

Citation: Zodiac Auto v. Purolator

Date: 20020424
File No: 2001-69366
Registry: Vancouver

In the Provincial Court of British Columbia
(CIVIL DIVISION)

BETWEEN:

ZODIAC AUTO CENTRE LTD.

CLAIMANT

AND:

PUROLATOR COURIER LTD.

DEFENDANT

**REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE PALMER**

COPY

**Agent for the Claimant:
Counsel for the Defendant:**

**Matthew Lesani
C. Rhone**

**Place of Hearing:
Date of Judgment:**

**Vancouver , B.C.
April 24, 2002**

[1] THE COURT: This is an action brought by Zodiac Auto Centre against Purolator Courier Limited for damages which the claimant says flow from the defendant's failure to deliver a package to the claimant in a timely manner.

[2] The claimant is in the business of buying and selling used cars. In March 2001 the claimant acquired a Mercedes Benz 500SL vehicle. The vehicle needed an alternator. Mr. Lesani testified that the claimant had an agreement with a buyer, who was never identified, for the purchase of the Mercedes Benz at a price of \$37,000. The vehicle had been purchased by the claimant for \$33,119.31, according to the bill of sale. Mr. Lesani said that the claimant would recover the GST in the amount of \$2,149, so that the cost to his company was \$30,970.31. He testified that some additional monies of approximately \$1,400 were spent in shipping the vehicle to Vancouver, doing some mechanical repairs, having the car detailed, and advertising the car on two occasions. Mr. Lesani testified that he had a purchaser for the car for \$37,000, that he was going to grant a two-year warranty to the customer, but that the sale was contingent on the replacement of the alternator in the vehicle within 48 hours. He located the necessary part in Toronto, he made arrangements to have the part shipped by air on July 3rd, 2001, by the defendant

company.

[3] It is not disputed between the parties that the package was delivered more than 24 hours after Mr. Lesani had contracted to have it sent from Toronto. Mr. Lesani had requested air shipping so that the package would be delivered overnight. He was uncertain as to the date on which the package was received, but said that it was perhaps four or five days later. Mr. Lesani was unable to adduce any documentary evidence in support of his claim that he had a deal to sell the vehicle for \$37,000. The vehicle was sold ultimately to Saturn Motors in August of 2001 for the price of \$33,100.

[4] Counsel for the defendant relies on case law supporting the proposition that the damages the claimant seeks are too remote, because Mr. Lesani failed to notify either the shipper, Dominion Auto in Toronto, or the courier, Purolator, that he would lose a contract of sale if he did not receive the package within 24 hours. Mr. Lesani did not testify to any such discussions in his direct evidence. In submission, in reply to Mr. Rhone's argument, Mr. Lesani said that he had, in fact, not done so, and questioned whether or not anyone realistically would.

[5] Counsel for the defendant relies, in the alternative, on

the exclusions of liability as are set out in the bill of lading, which became Exhibit 1 in this proceeding.

[6] I find as fact the following: that Mr. Lesani requested the defendant, Purolator, to ship the alternator by air; that both the claimant and the defendant understood that to mean overnight delivery, so Mr. Lesani should have received the part on July 4th, 2001; that Mr. Lesani failed to notify either the shipper, Dominion Auto, or the courier, Purolator, that the claimant, Zodiac Auto, stood to lose a contract for sale of the vehicle if the alternator was not delivered on time; and that the alternator was not delivered until at least three days after the requested delivery date.

[7] The claimant has not established his loss on a balance of probabilities. A reasonable person engaged in the sale and purchase of a motor vehicle worth \$37,000, for which the claimant says he was prepared to provide a two-year warranty, would, in my view, have a written record of such a transaction. Further, a reasonable person purchasing a vehicle for \$37,000 would not, in my view, walk away from such a deal over a minor delay, or over a part, which while integral in the running of the vehicle, is minor in cost relative to the value of the vehicle. Mr. Lesani should have been able to adduce either written records of this alleged

deal, or perhaps call the alleged prospective buyer. He did testify in direct examination that he had transferred his file to Saturn Auto at the time that the vehicle was sold. It was certainly open to Mr. Lesani to request copies of that alleged incomplete transaction.

[8] Even if Mr. Lesani had been able to establish his loss on a balance of probabilities, I would, on the binding case law presented by defence counsel, be obliged to dismiss this claim because the damages claimed are, in fact, too remote. They could not be reasonably considered to have arisen naturally from Purolator's breach, nor, given my finding that Mr. Lesani did not communicate special circumstances to Purolator, be in the contemplation of the defendant Purolator as to the injury or damages arising from their breach of this contract with Mr. Lesani, and I therefore dismiss the claimant's case.

[9] I am not awarding you damages, Mr. Lesani. I have dismissed your case, and I do that on two grounds, really. First, I have made a finding that you have not met the onus on you. You have to prove your case on a balance of probabilities. You have to show to the court that it is more probable than not, and I have not accepted your evidence simply to come to court and say, "I had a contract." You should be able to support that with documentary evidence and

you have not done so, sir, so I have not accepted that evidence. And further, I have found that if you had been able to do that, if you had put that evidence before me, the fact of the matter is that I simply would not have been able to uphold your claim on the basis of well established case law. And the cases say that when you are in a special situation with circumstances such as having a contract you will lose in a specified time frame if somebody does not do something you want them to do, then you have to communicate that to them. And if you fail to do so you cannot expect them to be held liable for the damages. And so I have dismissed your claim on that basis.

[10] THE CLAIMANT: Your Honour, nobody asked me if I had any discussion with the customer or not, which I could tell you we offered the customer to drop the price and sell the car for lower price and keep the deal. They walked away from the deal, and that decision tells me, even I pay for the service, \$56, which must be a lot cheaper. There is no difference between the urgent by the air or the ground. With the now order you're making up right now, because simply I asked Purolator to have my package to be mailed. That order allows them to have everybody the same thing as your order is made right now. Simply I ask to have that mailed, shipped by air.

They made a mistake. You're telling me they did not make a mistake. Because --

[11] THE COURT: No, I did not say that, Mr. Lesani.

[12] THE CLAIMANT: -- the other hand, you forget about the fact which I am in here, because of very, very simple things; I asked to have that shipped by air. Now, you going to continue to something else which has nothing to do with this, and you allowing them to walk away because of their mistake. They made a mistake, Your Honour, and they don't pay anything for their mistake? I am the one that have to pay?

[13] THE COURT: Mr. Lesani, they did not deliver the package within 24 hours.

[14] THE CLAIMANT: So they have to pay penalty for that, [indiscernible].

[15] THE COURT: No, sir, they don't, not in this case.

[16] THE CLAIMANT: So they can do anything they want with the order you have in here. I'll take your order, I have no choice.

[17] MR. RHONE: Your Honour, I would like to make submissions regarding costs.

[18] [SUBMISSIONS RE COSTS]

[19] I understand that, but I also read Rule 20(2), Mr. Rhone, as being a discretionary order; "must pay unless a judge or registrar orders otherwise. And on the basis of the facts that I found, and given the fact that we are here, and there is an admitted breach of contract by your client, I am not going to order costs in this case.

(JUDGMENT CONCLUDED)