

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. S862 OF 2000

SAMUEL JONES

PLAINTIFF

AND

INTERCOMMERCIAL BANK

DEFENDANTS

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mr. A. Ramlogan for the Plaintiff

Mr. B. Reed for the Defendants

JUDGMENT

1. By a Writ of summons filed on the 11th July 2000 the Plaintiff claims against the Defendant:

- (i) Damages for breach of contract;
- (ii) Damages for detinue and/or conversion;
- (iii) A declaration that the Plaintiff is entitled to information about any unpaid installments and/or any monies which are due and owing on the said loan and/or an order directing the Defendant to provide the Plaintiff with a statement showing this information;
- (iv) Aggravated and/or exemplary damages.

2. The issues for determination are:
- (i) Is the Plaintiff in breach of the duty to insure his motor vehicle as imposed by the mortgage bill of sale made between the Plaintiff and the Defendant?
 - (ii) If so, was it open to the Defendant to repossess the said motor vehicle?
 - (iii) If the answer to either of the two questions is no, is the Defendant liable to the Plaintiff in damages for breach of contract and/or detinue and/or conversion and
 - (iv) If the Plaintiff is so liable what is the quantum of damages payable by the Defendant?
 - (v) Does the contract between the parties either expressly or impliedly require the Defendant to provide the Plaintiff with information about any unpaid installment and /or any monies which are due and owing on the said loan? and
 - (vi) If so, should the Court order that the Defendant provide the Plaintiff with a statement showing this information?

FACTS

- 3.
- (i) The Plaintiff was the owner of motor vehicle PAY 8804 (hereinafter called “the motor vehicle”), the subject of a mortgage bill of sale dated the 30th July 1999 in favour of the Defendant to secure a loan to the Plaintiff in the sum of \$56,196.62.

- (ii) The amount borrowed by the Plaintiff from the Defendant plus the cost of borrowing amounted to \$83,637.00 and was also covered by a promissory note in favour of the Defendant.
- (iii) The Plaintiff was at all material times up to the month of December 1999 an employee of the Defendant and was subsequently employed with Maritime Insurance Company (hereinafter called “Maritime”).
- (iv) It was a term of the mortgage bill of sale that during the continuance of the mortgage bill of sale the Plaintiff would at all times during the continuance of the security keep the motor vehicle insured on a comprehensive motor vehicle policy to its full insurable value to the satisfaction of the Defendant.
- (v) During the period 15th December 1998 to 14th December 1999 the motor vehicle was insured with the New India Assurance Company (hereinafter called “New India”).
- (vi) This insurance (hereinafter called “the first insurance”) was effected through an insurance broker, Mr. Andrew Calcut of Calcut Insurance Services (hereinafter called “the Broker”).
- (vii) It was a term of the insurance policy, dated the 13th January 1999 that if any premium is not paid within 45 days of the effective cover then the transaction representing such premium shall be immediately cancelled and the appropriate “Time on Risk” premium charged.

- (viii) As was the usual practice where the vehicle was subject to a mortgage bill of sale, forming a part of the said policy was an endorsement of the right of the Defendant as mortgagees of the motor vehicle.
- (ix) As was the usual practice sometime prior to the expiration of the first insurance there was issued a renewal notice to the Defendant which advised among other things of the due date for continued coverage and the premium due. The premium due was \$2,127.44.
- (x) Issued by New India on the 13th December 1999 was a certificate of insurance for the period 15th December 1999 to 14th December 2000.
- (xi) Also issued by New India was a document referred to as a renewal endorsement dated the 24th January 2000 addressed to the Plaintiff. This document indicated the details of the new policy. Printed in capital letters on this document were the words “subject to automatic cancellation after 45 days from the inception of cover if premium is not paid as per section 48(1)(c) of the Insurance Act (1980).
- (xii) The Plaintiff paid \$400.00 on this policy.
- (xiii) By the mortgage bill of sale the Plaintiff was required to pay his installment of \$1,393.96 by the 25th of each month.
- (xiv) By the loan agreement a failure to make a payment within 5 days of its being due attracted a late payment calculated at 2% of the arrears or a minimum fee of \$50.00 of the amount overdue.
- (xv) The Plaintiff did not pay his December 1999 installment until mid January and his January installment until mid February 2000.

- (xvi) By the 3rd March 2000 the Plaintiff was up to date on his installments
- (xvii) The receipts for payment issued by the Defendant give details of payment and the current balance on the loan
- (xviii) On the Friday 3rd March 2000 at 7.15 pm a bailiff acting on behalf of the Defendant came to the Plaintiff's premises to repossess the motor vehicle. The motor vehicle was not at the Plaintiff's premises and the Plaintiff and his wife were taken in the bailiff's vehicle to the motor vehicle's location and the motor vehicle seized.
- (xix) On the 28th March 2000 the Plaintiff paid to the Defendant the sum of \$1,400.00 representing the installment due on the 25th March 2000 and on the 27th April the Plaintiff paid to the Defendant the sum of \$1,388.00 representing the installment due on the 25th April 2000. The Plaintiff has failed to pay any further installments.
- (xx) By a letter dated the 17th February 2000 written by the broker and addressed to the Defendant the Defendant was advised that the renewed insurance policy had been cancelled as a result of the non-payment of premium with effect from 14th February 2000.
- (xxi) By a letter dated the 14th June 2000 on a Maritime's letterhead it was confirmed that the motor vehicle was insured with Maritime for the period 18th February 2000 to 17th March 2000.
- (xxii) The Plaintiff was never issued with a policy of insurance by Maritime.
- (xxiii) By a letter dated June 13th June 2000 and written on the broker's letterhead and addressed to the Plaintiff the broker, by his servant Ria

Singh, advised that the period of insurance on the motor vehicle was 15th December 1999 to 19th February 2000.

The Mortgage Bill of Sale

4. The mortgage bill of sale provides in so far as it is relevant to the case:

By clause 5 “That the Borrower will during the continuance of this security at all times keep the property insuredin the case of any motor vehicles, on a comprehensive motor vehicle policy and such other risks as the Bank may require to their full insurable value to the satisfaction of the Bank. If default at any time be made by the Borrower in effecting and keeping such insurance it shall be lawful for the Bank to insure and keep insured the property and to charge the amount of the premium therefore to the Borrower.”

By clause 7 “That in case the borrower shall make default... in the performance of any covenant or agreement contained herein and necessary for maintaining this security... then and in any such case it shall be lawful for the Bank, its servants or agents without previous notice to the Borrower to seize and take possession of the Property in whatsoever place or places it happens to be.”

Is the Plaintiff in breach of the duty to insure his motor vehicle as imposed by the mortgage bill of sale made between the Plaintiff and the Defendant?

5. On the facts the real issue here is to determine whether the Plaintiff was in breach of clause 5 of the mortgage bill of sale. In other words was the motor vehicle at all times covered by a policy of insurance.

6. The evidence is that although the Plaintiff paid the sum of \$400.00 towards the premium on the renewed policy he did not pay the premium, that is the sum of \$ 2,127.44 due on the renewed policy. According to the terms of the renewal endorsement the policy of insurance was subject to automatic cancellation if 45 days from inception of cover the premium was not paid. The cover began on the 15th December 1999. The Plaintiff denies receipt of the renewal endorsement but accepts knowing that it was a term of the insurance that if he did not pay the premium within 45 days the insurance company had the right to cancel the policy.

7. Further the policy for the first insurance, which the Plaintiff admits having received, provides that if there is a failure to pay the premium within 45 days of the effective cover “then the transaction representing such premium shall be immediately cancelled....”. The cover began on the 15th December 2000. The fact that the Plaintiff paid a part of the said premium is irrelevant to the issue that this Court has to determine and is only relevant as between the insurer and the insured to ascertain what the policy calls the “Time on risk” period.

8. In the circumstances I find that the Plaintiff not having paid the premium within 45 days from the date of effective cover the renewed policy was automatically cancelled at midnight on the 28th January 2000. The motor vehicle was therefore uninsured for the period 29th January 2000 to the 18th February 2000. Further the use of the words “automatic cancellation” in the renewal form and “immediately cancelled” in the policy of insurance do not require that there be notification by the insurer to the insured or any other party for the cancellation

to have effect. The letters of the 17th February 2000 the 13th June 2000 and the dates of cancellation referred to in the said letter are therefore of no relevance to the issue to be determined. Since clause 5 makes it mandatory for the property to be insured at all times, neither is it relevant that at the time of the seizure the motor vehicle may have been covered by a valid insurance. In my opinion once the motor vehicle was not covered at any time by insurance during the continuance of the security there is a breach of clause 5 of the mortgage bill of sale. The answer therefore to the question posed here is yes.

If so, was it open to the Defendant to repossess the said motor vehicle?

9. Attorney for the Plaintiff submits that

- (i) On a proper construction of the mortgage bill of sale once there is a breach of clause 5 the Defendant's only remedy is for it to insure the property itself and charge the cost of the insurance premium to the borrower. In other words since clause 5 provides for its own remedy in circumstances of a breach no other provision in the mortgage bill of sale can apply to a breach of the clause.
- (ii) That the requirement to insure rather than being a covenant is a warranty the breach of which does to go to the foundation of the contract and therefore does not allow the Defendant to repossess the property.

10. I do not accept either submission. Clause 5 gives the Defendant the power to protect its interest by properly insuring the security but this does not oust the

application of clause 7. The Defendant therefore has the option on a breach of clause 5 to allow the security to continue and to protect its interest by insuring the property or to seize the property. The covenant to insure is a covenant the performance of which is necessary for the maintenance of the property, the security for the loan. A breach of this covenant entitles the Defendant to invoke the provisions of clause 7 of the mortgage bill of sale. In the circumstances I am of the view that on a proper construction of the mortgage bill of sale upon a breach of clause 5 the Defendant was entitled to repossess the motor vehicle.

11. In the circumstances it is not necessary to determine issues number 3 and 4.

Does the contract between the parties either expressly or impliedly require the Defendant to provide the Plaintiff with information about any unpaid installment and /or any monies which are due and owing on the said loan?

12. In support of this relief the Plaintiff pleads that

- (i) There was an express and/or implied term of the said loan agreement and /or the said mortgage bill of sale that the Plaintiff will be entitled and have access to and/or be provided with upon request information pertaining to his loan balance and particulars of any outstanding monies which are due and owing to the Defendant.
- (ii) That on the 28th of March 2000 and the 27th April 2000 he enquired of the tellers as to whether there were any arrears on the said loan but were informed by the tellers that they were not authorized to give to him such information. and

- (iii) A request was made through his Attorney by a letter dated the 12th June 2000 for information with respect to the unpaid installments and the total due on the loan.

The mortgage bill of sale and the loan agreement are both silent on this issue.

13. The Plaintiff's only oral evidence on this issue is that at the end of March 2000 he requested a statement of the loan account which statement he never received. According to him he demanded this of Mr. Ali. He did this again on the 28th April 2000 but this time the request was made of Mr. Meetoo. Forming a part of the agreed bundle was a letter dated the 12th June 2000 and written to the Defendant's Attorneys by the Plaintiff's Attorney in response to their letter of the 7th June 2000. In response to the statement made by the Defendant's Attorney that since the seizure the Plaintiff had paid one installment and was now in default on his loan payments the letter requests details of the unpaid installments and the unpaid amount now due and owing. There is no evidence that there was or was not any response to this letter. In cross-examination, however, both Mr. Meetoo and Mr. Ali deny any request of them for a statement of account by the Plaintiff. Mr. Ali however admits that it is the Defendant's practice to give one if requested.

14. The receipts for payment of money paid by the Defendant in the months of February and March 2000, three receipts in all, however, contain information as to the current balance on the loan. This information is printed and it would seem is generated by the system used by the Defendant.

15. I am of the view therefore that given the system adopted by the Defendant the Plaintiff would at all times upon the payment of his installments know what was in fact outstanding on the loan. To my mind, on the evidence and the circumstances of this case, the Defendant has provided the Plaintiff with sufficient information to what is outstanding on the loan. In the absence therefore of any evidence as to any further duty imposed on the Defendant by the contract between the parties or otherwise I decline to make the declaration sought.

16. In the event that I am wrong on the constriction of the mortgage bill of sale and/or the loan agreement let me say here that I was not impressed with the credibility of the Plaintiff, his evidence not only diverged from the case pleaded in material particulars, as for example, his evidence as to the dates and contents of his discussions with Mr. Meetoo and Mr. Ali with respect to the insurance and with respect to his demand for a statement of account and the return of the vehicle. As well his manner and demeanor in the witness box left a lot to be desired. Mr. Meetoo and Mr. Ali on the other hand both gave evidence in a straightforward and open manner and I accept their evidence.

In the circumstances the Plaintiff's claim is dismissed with costs.

Dated this 2nd day of December 2004

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Judith A. D. Jones
Judge