SIXTH DIVISION
February 3, 2017

No. 1-16-1718

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEVIN UNDERWOOD,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2014 M5 000601
	)	
JACK PHELAN DODGE, LLC,	)	Honorable
	)	Thomas Murphy,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We reversed the grant of summary judgment for defendant on plaintiff's fraudulent concealment and fraudulent misrepresentation count, and remanded for further proceedings, finding questions of material fact precluded the grant of summary judgment. We affirmed the grant of summary judgment for defendant on the Consumer Fraud Act count, where defendant's uncontradicted affidavit supported the grant of summary judgment in defendant's favor and where plaintiff's claim constituted an allegation of breach of contract and not a Consumer Fraud Act violation.

¶ 2 Plaintiff, Devin Underwood, filed a two-count complaint against defendant, Jack Phelan Dodge, LLC, alleging fraudulent misrepresentation and fraudulent concealment in count I, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2012)), in count II, in connection with his purchase of a new automobile. The trial court granted summary judgment in favor of defendant on both counts.

Plaintiff appeals. We reverse the grant of summary judgment in favor of defendant on count I of plaintiff's complaint and remand for further proceedings. We affirm the grant of summary judgment in favor of defendant on count II.

¶ 3 I. Plaintiff's Complaint

¶ 4 In his complaint, plaintiff alleged that on March 31, 2012, he purchased a Dodge Charger (automobile) from defendant for $34,094.39. Defendant represented the automobile as being "new." Defendant concealed from plaintiff that, prior to the sale, something fell on the roof of the automobile, causing damage in the amount of over 6% of its price and that defendant had "badly" repaired the damage.

¶ 5 The automobile's special 3-coat paint subsequently started peeling off, and plaintiff brought the automobile to defendant for a warranty repair. Defendant refused to make the repair, and wrote in a signed statement: "The roof concern appears to have had prior painting and is not a warrantable concern."

¶ 6 Plaintiff alleged that to repair the automobile correctly so as to be in a "like-new" condition, he will have to spend $4,814, which is more than 6% of its price.

¶ 7 In count I, plaintiff alleged defendant committed "common law fraudulent misrepresentation and fraudulent concealment," by failing to inform him of the damage to the automobile and intentionally misrepresenting that the automobile was new, when in fact its roof had been so badly damaged, and so poorly repaired, that it could no longer be considered a "new" automobile. In count II, plaintiff alleged in pertinent part that as part of the purchase of the automobile, the parties signed an arbitration agreement, and that plaintiff filed an arbitration demand in this case. Plaintiff alleged defendant violated the Consumer Fraud Act by refusing to participate in arbitration pursuant to the agreement.

¶ 8 II. Inspection Reports

¶ 9 As part of the suit against defendant, plaintiff's expert, Phillip J. Grismer, a certified member of the International Automobile Appraisers Association, inspected the automobile on August 17, 2012, and prepared a report. In pertinent part, Mr. Grismer's report noted that the automobile's manufacturer suggested retail price (MSRP) when new is $35,205.00 and stated:

> "The roof paint is occluded with dirt seeds and visible sanding scratches are present under the color coat. Paint measurements were taken using a digital FE/NFE paint thickness gauge. A base line of 5.5 to 6.5 mils. was established as consistent with a factory finish. The roof panel measures between 8.5 and Infinity, showing that the paint thickness is off the scale. This indicates a large concentration under the paint of plastic body filler. The moon roof opening edge is repainted with paint flash over and has a rough finish as a result. The paint finish itself is inconsistent due to a mismatch of the paint [pearlescence]."

¶ 10 On October 7, 2014, Mr. Grismer prepared a supplemental report "addressing the issue of roof damage and how to repair it." The supplemental report stated that the roof was not repaired to a "like-new" condition and further stated in pertinent part:

> "To repair the car correctly, to a 'like-new' condition will take the following: (1) Take all glass out of the car-5 hours at $100/hr=$500; (2) Cut the roof off-30 hours at $100 hr=$3,000 (sun roof equipment must be switched from the old roof to the new one); (3) New roof-part #68037866, $814.00; (4) Weld a new roof-(additional 5 hours); (5) Paint it-(included in additional 5 hours); (6) Paint-$500.00; (7) Put the glass back-(included in additional 5 hours)."

¶ 11 III. Affidavits

¶ 12 Robert Rogacki, defendant's customer relations manager, filed an affidavit attesting that prior to plaintiff's purchase of the automobile on March 31, 2012, it was never sold to any person except a motor vehicle dealer. An automobile may be sold as new provided it has not been titled or sold to any person except a distributor or wholesaler or motor vehicle dealer for resale.

¶ 13 Mr. Rogacki attested that, pursuant to section 5 of the Motor Vehicle Franchise Act (815 ILCS 710/5 (West 2012)), (discussed later in this order), "[a] car with minor damage, including damage to the roof, prior to the sale may be sold as new and disclosure of the damage prior to the sale is not required under Illinois law when the cost to repair does not exceed 6% of the manufacturer's suggested retail price [MSRP] of the vehicle based upon the dealer's actual retail repair cost, including labor, parts, and materials if the damage is repaired or the retail estimate to repair the vehicle if it is not repaired."

¶ 14 Mr. Rogacki attested that prior to the delivery of the automobile to defendant, it incurred a crease in the driver side of the roof panel[1]. The automobile was sent to U.S. Collision, Inc., an auto-body repair shop that is independent of defendant. U.S. Collision, Inc. made the repairs to the automobile's roof and charged defendant $793.25. The repair cost of $793.25 was about 2.25% of the automobile's MSRP, and therefore disclosure of the damage prior to the sale to plaintiff was not required under section 5 of the Motor Vehicle Franchise Act.

¶ 15 Mr. Rogacki further attested that defendant never refused to participate in arbitration prior to the commencement of plaintiff's lawsuit.

¶ 16 Mario Marr, the owner of U.S. Collision, Inc., attested that in July 2011, he inspected the automobile and observed a crease in the driver side roof panel. The size of the crease on the roof of the automobile was no greater than 6 inches long by 3/16 inches wide, and did not impact the

[1] The automobile also sustained a scuff in the driver side, front door sill, but no argument is made on appeal regarding the adequacy of the repairs made thereto.

operation of the sunroof. To repair the crease, Mr. Marr: used weld-on studs to remove the length of the crease and then gently pulled the crease out using the studs; grinded the studs off and used filler to fill in any low spots; sanded and primed the area where the crease was; and prepped the entire roof for paint, blended off the color, and clear coated the entire roof. This was the usual and customary procedure to repair a crease in the roof of an automobile under standard industry practices. The proper and reasonable repair for the crease in the driver side roof panel would never be to replace the roof.

¶ 17 Mr. Marr attested that on July 18, 2011, he charged defendant $793.25 for the repair of the crease in the driver side roof panel. The $793.25 represented the actual retail repair costs and included all labor, parts and materials.

¶ 18 Rick Hiller, defendant's service director, filed an affidavit attesting that the crease in the driver side roof panel was repaired properly and reasonably by Mr. Marr and that the repair cost of almost $800 was also reasonable.

¶ 19 Plaintiff's expert, Phillip Grismer, filed an affidavit attesting that to repair plaintiff's automobile "correctly, to a 'like-new' condition" would require: taking all the glass out of the automobile; cutting the roof off; installing a new roof; painting the roof; and putting the glass back. The total cost of such a repair is $4,814, or over 6% of the MSRP.

¶ 20 Mr. Grismer further attested:

> "Anyone with even a minimal experience in the automotive industry would know that the substandard, cheap repair on a structural component, such as the repair that was done on the car, would be totally inadequate, which was amply demonstrated by the car's subsequent repair history and its current condition. Therefore, I would not even consider this car to be 'repaired,' it was more like a cheap cover-up. Anyone with minimal

experience in the automotive industry would know that seven hundred dollars cannot possibly 'repair' a structural component."

¶ 21 IV. Deposition Testimony

¶ 22 Mr. Grismer testified in his deposition:

"Q. [I]f a car has a crease in it and it's presented to an auto body place, what is the most reasonable way in which that auto body would repair that crease?

A. Probably the way they repaired it.

Q. And the $793 that was paid for the repair, is that a reasonable cost *** to repair it?

A. Probably, yeah."

¶ 23 Elsewhere, though, in his deposition, Mr. Grismer testified that the repair to the driver side roof panel performed by U.S. Collision, Inc. was "cheap" and "substandard" and resulted in visible sanding scratches on the entire roof and that the roof paint is occluded with dirt seeds and does not match the paint on the rest of the automobile. The paint finish also has "tails," meaning there are lines at the edge of the spray pattern. The end result was a "patched up vehicle that was peddled off as a new car, which it wasn't." After the repair, the automobile was in "fair condition" and was "essentially a used vehicle." The repair that was done was worse than doing no repair at all.

¶ 24 Mr. Grismer testified that the appropriate measure to repair the automobile would be to replace the roof at a cost of about $4,800 or to install a simulated convertible top at a cost of more than $2,000.[2]

[2] No effort was made by counsel to have Mr. Grismer reconcile his seemingly contradictory testimony indicating, on the one hand, that the work performed by U.S. Collision, Inc. to the automobile's roof was a reasonable way to repair it and was priced reasonably and, on

¶ 25 V. Summary Judgment

¶ 26 The trial court granted summary judgment in favor of defendant on both counts of plaintiff's complaint. With respect to count I, the trial court found that "the actual cost of repair was $793.00 which is far less [than] the 6% of MSRP threshold that would require disclosure of the in-transit damage" and that plaintiff submitted no evidence showing an intent to deceive on the part of defendant and, thus, that the non-disclosure of the damage to the automobile did not constitute fraudulent conduct. With respect to count II, the trial court found that defendant's alleged failure to arbitrate was a breach of contract and that a contractual breach is not actionable under the Consumer Fraud Act.

¶ 27 VI. Plaintiff's Appeal

¶ 28 Plaintiff appeals the grant of summary judgment in favor of defendant on both counts of his complaint. Summary judgment is proper where the pleadings, depositions, admissions and affidavits on file, viewed in the light most favorable to the nonmoving party, show no genuine issue of material facts exists and that the moving party is entitled to judgment as a matter of law. *Express Casino Joliet Corp. v. W.E. O'Neil Construction Co*., 2016 IL App (1st) 151166, ¶ 58. Review of an order granting summary judgment is *de novo*. *Id*.

¶ 29 A. The Grant Of Summary Judgment for Defendant on Count I of Plaintiff's Complaint

¶ 30 Count I of plaintiff's complaint asserted fraudulent misrepresentation and fraudulent concealment against defendant for failing to inform plaintiff of the damage to the automobile's roof and intentionally misrepresenting that the automobile was new, when in fact its roof had been so badly damaged, and so poorly repaired, that it could no longer be considered “new.”

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the other hand, that the work was inadequate to repair the roof and that further repairs costing additional thousands of dollars was necessary.

¶ 31 "The elements of fraudulent misrepresentation are (1) a false statement of material fact; (2) the defendant's knowledge or belief that the statement was false; (3) the defendant's intent that the statement induce the plaintiff to act; (4) the plaintiff's justifiable reliance upon the truth of the statement; and (5) damages resulting from reliance on the statement." *Bauer v. Giannis*, 359 Ill. App. 3d 897, 902 (2005). "To prove fraudulent concealment, a plaintiff must establish that (1) the defendant concealed a material fact under circumstances that created a duty to speak; (2) the defendant intended to induce a false belief; (3) the plaintiff could not have discovered the truth through reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and justifiably relied upon the defendant's silence as a representation that the fact did not exist; (4) the concealed information was such that the plaintiff would have acted differently had he or she been aware of it; and (5) the plaintiff's reliance resulted in damages." *Id*. at 902-03.

¶ 32 The issue on appeal is whether defendant's failure to inform plaintiff of the damage to the automobile's roof constituted the concealment of a material fact for purposes of fraudulent concealment, and whether defendant's statement that the automobile was new constituted a false statement of material fact for purposes of fraudulent misrepresentation.

¶ 33 Section 5 of the Motor Vehicle Franchise Act (815 ILCS 710/5 (West 2012)), is dispositive. Section 5 states in pertinent part:

> "A motor vehicle dealer shall disclose to the purchaser before delivery of the new motor vehicle, in writing, any damage that the dealer has actual knowledge was sustained or incurred by the motor vehicle at any time after the manufacturing process was complete but before delivery of the vehicle to the purchaser. This disclosure is not required when the cost *to repair* does not exceed 6% of the manufacturer's suggested

retail price of the vehicle based upon the dealer's actual repair cost, including labor, parts, and materials if the damage is repaired or the retail estimate to repair the vehicle if it is not repaired." (Emphasis added.) *Id*.

¶ 34 Section 5 does not define the term "repair." The fundamental rule of statutory construction is to ascertain the legislative intent, the best indication of which is the language of the statute itself, which must be given its plain and ordinary meaning. *David Gassman and A.N. Anymous v. Clerk of the Circuit Court of Cook County*, 2017 IL App (1st) 151738, ¶ 15. When a statute contains undefined terms, we may employ a dictionary to ascertain their plain and ordinary meaning. *People v. Davison*, 233 Ill. 2d 30, 40 (2009). The construction of a statute is a question of law that is reviewed *de novo*. *Id*.

¶ 35 The American Heritage College Dictionary 1156 (3d ed. 2000) defines "repair" as "[t]o renew or revitalize" and defines "renew" as "[t]o make new or as if new again; restore." *Id*. at 1155. Thus, under section 5 of the Motor Vehicle Franchise Act, defendant was not required to inform plaintiff of the damage to the automobile's roof as long as "the cost to repair" (815 ILCS 710/5 (West 2012)), *i.e.*, the cost to make the automobile new or as if new again, "does not exceed 6% of the [MSRP]." *Id*.

¶ 36 Defendant contends that the reasonable cost to repair the automobile's roof was less than 6% of the MSRP, and points to the affidavits of Mr. Marr, Mr. Rogacki and Mr. Hiller, in which they attested that the repair to the roof performed by U.S. Collision, Inc., was reasonable and cost a total of $793.25, which was only about 2.25% of the MSRP. Defendant further points to the deposition testimony of Mr. Grismer, that: the roof of an automobile generally should not be replaced unless most of the roof is dented; the most reasonable way in which the auto body shop should repair a crease to the automobile's roof is "[p]robably the way [U.S. Collision, Inc.]

repaired it;" and that the $793.25 charged for the repair to the roof was "probably" reasonable. Defendant contends that Mr. Grismer's deposition testimony, along with the affidavits of Mr. Marr, Mr. Hiller, and Mr. Rogacki, support a finding that U.S. Collision, Inc.'s repair to the roof of plaintiff's automobile was reasonable, that the repair costs were less than 6% of the MSRP and, therefore, that defendant was under no obligation to tell plaintiff of the damage to the automobile's roof and lawfully could state under section 5 of the Motor Vehicle Franchise Act that the automobile was "new."

¶ 37 However, while recognizing that Mr. Grismer briefly testified in one portion of his deposition that the repair performed by U.S. Collision, Inc. to the automobile's creased roof was a reasonable way to repair the crease, and that the $793.25 cost for the repair to the roof also was reasonable, we note that he made contrary statements in his affidavit and gave extensive contrary testimony elsewhere in his deposition that precludes the grant of summary judgment. See *Vulpitta v. Walsh Construction Co.*, 2016 IL App (1st) 152203, ¶ 30 (the trial court cannot weigh evidence, decide facts and make credibility determinations at the summary judgment stage). Specifically, Mr. Grismer attested in his affidavit that the repair done to the automobile's roof by U.S. Collision, Inc. was substandard, cheap and inadequate, and that he did "not even consider this car to be 'repaired,' it was more like a cheap cover-up." To repair the automobile to a "like-new" condition would require taking all the glass out of the automobile, cutting off the roof and installing a new roof, painting the roof, and putting the glass back, at a total cost of $4,814, or over 6% of the MSRP. Mr. Grismer further attested that defendant should have known that the repair performed by U.S. Collision, Inc. to the automobile's roof was inadequate to restore the automobile to a new or "like-new" condition.

¶ 38 Consistent with his affidavit, Mr. Grismer also testified in his deposition that U.S. Collision, Inc.'s repair to the automobile's roof was cheap and substandard, leaving visible sanding scratches on the entire roof, and that the roof paint is occluded with dirt seeds and does not match the paint on the rest of the automobile. After the repair, the automobile was in "fair condition" and was not new but was instead "essentially a used vehicle." The appropriate measure to repair the automobile would either be to replace the roof at a cost of about $4,800 or to install a simulated convertible top at a cost of more than $2,000, both of which costs were more than 6% of the car's MSRP.

¶ 39 This case is similar to *Stone v. Clifford Chrysler-Plymouth, Inc.*, 333 Ill. App. 3d 363 (2002). In *Stone*, the plaintiff alleged the defendant had misrepresented that the automobile he was leasing was new and had failed to inform him that his "new" automobile had previously been damaged and repaired. *Id*. at 365. The plaintiff sought recovery against the defendant for statutory and common-law fraud. *Id*. The defendant filed a motion for summary judgment and attached the affidavit of the employee who sold the vehicle to the plaintiff. *Id*. at 365-66. The employee attested that an insurance statement indicated repairs had previously been performed on the automobile for a broken window, a stolen radio, and damage to the dash. *Id.* at 366. The employee attested that neither he nor anyone else at the defendant's dealership knew of the damage to the vehicle and corresponding repairs prior to leasing the vehicle to the plaintiff. *Id*.

¶ 40 The defendant asserted that, pursuant to section 5 of the Motor Vehicle Franchise Act, it had no duty to disclose the damage done to the automobile because the repairs did not exceed 6% of the retail price. *Id*. The plaintiff responded that questions of material fact existed regarding whether the extent of the damage to the vehicle exceeded 6% of the price and whether the defendant had actual knowledge of the damage. *Id*. at 366, 369. The plaintiff attached the

affidavit of his expert who attested that there may have been repairs made that were not reflected on the insurance statement. *Id*. at 366. Additional repairs/repainting were necessary and had not been properly completed. *Id*. Further, "the repaint masking lines and the paint color and texture differences should have been obvious to any professional working in the automobile sales or repair business." *Id*. at 367.

¶ 41 The trial court granted summary judgment in favor of the defendant. *Id*. The appellate court reversed and remanded, holding in pertinent part that the plaintiff's expert's affidavit raised genuine issues of material fact regarding the total cost to repair the vehicle, whether the repairs were done properly, and whether the defendant knew of the damage and corresponding need for further repairs prior to the lease. *Id*. at 368-69. The appellate court also found an issue of material fact regarding the MSRP of the vehicle, and whether the cost to repair the vehicle was greater than 6% of the MSRP. *Id*.

¶ 42 In the present case, as in *Stone*, Mr. Grismer's affidavit and deposition testimony raise questions of material fact as to: the adequacy of the repairs done to the automobile's roof by U.S. Collision, Inc.; whether additional repairs were necessary to the roof to restore the automobile to a new or like-new condition; whether those additional repairs would cost more than 6% of the MSRP; whether defendant knew that the repairs performed by U.S. Collision, Inc., were inadequate to restore the automobile to a new or like-new condition and that further repairs costing more than 6% of the MSRP were necessary; whether defendant was obligated under section 5 of the Motor Vehicle Franchise Act to inform plaintiff of the damage to the automobile's roof because it knew the cost of repairs to restore the automobile to a new or like-new condition was more than 6% of the MSRP; whether defendant's failure to inform plaintiff of the damage to the automobile's roof was fraudulent concealment because of its obligation to

inform plaintiff of that damage under section 5 of the Motor Vehicle Franchise Act; and whether defendant's affirmative declaration to plaintiff that the automobile was "new" constituted fraudulent misrepresentation under section 5 of the Motor Vehicle Franchise Act where it knew the repairs performed by U.S. Collision, Inc. to the automobile's roof left it as essentially a used vehicle and where further repairs costing more than 6% of the MSRP were required to make the automobile new or like-new again.

¶ 43 Given these issues of material fact, we reverse the grant of summary judgment in favor of defendant on count I of plaintiff's complaint for fraudulent concealment and fraudulent misrepresentation and remand for further proceedings.

¶ 44 B. The Grant of Summary Judgment for Defendant on Count II of Plaintiff's Complaint

¶ 45 Plaintiff alleged in pertinent part in count II of his complaint that, as part of the purchase of the automobile, the parties signed an arbitration agreement, and that plaintiff filed an arbitration demand in this case. Plaintiff alleged defendant violated the Consumer Fraud Act by refusing to participate in arbitration pursuant to the agreement.

¶ 46 Robert Rogacki, defendant's customer relations manager, filed an affidavit attesting in pertinent part:

> "20. I called the Better Business Bureau sometime after May 7, 2013. A person at the Better Business Bureau informed and instructed me to contact [p]laintiff's counsel to discuss and potentially resolve issues with [p]laintiff Devin Underwood prior to arbitration.
>
> 21. As the Better Business Bureau instructed, I e-mailed and called [p]laintiff's counsel on several occasions. Plaintiff's counsel never called me back or emailed me to discuss the matter.

22. Based on the information and instruction from the Better Business Bureau, it was my understanding that the parties had to discuss the matter and try to resolve the issues prior to proceeding with arbitration. In this regard, Jack Phelan never refused to participate in arbitration, and [p]laintiff initiated this lawsuit against Jack Phelan."

¶ 47 " 'When affidavits presented in support of summary judgment are not contradicted by counter-affidavits, they must be taken as true, even though the adverse party's pleadings allege contrary facts.' " *Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748, ¶ 53 (quoting *Safeway Insurance Co. v. Hister*, 304 Ill. App. 3d 687, 691 (1999)).

¶ 48 Plaintiff filed no counter-affidavits contradicting the affidavit of Mr. Rogacki attesting that defendant complied with the instructions of the Better Business Bureau and did not refuse to participate in arbitration. Accordingly, the affidavit of Mr. Rogacki is taken as true and, therefore, plaintiff's claim in count II of his complaint of a Consumer Fraud Act violation against defendant (for refusing to participate in arbitration) fails as a matter of law.

¶ 49 Further, we note that the allegation of count II against defendant regarding its alleged violation of the arbitration agreement constitutes a claim of breach of contract; however, "[a] breach of contractual promise, without more, is not actionable under the Consumer Fraud Act." *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 169 (2005).

¶ 50 Accordingly, we affirm the grant of summary judgment in favor of defendant on count II of plaintiff's complaint.

¶ 51 For the foregoing reasons, we reverse the grant of summary judgment for defendant on count I of plaintiff's complaint and remand for further proceedings thereon, and we affirm the grant of summary judgment in favor of defendant on count II of plaintiff's complaint.

¶ 52 Affirmed in part, reversed in part, and remanded.