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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

DAN'S CARWORLD, LLC
d/b/a DAN CAVA'S TOYOTA WORLD,

Plaintiff,

v.

Civil Action No. 06-C-209

DAVID SERIAN,

Defendant.

2007 OCT 19 10 00 AM
CIRCUIT COURT
MARION COUNTY
WEST VIRGINIA

**ORDER GRANTING JUDGMENT AS A MATTER OF LAW
IN FAVOR OF THE PLAINTIFF
ON ALL ISSUES AND FINAL JUDGMENT ORDER**

On the 26th day of September, 2007 came the plaintiff, Dan Cava's Toyota World, by counsel, Gregory H. Schillace, and the defendant, David Serian, by counsel, Julie Gower Rorain, with respect to the plaintiff's motion for a judgment as a matter of law against the defendant, David Serian, with respect to the claim asserted by the plaintiff against the defendant as well as the claims asserted by the defendant against the plaintiff contained in the counterclaim. After consideration of the motion for summary judgment of the plaintiff; the memorandum of law in support thereof; the defendant's response thereto; the exhibits submitted by the parties; all other pleadings in this action; and, argument of counsel for the parties, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. On or about March 23, 2006, the defendant, David Serian, contracted with the plaintiff, Dan Cava's Toyota World, Inc., to purchase a 2006 Toyota Tacora
2. As part of the Motor Vehicle Purchase Agreement the defendant, David Serian, traded his 2002 Toyota Tacora to the plaintiff, Dan Cava's Toyota World
3. The defendant, David Serian, in negotiating the purchase of the 2006 Toyota Tacora dealt directly with Joseph Iaquinta, a salesperson employed by the plaintiff.
4. Prior to entering into the Motor Vehicle Purchase Agreement, Mr. Iaquinta had a discussion with the plaintiff, David Serian, during which Mr. Serian advised Mr. Iaquinta that the payoff on his vehicle was approximately \$2,000.00.
5. Other employees of the plaintiff, utilizing the information provided by Mr. Serian, including, but not limited to, his social security number, requested payoff information from Mr. Serian's lien holder, Wachovia Bank.
6. Information from Mr. Serian's lien holder, Wachovia Bank, was obtained by a representative of the plaintiff utilizing a fully automated telephone system. The pay off was obtained using Mr. Serian's social security number as reference.
7. Utilizing the Wachovia automated telephone system and Mr. Serian's social security number representatives of the plaintiff discovered that Mr. Serian had two (2) loans with Wachovia, one with a balance of \$2,320.09 and one with a balance of \$4,357.87.

8. Relying upon the representations of the defendant, David Serian, the plaintiff considered the payoff of Mr Serian's 2002 Toyota Tacoma being equal to \$2,320.09.

9. On March 23, 2006 a representative of the plaintiff, Jean Haight, met with the defendant, David Serian, and reviewed the documents related to Mr Serian's purchase of the 2006 Toyota Tacoma

10. The defendant executed the Motor Vehicle Purchase Agreement agreeing and certifying, among other things, that the balance owed by the defendant, David Serian, with respect to the 2002 Toyota Tacoma being traded in was \$2,320 09.

11. In addition to the Motor Vehicle Purchase Agreement, the defendant, David R. Serian, executed an Authorization for Certificate of Title Release. This document authorized Wachovia Bank to release the 2002 Toyota Tacoma title to the plaintiff. By executing this document, the defendant, David Serian, again represented to the plaintiff that the amount owed to Wachovia with respect to the 2002 Toyota Tacoma was \$2,320.09.

12. On March 23, 2006 the plaintiff forwarded to Wachovia Bank a check in the amount of \$2,320.09 representing the payoff for the 2002 Toyota Tacoma as represented by the defendant, David Serian, to the plaintiff.

13. On March 28, 2006 the plaintiff received correspondence from Wachovia Bank indicating that the actual payoff with respect to the 2002 Toyota Tacoma was \$4,357.87.

14. As the 2002 Toyota Tacoma had been previously sold to a third party, the plaintiff was left with no option but to pay Wachovia Bank the sum of \$2,037.78 fully satisfying the lien on the 2002 Toyota Tacoma previously owned by the defendant, David Serian, for which Mr. Serian remained indebted to Wachovia Bank.

15 After March 28, 2006 representatives of the plaintiff advised the defendant, David Serian, regarding the incorrect amount of the payoff as represented by Mr. Serian in various documents including, but not limited to, the Motor Vehicle Purchase Agreement and the Authorization for Certificate of Title Release, however, the defendant, David Serian, refused to reimburse the plaintiff for the \$2,037.78 paid on his behalf to Wachovia Bank.

16. The Motor Vehicle Purchase Agreement executed by the defendant, David Serian, provides at paragraph 7 as follows:

7. BALANCE OWED IN TRADE-IN: If the Purchaser is delivering a trade-in vehicle or is turning in a leased vehicle as part of the transaction and the actual amount of the balance owed on the trade-in vehicle/lease turn-in is different than the amount of the balance owed as listed in this Agreement, the Purchaser agrees to pay the difference to the Dealer if the actual amount of the balance owed is greater than the amount listed and, if the actual amount of the balance owed is less than the amount listed, the Dealer agrees to pay the difference to the Purchaser.

17 Pursuant to the express and unambiguous terms of the Motor Vehicle Purchase Agreement, the defendant is obligated to pay the difference to the plaintiff of \$2,037.78 as the actual amount of the balance owed by the defendant to Wachovia Bank was greater than the amount identified in the Motor Vehicle Purchase Agreement.

18 The Court finds that the defendant, David Serian, has been unjustly enriched to the detriment of the plaintiff in the amount of \$2,037.78

19. In response to the plaintiff's complaint in the above-styled action, the defendant filed a counterclaim asserting that the plaintiff violated various provisions of West Virginia Code § 46A-1-101 et seq in attempting to collect money owed by the defendant to the plaintiff.

20 The defendant alleges that the plaintiff violated the following provision of the Consumer Protection Act:

A West Virginia Code § 46A-2-121 which deals with the following transactions:

With respect to a transaction which is or gives rise to a commercial credit sale, consumer lease or consumer loan...

B. West Virginia Code § 46A-2-125 which provides as follows:

No debt collector shall unreasonably oppress or abuse any person in connection with the collection of or attempt to collect any claim alleged to be due and owing by that person or another.

C. West Virginia Code § 46A-2-127 which provides as follows:

No debt collector shall use any fraudulent, deceptive or misleading

¹ The amount owed by the defendant to the plaintiff does not fall within any of these categories. The amount owed is the difference between the payoff represented by the defendant to be owed with respect to the 2002 Toyota Tacoma used as a trade-in and purchased by the plaintiff from the defendant and the amount actually owed by the defendant to Wachovia Bank

representation or means to collect or attempt to collect claims or to obtain information concerning consumers.

D. West Virginia Code § 46A-2-128 which provides as follows

No debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim.

21 The Court **FINDS** these statutory sections inapplicable to the above-styled action as the plaintiff was not attempting to collect a claim or debt as defined and contemplated by the West Virginia Consumer Credit and Protection Act. The plaintiff sought to recover amounts it paid to get a clear title to the vehicle traded by the defendant to the plaintiff.

Conclusions of Law

1. A clear and unambiguous written contract's meaning and legal effect must be determined solely from its contents and it will be given full force and effect according to its plain terms and provisions Capitol Chrysler-Plymouth, Inc v. Meckinson, 207 W. Va. 325, 532 S.E 2d 43 (2000); Kanawha Banking and Trust Co. v. Gilbert, 131 W. Va. 88, 46 S E 2d 225 (1947).

2. When the language of valid written contract is plain and unambiguous, it is not subject to judicial interpretation Magrus v. Halltown Paper Board Company, 143 W Va. 122, 100 S.E.2d 201 (1957); Green v. Farm Bureau Mutual Automobile Insurance Co., 139 W. Va. 475, 80 S.E 2d 424 (1954); Davis v. Combined Insurance Company of America, 137 W Va. 196, 70 S.E 2d 814 (1952), Kanawha

Banking and Trust Co v Gilbert, 131 W Va 88, 46 S.E.2d 225 (1947).

3. Where valid written contract is clear and free from ambiguity, the only function of court is to give such contract force and effect Magnus v. Halls town Paper Board Company, 143 W. Va 122, 100 S.E.2d 201 (1957); Continental Coal Company v. Connelisville By-Product Coal Company, 104 W. Va 44, 138 S.E. 737 (1927)

4 The purchase agreement entered into between the parties clearly and unambiguously states "the Purchaser agrees to pay the difference to the Dealer if the actual amount of the balance owed is greater than the amount listed." Despite the incorrectness of the payoff amount represented by the defendant, the defendant has the contractual obligation to pay the full balance of the loan on the 2002 Toyota Tacora.

5. The Court **FINDS** that the actual amount of the balance owed on the 2002 Toyota Tacoma traded to the plaintiff was \$4,357.87 The Motor Vehicle Purchase Agreement executed by the defendant acknowledged that the trade in loan balance identified on the Motor Vehicle Purchase Agreement may be more than the amount on the face of the agreement but the defendant expressly agreed to pay the correct lien amount.

6. The Court **CONCLUDES** that if benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving the benefits to

avoid paying for such benefits, the law requires the party receiving the benefits to pay the reasonable value of those benefits Copley v. Minco County Board of Education, 195 W.Va 480, 466 S.E.2d 139 (1995), Realmark Developments v. Ranson, 208 W.Va. 717, 542 S.E.2d 880 (2000).

7. The Court **FINDS** that this action is inequitable and unconscionable to permit the defendant, David Serian, from unjustly benefitting from the payment by the plaintiff of the full amount of the lien on the 2002 Toyota Tacoma.

8. In equity, it is not what caused the mistake which is operative, but rather the existence of the mistake. Further, even if a mistake arises from negligence, the negligence does not in and of itself preclude the consideration of the mistake in the equitable context Absure, Inc. v. Huffman, 213, W.Va. 651, 584 S.E.2d 507 (2003); Prudential Insurance Company of America v. Couch, 180 W.Va. 210, 376 S.E.2d 104 (1988).

9. There is no factual dispute that the plaintiff, Dan Cava's Toyota World, paid money on behalf of the defendant, David Serian, to which Mr. Serian received the benefit. Even if the plaintiff, Dan Cava's Toyota World, mistakenly misplaced its confidence in the defendant's truthfulness regarding the amount of the lien against his 2002 Toyota Tacoma the plaintiff is entitled to relief to prevent the defendant from being unjustly enriched Taylor v. Godfrey, 62 W.Va. 677, 59 S.E. 631 (1907); Absure, Inc. v. Huffman, 213, W.Va. 651, 584 S.E.2d 507 (2003)

10. West Virginia Code § 46A-2-122(b) defines "a claim" as

Any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or service which is the subject of the transaction is primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.

11. The West Virginia Supreme Court of Appeals has not considered any case instructive to this action, however, the Federal Fair Debt Collection Act, although not applicable in this action, is somewhat instructive as the definition of "debt" under the federal law is virtually identical to the definition of claim under West Virginia law See, 15 U.S.C. § 6092a(5).

12. Under the federal act the threshold requirement to assert a claim is the determination that the debt arose out of a transaction, in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes. Gary v Goldman and Company, 180 F.Supp.2d 668 (E D. Pa. 2002).

13 As this transaction involves the purchase of the 2002 Toyota Tacoma by the plaintiff it does not involve a claim as contemplated by West Virginia Code § 46A-2-122(b). The amount owed is to satisfy the lien on personal property purchased by the plaintiff from the defendant.

14. Accordingly, the Court **FINDS** that as the amounts owed by the defendant to the plaintiff do not constitute a "claim" as

defined by West Virginia Code § 46A-2-122(b), therefore, the plaintiff is entitled to a judgment as a matter of law in its favor with respect to the defendant's counterclaim.

15 In conclusion, the Court **FINDS**, that the defendant, David Serian, has been unjustly enriched in the amount of \$2,037.78; that the Sales Agreement clearly requires the defendant, David Serian, to reimburse the plaintiff in that amount; and that the requisite provision of the contract is not unconscionable, as the bargaining power of both parties was equal.

Accordingly, it is **ADJUDGED** and **ORDERED** that the plaintiff, Dan's Carworld, LLC d/b/a Dan Cava's Toyota World, recover from the defendant, David Serian, the sum of \$2,037.78 with prejudgment interest to be calculated at a rate of 10% per annum from April 4, 2006 until October 2, 2007, which said interest amounts to \$304.87 for a total judgment of \$2,342.65. Accordingly, the plaintiff, Dan's Carworld, LLC d/b/a Dan Cava's Toyota World, shall recover from the defendant, David Serian, the sum of \$2,342.65 with post judgment interest at the rate of 9.75% per annum from October 3, 2007 until paid.

The Court further **ORDERS** that the plaintiff, Dan's Carworld, LLC d/b/a Dan Cava's Toyota World, recover all costs taxable by statute from the defendant, David Serian.

The defendant, David Serian, objects and excepts to the award of judgment to the plaintiff, Dan's Carworld, LLC d/b/a Dan Cava's Toyota World, as set forth herein.

The Clerk is directed to send a certified copy of this Final Judgment Order to all counsel of record.

ENTER: 10/19/07

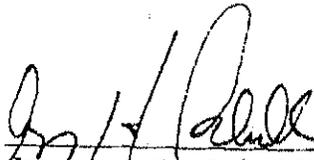


David R. Ganes, Judge

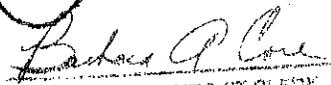
Submitted by

COPY

TESTE:



Gregory H. Schillace
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CLERK OF THE CIRCUIT COURT
MARION COUNTY, WEST VIRGINIA

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