Matt Blatt Atlantic City dealership on January 16, 2007. As part of the purchase, she was issued a three-year/36,000 mile basic warranty. The warranty provided that Suzuki would repair or replace parts defective in material or workmanship at no cost to the customer.

Adams alleges the vehicle underwent multiple repairs after she detected leaking oil, and that the vehicle was recalled twice for safety reasons.

On May 14, 2007, Adams brought the car to the dealership for an oil change at 4,121 miles. She reported no complaints. She brought the car in for another oil change and a tire rotation on August 11, at 7,747 miles. She reported that the subwoofer produced "hums and cracks." The dealer replaced the subwoofer under the Suzuki warranty.

On October 27, at 10,517 miles, Adams brought the vehicle in for another oil change and repair of a front tire damaged by a nail. She reported that the "engine makes a ticking sound," however, the dealer was unable to duplicate the sound, so no

repairs were performed. She did not complain about the sound again.

On March 12, 2008, at 13,274 miles, Adams returned for an oil change and tire rotation. No problems were reported. On June 20, at 17,792 miles, Adams received another oil change. On that visit, she reported that the rear wiper was not dispensing fluid. The dealer reconnected a hose that had become detached. Adams also reported that the front door window button fell in its hole. The dealer reset the button. It appears Adams was charged $1.79 for "shop supplies" related to the repair of the front door window button.

On November 15, when the car had reached 22,670 miles, Adams returned to the dealership for another oil change and tire rotation. She reported no problems. On December 3, with 23,384 miles, Adams reported that the car was emitting a burning smell and the check engine light was on. There was also a nail in the rear passenger-side tire. The dealer turned the engine light off and replaced the purge valve, which was not functioning properly. It also replaced the rear main seal, which was leaking oil, and replaced the rear tire. Because these repairs were under warranty, Adams was charged only $1.79 for miscellaneous "shop supplies."

On January 10, 2009, at 25,515 miles, Adams again reported a burning odor. She also reported that her right headlamp was not operational and that the right front door speaker was distorted. The dealership was unable to duplicate the odor, but found that the cabin air filter was in need of replacement. It also replaced the right headlamp and the engine air filter. The dealer special ordered the part to repair the speaker. Adams was charged a total of $63.41 for the cabin and engine air filter replacement parts, and $27.83 in labor costs.

Adams returned on February 7, at 26,149 miles, for a tire rotation, oil change, and installation of the replacement speaker. She again reported a burning odor. The mechanic noted that oil was seeping and scheduled a second repair date. On February 19, Adams returned for repair of the oil leak. The dealer determined that the cause was a leaking pinion seal, which was replaced at no cost to Adams. She was loaned a vehicle while the repairs were being completed.

Adams filed a complaint against Suzuki on April 3, alleging violations of the New Jersey Lemon Law, N.J.S.A. 56:12-29 to -49; Article Two of the Uniform Commercial Code, N.J.S.A. 12A:2-101 to -725 (UCC); and the Magnuson-Moss Warranty Improvement Act (Magnuson-Moss Act), 15 U.S.C. § 2301 to § 2312.

On June 6, at 30,193 miles, Adams reported a squealing noise when the air conditioner was tuned on. She also requested installation of new wiper blades and an oil change. The dealer determined that the squealing sound was due to a loose serpentine belt, which was adjusted. Adams was charged $9.28 in labor costs for adjustment of the serpentine belt. She was charged $18.18 in parts for the wiper blades.

Henry Gill prepared a vehicle evaluation report on behalf of the dealer. His inspection on October 5, 2009, revealed that all repaired warranty components were "functioning normally" and that "[r]oad testing provided excellent engine and transmission operation with performance equal to any 2006 Suzuki Grand Vitara." He noted that the vehicle was "in good condition with no factory defects and an excellent value for trade-in or resale." He road tested the vehicle at speeds up to sixty miles per hour for twenty miles and detected no oil leaks or burning odor during the inspection. He noted that a rattle noise did not occur between thirty and fifty miles per hour. He also noted that the radio tested to specifications, with normal speaker and subwoofer operation. He further noted the homemade CDs in the player had extreme bass boost applied, which he opined would cause speaker failure if played at high volume levels.

Adams obtained a report from Scot Turner, who runs Turner Automotive. He reported that he observed oil leaking from the front differential, which he opined could cause a burning odor when it splashed back onto heated components of the engine. He also opined that the repair history reduced the resale value of the vehicle.

Adams was deposed on September 10. She testified that she was not experiencing any problems with the vehicle at that time.

Suzuki filed a motion for summary judgment in December. Adams opposed the motion. The motion judge granted Suzuki's motion as to the Lemon Law and Magnuson-Moss claims. He partially denied Suzuki's motion for summary judgment as to Adams's claims under the UCC. The judge dismissed Adams's breach of express warranty claim, but did not dismiss the claim for breach of implied warranty.

Suzuki submitted an amended proposed order, which dismissed all counts of Adams's complaint except the claim for breach of the implied warranty of fitness for a particular purpose under the UCC. See N.J.S.A. 12A:2-315. The judge executed the amended order. Adams filed a motion for reconsideration, which was denied.[1]

[1] The motion for reconsideration was decided by a different judge, because the original motion judge had retired.

Suzuki then filed a motion for summary judgment as to Adams's claim for breach of the implied warranty of fitness for a particular purpose. The second judge granted the motion in April 2010. This appeal followed.

II.

On appeal, Adams argues that both Law Division judges erred in granting summary judgment because there were genuine issues of material fact precluding summary judgment. She also argues that the judges misapplied the applicable law.

It is well-established that our review of a trial judge's conclusions of law is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). Consequently, we review a grant of summary judgment de novo, applying the same standard governing the trial court under Rule 4:46-2(c). Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007); Brill v. Guardian Life Ins. Co., 142 N.J. 520, 539-40 (1995).

Generally, a court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in

favor of the non-moving party." Brill, supra, 142 N.J. at 540; see also R. 4:46-2(c). However, a "'genuine' issue of material fact" does not exist if there is only one "unavoidable resolution of the alleged disputed issue of fact." Ibid. (citation omitted).

A.

The New Jersey Lemon Law (Lemon Law), N.J.S.A. 56:12-29 to -49, states in relevant parts:

> If a consumer reports a nonconformity in a motor vehicle to the manufacturer or its dealer during the first 18,000 miles of operation or during the period of two years following the date of original delivery to a consumer, whichever is earlier, the manufacturer shall make, or arrange with its dealer to make, within a reasonable time, all repairs necessary to correct the nonconformity.
>
> [N.J.S.A. 56:12-31.[2]]
>
> If . . . the manufacturer or its dealer is unable to repair or correct a nonconformity within a reasonable time, the manufacturer shall accept return of the motor vehicle from the consumer. The manufacturer shall provide the consumer with a full refund of the purchase price of the original motor vehicle including any stated credit or allowance for the consumer's used motor vehicle . . . .

[2] We note that the above language is quoted from the version of the Lemon Law in effect in April 2009, when Adams filed a complaint against Suzuki. N.J.S.A. 56:12-31 and -32 were subsequently amended. See L. 2009, c. 324, §§ 3 and 4.

[N.J.S.A. 56:12-32(a).]

"Nonconformity" is defined as "a defect or condition which substantially impairs the use, value or safety of a motor vehicle." N.J.S.A. 56:12-30.

In granting Suzuki's's motion for summary judgment on the Lemon Law issue, the motion judge explained:

> With respect to the Lemon Law problem or claim, rather, the statute as the Legislature made clear and as the cases that have interpreted the statute makes — make clear, was intended to address problems . . . with a vehicle that, and I quote, substantially impairs the use, value or safety of the vehicle. That is what is a non-conformity as defined in the statute that permits a claim. I do not believe that on this record plaintiff has established any non-conformity so defined. I believe plaintiff can be considered as having established, again, at this posture of the proofs, accepting what the plaintiff says as so, as having a series of annoying inconveniences with respect to the vehicle that required repeated trips to the dealership to address and that, except for the odor problem, were addressed. The plaintiff has — it's reasonable to believe that the plaintiff would have been annoyed. It would have been reasonable to believe that the plaintiff would have been inconvenienced. It is not in my view on this record permissible for a jury to conclude that any one or all of those complaints constituted a non-conformity as defined which is a defect or condition which substantially impairs the use, value or safety. . . . [T]hese were all under the category of minor problems that . . . could have been and were duly addressed by the dealership. So, accordingly, as to the

> Lemon Law claim, plaintiff's claim is dismissed on the motion.

Adams argues that she has "adduced expert testimony and showed evidence of multiple complaints of engine and transmission complaints, leaking oil and burning smell, with only one actual repair attempt and a possible missed recall, all within the statutory Lemon Law period." She contends that she "presented evidence sufficient to withstand summary judgment on [her] Lemon Law claim" because substantiality "is both a mixed factual and legal issue, which both [her] oral and written testimony and expert's report would establish" and that "the court erred in granting summary judgment."

Suzuki asserts that Adams has failed to meet her burden of proof for two reasons. First, Suzuki argues Adam's only documented complaints within the Lemon Law period, a humming subwoofer, an unconfirmed ticking noise, an inoperable rear wiper blade, and a broken door window button, do not rise to the level of a "nonconformity," i.e., a defect or condition which substantially impaired the use, value or safety of the vehicle. Suzuki further argues that Adams failed to establish that the dealer failed to effectuate repairs within a reasonable period of time. It points to Adams's deposition testimony that the repairs were effective.

Based upon our review of the record, we are satisfied that there were no genuine issues of material fact in this case. The record reflects that Adams reported four defects during the Lemon Law statutory period, which was two years or 18,000 miles, whichever occurs first. N.J.S.A. 56:12-31. They were the humming subwoofer (7,747 miles), the ticking noise (10,517 miles), the inoperable rear wiper wash (17,792 miles), and the broken door window button (17,792 miles). The subwoofer, rear wiper, and window button were repaired when Adams raised the issues with the dealer. The ticking noise was not repaired because the dealer could not replicate it, but Adams never complained of it again and it was not a problem at the time of her deposition.

Applying the Lemon Law standard to these facts, there are two legal questions. The first is whether the four repairs constituted "nonconformities," i.e., "a defect or condition which substantially impairs the use, value or safety of a motor vehicle." N.J.S.A. 56:12-30. The second is, if so, whether they were repaired "within a reasonable time." N.J.S.A. 56:12-31.

As Adams argues, substantiality is a mixed issue of fact and law. In determining whether the alleged defect is sufficiently substantial to impair the use, value or safety of a

vehicle, both subjective and objective evidence must be evaluated. Berrie v. Toyota Motor Sales USA, Inc., 267 N.J. Super. 152, 157 (App. Div. 1993). Objectively, the question is whether a reasonable person in the buyer's position would believe the defects to substantially impair the use, value or safety of the vehicle. Subjectively, the issue is whether the buyer did believe the defects impaired the use, value or safety of the vehicle. Ibid.

Here, we are satisfied that the defects reported by Adams did not, as a matter of law, rise to the level of objectively impairing the use, value or safety of the vehicle. As the motion judge explained, they were more appropriately categorized as inconveniences or annoyances, but not conditions which substantially impaired the use, value or safety of the vehicle.

In addition, the record reflects that the problems at issue were fixed in a timely manner. Each of the alleged defects that were found by the mechanic were repaired as soon as plaintiff brought the car to the dealership and complained about them. The only defect which was not repaired, the ticking sound, was not repaired because the mechanic could not detect it. However, Adams never complained of the ticking sound again, and testified that she was not having any problems with the car at the time of

her deposition. Consequently, we affirm the dismissal of the Lemon Law claim.

B.

We now turn to the claims brought under the UCC and the Magnuson-Moss Act. We agree with Adams that the motion judge should not have dismissed the Magnuson-Moss claim prior to ruling on the UCC claim. If a plaintiff has a UCC claim, the Magnuson-Moss Act exists to expand those remedies. Gen. Motors Acceptance Corp. v. Jankowitz, 216 N.J. Super. 313, 331-32 (App. Div. 1987). Nevertheless, because we conclude that the UCC claim was properly dismissed after the second motion for summary judgment, the order of dismissal does not require a reversal.

To establish an implied warranty of merchantability claim with respect to a motor vehicle, a plaintiff must prove that the vehicle was not "fit for the ordinary purposes for which such goods are used." N.J.S.A. 12A:2-314(2)(c). The ordinary purpose for which a car is intended is transportation. Here, Adams failed to prove that the vehicle was not merchantable because she could not drive her car. She used it on a regular basis and averaged 13,000 miles per year.

In granting summary judgment on the UCC claim for breach of warranty for a particular purpose under N.J.S.A. 12A:2-315, the second motion judge explained his reasons as follows:

> [D]efendant cites the deposition of the plaintiff. Specifically, she was asked a question at her deposition, "when you bought the vehicle did you buy it for any particular purpose?" And the answer was, "no, just for personal use."
>
> I would note that the implied warranty of fitness for a particular purpose is set forth in N.J.S.A. 12A:2-315 which provides as follows:
>
> > "Where the seller, at the time of contracting, has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods there is, unless excluded or modified under the next section, an implied warranty that the goods shall be fit for a particular purpose."
>
> The deposition testimony of the plaintiff, when read in conjunction with that provision, it's clear to the [c]ourt that there was no breach of implied warranty of fitness for a particular purpose.

Consequently, dismissal of both the UCC and Magnuson-Moss claims was correct as a matter of law.

Affirmed.