Citation: *Whitehorse Wholesale Auto Centre Ltd.* v. *Terry Hanson (now Terri-Lynn Kowalchuk),* 2010 YKSM 3

Date: 20091026
Docket: 06-S0189
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Faulkner

BETWEEN:

WHITEHORSE WHOLESALE AUTO CENTRE LTD.

Plaintiff

AND:

TERRY HANSON (NOW TERRI-LYNN KOWALCHUK)

Defendant

Appearances:
Edwin Woloshyn — Appearing for the Plaintiff
Terri-Lynn Kowalchuk — Appearing on her own behalf

REASONS FOR JUDGMENT

[1] FAULKNER T.C.J. (Oral): In this case, Whitehorse Wholesale Auto Centre sued the defendant, Terri-Lynn Kowalchuk, on the basis of a promissory note signed by the defendant. It is interesting to note that the claim against the defendant reveals nothing about the circumstances that led up to the signing of the note.

[2] Those circumstances were that some years previous to the note being signed the defendant had purchased a car from the plaintiff and had made a down payment on it.

However, the payments were irregular and I gather the defendant was experiencing difficulty in making the payments. Ultimately, she brought the car back to the plaintiff's lot. The plaintiff agreed to take the car back but insisted that the defendant sign a promissory note for the balance then owing, less $2,800, which the plaintiff reckoned to be the value of the car at that time.

[3] No payments were made under the note and ultimately the plaintiff sued the defendant. The defendant failed to take any steps whatever to defend the action and the plaintiff received default judgment, which was for the amount of the note plus interest then owing. Thereafter, the now judgment debtor, the former defendant, commenced making payments on the judgment. The judgment was obtained in early 2007, April I believe, and the judgment debtor has made payments since then totalling $3,900.

[4] After more than two years had gone by, the defendant belatedly became aware of the provisions of the *Consumers Protection Act,* R.S.Y. 2002 c. 40 which, in her view, provided her with a defence to the claim. Up until that time, she had done nothing whatever to determine what her legal position or rights were. Finally, in September of 2009, some two years after the judgment, and after having made considerable payments on the judgment, the judgment debtor brought a notice of motion asking the Court to set aside the default judgment and additionally asking that the plaintiff's claim be dismissed and that the monies she had paid be returned to her.

[5] The plaintiff/judgment creditor indicates that he was at all times fully aware of the provisions of the *Consumers Protection Act* which essentially provides that where a

vehicle such as this, that was sold on time payments, is repossessed, that any balance is extinguished and there is no right to sue for any deficiency. He, however, argues that the *Act* has no application to the present circumstances because he did not seize the car but voluntarily agreed to take it back and incidentally, at that time, agreed to relieve the defendant's mother and father of their obligations under the conditional sales contract.

[6] In my view, the plaintiff cannot claim that the *Consumers Protection Act* has no applicability to these circumstances. The repossession provision does not specifically provide that it must be a repossession which is contested by the time purchaser and is carried out by the sheriff. It seems to me that if the car lot in this case has the car brought back to them and they agree to take it back, that the provisions of the *Act* would apply. And it might be that there are other considerations here, particularly the fact that the plaintiff, in accepting the return of the car, agreed to relieve the mother and father of their obligations under the contract, which was something he did not have to do and that, I think, puts a slightly different complexion on the overall transaction than might otherwise be the case.

[7] I think the fairest way that I can deal with the matter at this point in time, having regard to the fact that the defendant has waited two and a half years to make her application to set the judgment aside, having regard to the fact that Mr. Woloshyn was well aware of the provisions of the *Consumers Protection Act,* but, as I say, having regard to the fact that there were other considerations, most particularly the involvement of the parents as effective co-signers for the debt, the fairest way to deal with the matter is to dismiss the defendant's motion to set aside the judgment but to declare that it is

fully satisfied by the amounts paid to date.

[8] I should also add that coming to the conclusion that I have, I am also taking into account the fact that the plaintiff repossessed the car and has obviously resold it since, but cannot advise the Court as to the amount of money it obtained for the vehicle, which would certainly be a relevant consideration.

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FAULKNER T.C.J.