

**DAVID ROSS ARMSTRONG AND MARY MARGARET
ARMSTRONG, AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs, v. LEITH, INC. AND WESTERN SURETY COMPANY,
Defendants.**

No. 5:97-CV-761-BO(1)

**UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NORTH CAROLINA, WESTERN DIVISION**

1999 U.S. Dist. LEXIS 12770

May 26, 1999, Decided

May 27, 1999, Filed

DISPOSITION: [*1] Defendants' Motion to Strike Affidavit of Plaintiff David Armstrong GRANTED and Defendants' Motion for Summary Judgment GRANTED in its entirety. Plaintiffs' action DISMISSED. Plaintiffs' motions seeking summary judgment and class certification denied.

OVERVIEW: Defendant car dealer moved for summary judgment on plaintiffs' claims in connection with a car lease. Plaintiffs argued defendant failed to provide them with the value of their trade-in as negotiated. Defendant contended plaintiffs were given the agreed credit as reflected in the sale of the automobile below suggested manufacturer's price (MSP) and a reduced cash down payment. The court granted defendant's motion and dismissed plaintiffs' claims, concluding no genuine issue of material fact was raised. The court explained plaintiffs were unable to show defendant did not credit their trade-in when undisputed evidence showed the lease was calculated using a number significantly less than the MSP. The court noted the fact that defendant wrote "N/A" in the space for trade-in did not establish deception when the credit was given in two other places in the contract. The court found plaintiffs received the very terms negotiated and thus were unable to show dishonesty. The court found insufficient evidence to support fraud, unconscionability, or deceptive trade practice claims. The court found defendant adhered to required disclosure under the then applicable federal regulation.

OUTCOME: The court granted defendant's motion for summary judgment and dismissed plaintiffs' numerous claims because a genuine issue of material fact was not raised when the basis for plaintiffs' claims, an alleged failure to credit their trade-in value in a car lease, was not established in the record because the lease reflected the trade-in value in both a reduced purchase price and down payment, and plaintiffs received the exact terms negotiated.

COUNSEL: For DAVID ROSS ARMSTRONG, MARY MARGARET ARMSTRONG, plaintiffs: Nigle B. Barrow, Jr., Raleigh, NC.

For DAVID ROSS ARMSTRONG, MARY MARGARET ARMSTRONG, plaintiffs: Raymond W. Postlethwait, Jr., Postlethwait & Hudson, Durham, NC.

For LEITH, INC., WESTERN SURETY COMPANY, defendants: Thomas H. Davis, Jr., David Dreifus, Poyner & Spruill, Raleigh, NC.

For LEITH, INC., third-party plaintiff: Thomas H. Davis, Jr., David Dreifus, Poyner & Spruill, Raleigh, NC.

JUDGES: TERRENCE W. BOYLE, CHIEF UNITED STATES DISTRICT JUDGE.

OPINIONBY: TERRENCE W. BOYLE

OPINION:

ORDER

This matter is before the Court on Plaintiffs' Motion for Summary Judgment, Plaintiffs' Motion to Certify Class Action, Defendants' Motion for Summary Judgment, and Defendants' Motion to Strike Affidavit of Plaintiff David Armstrong. The underlying complaint alleges that Defendant Leith, Inc. violated North Carolina and federal laws relating to automobile leasing.

BACKGROUND [*2]

Named Plaintiffs David and Mary Armstrong leased a new BMW 525i from Defendant Leith in January 1995. As part of the transaction, Plaintiffs traded to Leith a 1989 BMW (with over \$ 8,000 in remaining debt), made a down payment, and agreed to monthly lease payments of \$ 350.00.

Plaintiffs filed this suit in State Court on August 21, 1997, and the suit was removed to this Court. Plaintiffs, in essence, allege that they were deceived by Leith as to the amount of credit received for their trade-in vehicle.

The BMW 325i that Plaintiffs leased had a manufacturer's suggested retail price (MSRP) of \$ 35,770.00. Plaintiffs agreed to monthly lease payments of \$ 350 for a term of 36 months, with an estimated end of term residual value of \$ 21,462. Because the lease was "closed end," Plaintiffs retained the option to purchase the vehicle for this set residual value at the end of the lease term, or could choose to walk away at the end of the lease with no further obligations.

While there are certain inconsistencies in the Plaintiffs' allegations, it appears that Plaintiffs allege that Leith agreed to credit Plaintiffs a net total of \$ 4,500.00 for their trade-in. n1 Plaintiffs further allege [*3] that Leith did not give them any credit for their trade-in. One apparent basis for Plaintiffs' position is the fact that Leith inserted the term "N/A" in a space on the lease form reserved for trade-in credit.

n1 This would appear to result in a total trade-in credit of 12,529.07, as Leith paid off the outstanding \$ 8,029.07 lien on the trade-in.

Leith argues that Plaintiffs were indeed credited for their trade-in. According to Plaintiff David Armstrong's initial deposition testimony, Leith agreed that his monthly lease payments would be calculated using a selling price of \$ 31,193.18, more than \$ 4500 less than the MSRP

of \$ 35,770. Leith argues that Plaintiffs' lease was indeed calculated based on a selling price of \$ 31,193.18, as negotiated by Plaintiffs.

The lease agreement between Leith and Plaintiffs includes an initial payment due (at the inception of the lease) of \$ 4,663.14. It appears that Leith received no more than \$ 3,644.80, and perhaps as little as \$ 3,244.80, in cash at the inception of the [*4] agreement. Leith ultimately sold Plaintiffs' trade-in vehicle at auction for \$ 8,250 -- only \$ 221.93 more than Leith had to pay to acquire the car. n2

n2 Due to the remaining lien of \$ 8,029.07 remaining on the car at the time of the trade. Plaintiff David Armstrong claimed in his deposition that his market research valued his trade-in at over \$ 12,000.

Plaintiffs have based their suit on a number of State and federal laws. Cross-motions for summary judgment have been filed, along with a motion for class certification. A motion to strike Plaintiff David Armstrong's "Affidavit in Opposition to Defendant's Motion for Summary Judgment" is also before the Court. All motions which have been filed in this matter are fully briefed and ripe for ruling.

ANALYSIS

A. Defendants' Motion to Strike Affidavit of Plaintiff David Armstrong

On October 30, 1998, Defendants filed a Motion to Strike Affidavit of Plaintiff David Armstrong. The affidavit in question was filed by Plaintiffs as part of their response [*5] to Defendants' Motion for Summary Judgment. This affidavit conflicts in certain pertinent material respects with David Armstrong's sworn deposition testimony.

Upon review of the law in the Fourth Circuit, it is clear that [HN1] a party cannot raise an issue of fact in an effort to avoid summary judgment by submitting an affidavit that conflicts with his own prior deposition testimony. See *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975 (4th Cir. 1990); see also *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). As the Fourth Circuit has explained, "if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Barwick*, 736 F.2d at 960. A thorough comparison of David Armstrong's affidavit shows it to be in clear and material conflict to his sworn deposition testimony. Therefore, the Court will strike the Affidavit of David Armstrong filed on October 13, 1998.

*B. Defendants' Motion for Summary Judgment [*6]*

Plaintiffs present a picture of an elaborate pattern of deception on the part of Leith and its employees. The Court need not address Plaintiffs' broad allegations of injustice, however, as the more proper focus of analysis is found in the laws which Defendant Leith allegedly violated. Therefore, the Court will examine each of the Plaintiffs' claims in order to determine if Defendants are entitled to judgment as a matter of law.

[HN2] A motion for summary judgment cannot be granted unless there are no genuine issues of material fact for trial. *Fed. R. Civ. P. 56(c)*; See *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The movant must demonstrate the lack of a genuine issue of fact for trial, and if that burden is met, the party opposing the motion must "go beyond the pleadings" and come forward with evidence of a genuine factual dispute. *Id. at 324* (1986). The Court must view the facts and the inferences drawn from the facts in the light most favorable to the nonmoving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). [HN3] Conclusory [*7] allegations are not sufficient to defeat a motion for summary judgment. Cf. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The Court will address Plaintiffs' claims in the order in which they are presented in Plaintiffs' Amended Complaint.

1. Plaintiffs' Claim for "Estoppel"

Plaintiffs' first claim for relief asserts a claim for "estoppel." Plaintiffs apparently argue that because Leith inserted the term "N/A" in the blank on the lease form for trade-in credit, Leith is somehow "equitably estopped to deny its obligation to credit the reasonable value of [Plaintiffs'] trade-in vehicle toward the lease" agreement. Plaintiffs also state that Leith is "further estopped to claim that the lease agreements and the disclosure provisions therein establish in writing the price to be paid or credited" for trade-ins.

[HN4] Under North Carolina law, estoppel can be used as an affirmative claim. See *Miracle v. N. C. Local Gov't Employees Retirement System*, 124 N.C. App. 285, 295, 477 S.E.2d 204, 210 (N.C. App. 1996). [HN5] The party claiming estoppel must establish: (1) lack of knowledge and the means of knowledge of [*8] the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially. In addition, the party to be estopped must engage in (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) with intent or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; and (3) knowledge, actual or constructive, of the real facts. See *id.*

Plaintiffs cannot show that Leith did not credit Plaintiffs for the value of their trade-in. The undisputed evidence shows that Plaintiffs' lease was calculated using a number significantly less (approximately \$ 4,500) than that named in the MSRP. The undisputed evidence further shows that Plaintiffs' up front payment was significantly less (over \$ 1,000) than that [*9] specified by the lease agreement. The fact that Leith used the term "N/A" in the trade-in blank on the lease agreement does not establish deception when Leith can show that trade-in credit was given in two other, different places. This is doubly true when it appears that the real (post-lien) value of the Plaintiffs' trade-in was less than \$ 1,000. Even taking the facts as presented by Plaintiffs, Plaintiffs cannot meet the tests established for affirmative estoppel under North Carolina law. The use of the term "N/A" in a blank on the lease form does not represent false misrepresentation or concealment of material facts.

2. Plaintiffs' Claim for "Breach of Implied Covenant of Good Faith"

Under North Carolina Law, " [HN6] good faith" in the performance of a lease is defined as "honesty in fact in the conduct or transaction concerned and observance of reasonable commercial standards of fair dealing in the trade." N.C.G.S. § 25-2A-103(3), referencing N.C.G.S. § 25-2-103(1)(b). [HN7] When determining whether the implied covenant of good faith has been breached, courts examine (1) whether the defendant breached a material term of the contract with the plaintiff; (2) whether the defendant [*10] treated the plaintiff unfairly or differently in some way than others who were in an identical position vis-a-vis defendant; and (3) whether the defendant was in some way "dishonest" in its dealings with the plaintiff. See *Carolina Truck & Body Co., Inc. v. General Motors Corp.*, 102 N.C. App. 262, 268, 402 S.E.2d 135, 138, cert. denied, 329 N.C. 266, 407 S.E.2d 831 (1991) (applying N.C.G.S. § 25-2-103(1)(b)'s definition of "good faith" in the franchising context).

It is undisputed that Plaintiffs received the exact terms negotiated with Leith. The payments and payoff were exactly as contemplated by the parties to the lease. There is no evidence that Leith treated Plaintiff unfairly or differently from others in a similar position. Indeed, it appears that various credits involved in the lease between Leith and Plaintiffs more than covered the actual value of Plaintiffs' trade-in. Plaintiffs also fail to present or forecast evidence that Leith was "dishonest" in its dealings with Plaintiffs. While Leith perhaps could have been more clear in its calculations and recordkeeping, there is no dispute that Plaintiffs and Leith negotiated exactly the terms [*11] Plaintiffs received. Whether Plaintiffs could have negotiated a better deal is utterly irrelevant, from a legal perspective.

3. Plaintiffs' Claim for Breach of Contract

Plaintiffs' argue that Leith, by accepting a trade-in, entered into a contract for sale of goods, which was breached when Leith failed to credit Plaintiffs for the reasonable value of their trade-in. The facts and evidence do not support this position.

Plaintiff David Armstrong, in his deposition testimony, admitted that his lease was calculated using a selling price more than \$ 4500 lower than the MSRP of the leased vehicle. Plaintiff David Armstrong also admitted that this reduction in the selling price used in calculation of the lease represented a trade-in credit. Furthermore, Plaintiff received an additional reduction of over \$ 1,000 in his initial payment on the lease. Considering that Plaintiffs' equity in their trade-in appears to have been less than \$ 1,000, it is difficult for this Court to see how Leith failed to credit Plaintiffs for the reasonable value of their trade-in. While Plaintiff David Armstrong filed a second affidavit to attempt to resist Defendants' Motion for Summary Judgement, the [*12] Court will credit the statements made in his initial deposition testimony, for the reasons explained above. n3 This evidence does not support a claim for breach of contract.

n3 In essence, Plaintiff David Armstrong's "Affidavit in Opposition to Defendant's Motion for Summary Judgment" argues that because terms similar to those he received were advertised independently of trade-in credit, he must have been cheated. However, he negotiated the exact terms he received in his lease. While Leith's record keeping could have been more clear, Leith can point at two different credits that would provide reasonable value for Plaintiffs' trade-in.

4. Plaintiff's Claim under the North Carolina Unfair and Deceptive Trade Practices Act

[HN8] A claim under the North Carolina Unfair and Deceptive Trade Practices Act must establish (1) an unfair or deceptive act or practice, or an unfair method of competition; (2) in or affecting commerce; (3) which proximately causes actual injury to the plaintiff. *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (N.C. App. 1991). [*13] [HN9] A practice is "unfair" when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers; an act or practice is deceptive if it has the capacity or tendency to deceive. *Jacobs v. Central Transportation, Inc.*, 891 F. Supp. 1088, 1116 (E.D.N.C. 1995), reversed in part on other grounds, 83 F.3d 415 (4th Cir. 1996).

It appears that Plaintiffs base their unfair and deceptive trade practices claim partially upon an alleged pattern of "high pressure" sales tactics. Despite broad and sweeping allegations, this Court finds no legally cognizable claim among the Plaintiffs' lengthy filings, and Plaintiff David Armstrong himself admits he has no evidence to support his allegations regarding alleged "high pressure" tactics. Therefore, the Court will move to Plaintiffs' more clearly articulated legal claims.

Plaintiffs also claim that Leith obtained Plaintiffs' trade-in vehicle by promising credit, but did not give Plaintiffs the promised credit. However, as discussed above, Leith can point to two points in the transaction where Plaintiffs received credit, and that credit [*14] more than equaled any reasonable value for their trade-in.

Plaintiffs further claim that Leith failed to disclose the credit Plaintiffs received for their trade-in vehicle in the lease agreement, and that this alleged failure to disclose was an act of deception. As discussed below, Leith made all disclosures required under law. As no legal disclosure requirement has been violated by Leith, this Court finds no unfair and deceptive trade practice related to disclosure.

5. Plaintiffs' Claim for Fraud

Plaintiffs argue that Leith calculated Plaintiffs' lease agreement without any credit for Plaintiffs' trade-in, while informing Plaintiffs that they were actually receiving credit. According to Plaintiffs' theory, Leith's alleged course of action was fraudulent. However, as discussed above, the undisputed evidence indicates that Plaintiffs received credit more than equaling their equity in their trade-in.

Plaintiffs appear to argue that Defendant Leith did not disclose the "true cost of the vehicle" to Plaintiffs. The Court sees no legal duty on the part of Leith to disclose the "true cost of the vehicle" to a purchaser, and indeed is not entirely certain what Plaintiffs mean [*15] by the "true cost of the vehicle." n4 Plaintiffs prove no fraud by this argument.

n4 While the Court does not wish to digress into a lengthy discussion of economics, it appears to the Court that Plaintiffs would base the "true cost" of the vehicle upon the price Leith was charged for the vehicle by BMW. However, it would appear that the "true" value of any object in the marketplace is the price at which a buyer and seller agree to a transaction. The facts in this case demonstrate that Leith and Plaintiffs engaged in an arm's length negotiation, and Leith agreed to lease a BMW 525i to Plaintiffs in return for certain

payments and a trade-in. Plaintiffs got the exact terms they bargained for. These terms, reached at arm's length, would appear to state the "true cost" of the BMW 525i to the parties involved at the time of the lease.

Plaintiffs also argue that the use of the term "N/A" in the space in the lease agreement for trade-in credit is [HN10] fraudulent. In order to prove fraud under North Carolina law, Plaintiffs [*16] must show "(1) false misrepresentation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party." *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468, 343 S.E.2d 174, 178 (1986). Plaintiffs can prove no loss from any alleged fraud, as the undisputed evidence demonstrates that the reasonable value of Plaintiffs' trade-in was accounted for in the negotiation of the lease agreement. Furthermore, the undisputed evidence that credit for Plaintiffs' trade-in was given independently of the "trade-in blank" in the lease agreement shows that Leith behavior was not reasonably calculated to deceive. Thus, Plaintiffs fail to establish at least two of the elements of fraud.

6. Plaintiffs' Claim Pursuant to N.C.G.S. § 25-2A-108

Plaintiffs' claim that the lease transaction is "unconscionable" as defined by N.C.G.S. § 25-2A-108. It is hornbook law that [HN11] a contract is unconscionable when its terms are so inequitable as to "shock the judgment," and are so oppressive that "no reasonable person would make them on the one hand, and no honest [*17] and fair person would accept them on the other." See *Alpiser v. Eagle Pontiac-GMC-Isuzu, Inc.*, 97 N.C. App. 610, 615, 389 S.E.2d 293, 295 (N.C.App. 1990). The evidence in this case shows that the parties negotiated at arm's length and came to a mutual agreement. There appears to be no inequality of bargaining power. Certainly, the terms of the lease agreement, as discussed elsewhere in this order, do not come close to "shocking the judgment." Plaintiffs' claim under N.C.G.S. § 25-2A-108 is not supported by the evidence and must fail.

7. Plaintiffs' Claim Pursuant to N.C.G.S. § 25-2A-505(4)

N.C.G.S. § 25-2A-505(4) and related statutes state that rights and remedies for material misrepresentation or fraud include rescission of the contract involved. As this Court has found that Plaintiffs' claim for fraud must fail, this claim too must fail.

8. Plaintiffs' Claim under the Federal Consumer Leasing Act and Regulation M

In this claim for relief, Plaintiffs argue that Leith violated the disclosure requirements of Regulation M (12 C.F.R. § 213.4(g)(2)) n5 by (1) failing to disclose any credit for the trade-in as a component of the initial payment, (2) [*18] failing to disclose if the trade-in was intended as a component of the initial payment, and (3) failing to accurately record the total amount of the initial payment. Leith argues that Regulation M and the commentary to Regulation M in effect at the time of the lease did not require disclosure of trade-in value in a situation such as that presented by the Armstrongs' lease.

n5 This refers to the version of Regulation M that was in place at the time of the lease. An amendment took effect on January 1, 1998.

Plaintiffs rely upon a stilted reading of Regulation M to reach their conclusion. According to Plaintiffs, Leith was under a duty to specifically list any credit given for the trade-in as part of the initial payment. However, a review of the commentaries to Regulation M then in effect shows that itemization of the components of the initial payment amount was not required: "*Itemization not required.* The lessor must disclose one total initial payment amount and identify the components of this one amount . [*19] . . . The lessor may, but need not, disclose the dollar amount of each component." See 12 C.F.R. § 213, Supp. I, at 370 (1/1/95 ed.). The fact that the 1998 amendments to Regulation M specifically require the disclosure of trade-in allowance further supports Leith's position that specific disclosure of trade-in value as a component of initial payment was not required prior to January 1, 1998. See 12 C.F.R. § 213.4(b) (1/1/98 ed.).
n6

n6 Plaintiffs rely upon a District of New Mexico decision for the proposition that where the total of initial payments is disclosed, and some but not all components are disclosed, there is a violation of Regulation M. See *Candelaria v. Nissan Motor Acceptance Corporation*, 740 F. Supp. 806 (D. N. M. 1990). The Court notes that the Candelaria decision is heavily criticized in *McPhillips v. Gold Key Lease, Inc.*, 38 F. Supp. 2d 975 (M.D.Ala. 1999) (allowing lessor defendants to apply good faith defense against accusations of violation of the Consumer Leasing Act).

[*20]

Even under Plaintiffs' theory of the law, it is difficult to see how Leith was under an obligation to list credit for trade-in as part of an initial payment, when David Armstrong's deposition testimony is that credit for Plaintiffs' trade in was not reflected in the initial payment, but in a reduced "selling price" used in lease calculations. n7 Plaintiffs also argue that if Leith indeed credited Plaintiffs for their trade-in by a reduction in the initial payment rather than by a reduction in the selling price (a course of action that would require complete dismissal of Plaintiff David Armstrong's deposition testimony), this would place Leith in violation of the disclosure requirements of the Consumer Leasing Act. That is to say, Plaintiffs desire that Leith be punished for requiring Plaintiffs to pay an initial payment *smaller* than that disclosed on the lease form.

n7 According to Plaintiff David Armstrong's deposition testimony, Leith credited Plaintiffs for their trade-in by taking \$ 4,500 off the MSRP of the lease vehicle before beginning calculation of the lease terms. This reduction could be analogized to an "above the line" tax exemption. Just as an "above the line" tax exemption is not included in tax calculations, so this "above the line" reduction in the starting point of the lease calculations did not need to be included in the lease calculations, as long as the agreed-upon starting point (\$ 4,500 below MSRP) was applied.

[*21]

It appears to the Court that Leith's actions would violate the current version of Regulation M. However, this is irrelevant to the exercise at hand. Leith was entitled to rely upon the version of Regulation M in effect at the time of the lease, and the Court finds that Leith did not violate Regulation M in respect to the Armstrongs' lease.

9. Plaintiffs' Claim Relating to the Motor Vehicle Dealer Surety Bond

Plaintiffs seek indemnity for Leith's alleged wrongdoing under North Carolina's Dealer Bond law. As the Court has found no legally cognizable wrongdoing by Leith, Plaintiffs are not entitled to indemnity.

10. Plaintiffs' Request for Declaratory Judgment

In their Tenth Claim for Relief, Plaintiffs "seek a declaratory judgment that they may recover from Leith either the amount received by Leith from the sale of each Class member's trade-in vehicle or the reasonable value of the trade-in vehicle. . . ." As the Court has found no legal justification for an award of damages against Leith in its preceding discussion, Plaintiffs' tenth and final claim for relief must fail.

CONCLUSION

After full consideration of the parties' arguments, and for the reasons given [*22] above, Defendants' Motion to Strike Affidavit of Plaintiff David Armstrong is GRANTED, and Defendants' Motion for Summary Judgment is GRANTED in its entirety. Plaintiffs' action is DISMISSED. Because of these actions, Plaintiffs' motions seeking summary judgment and class certification must be denied.

SO ORDERED.

This 26 day of May, 1999.

TERRENCE W. BOYLE

CHIEF UNITED STATES DISTRICT JUDGE