

**SCCH 372040**

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

**Cite as: Maloney v. Hoyeck, 2012 NSSM 32**

**BETWEEN**

**Michael P. Maloney**

**CLAIMANT**

**-and-**

**Elie Hoyeck and Your Mechanic Auto Corner  
850 Main Street Dartmouth Nova Scotia  
B3M 3K5**

**DEFENDANT**

**Heard: June 27, 2012  
Decision: August 9, 2012**

**Adjudicator: David TR Parker**

**Counsel: Jason May, Counsel and Natalie Clifford, Articled Clerk  
represented the claimant.**

**Elie Hoyeck was self represented**

**AMENDED DECISION and ORDER**

1. This matter came before the Small Claims Court earlier and a Quick Judgment Order was issued out of this court on March 16, 2012. An Application to Set Aside that Order was granted by way of an Order issued out of this court on April 10, 2012.
2. The parties were asked if there were any amendments to the pleadings and they were asked if there were any questions about the procedure in Small Claims Court. The matter then proceeded accordingly.

3. The claimant took the witness stand and was sworn in wherein counsel provided the claimant with his affidavit sworn to on March 13, 2012. After some preliminary questions put forward to the claimant, the claimant was asked if he was familiar with his affidavit and asked if he confirmed each and every point outlined in the affidavit. The claimant confirmed the facts as contained in the affidavit. The defendant following the presentation of the evidence from the claimant including his affidavit was asked by the court if he had any questions pertaining to anything stated in the affidavit of the claimant. The defendant had no questions on those facts. The affidavit stated the following:

**“That I am the Claimant herein, and as such have personal knowledge of the matters deposed to in this affidavit except where stated to be based on information or belief in which case I verily believe the same to be true to the best of my knowledge, information and belief.**

**On April 15, 2011, I attended at Your Mechanic Auto Corner with the intention of purchasing my first vehicle and was attended to by Elie Hoyeck (“Mr. Hoyeck”). I was interested in purchasing a 2003 VW Golf TDI (“the vehicle”).**

**Mr. Hoyeck refused to allow me to test drive the vehicle, stating that he did not own the vehicle and it could not be removed from the lot.**

**Mr. Hoyeck told me that the vehicle had just come from a VW dealership and that it had been inspected and that it was in great condition.**

**I was told by Mr. Hoyeck that the vehicle was in good working order and that it would pass the mandatory provincial safety inspection, even though it was being sold without a current safety inspection sticker.**

**On April 15, 2011, I agreed to buy the vehicle conditional on a subsequent successful motor vehicle safety inspection. The vehicle was sold to me “not safety approved”, which certificate is attached as Exhibit “A”.**

**On April 15, 2011 I withdrew cash from my Royal Bank Account and purchased the vehicle with that cash for the sum of \$5600. My withdrawal receipt is attached as Exhibit “B”. The Bill of Sale on the transaction, which is attached as Exhibit “C”, includes a written 3 month/ 3000 km Powertrain Warranty.**

**After driving the vehicle off the lot, I became aware that there were mechanical problems with the vehicle, as it was having difficulty accelerating.**

**On April 26, 2011, I took the vehicle to Steele Volkswagen in Dartmouth for a motor vehicle inspection, a used vehicle 67-point inspection, and an engine diagnostic inspection. The cost of these inspection services was \$225.39, which receipt and invoice is attached as Exhibit “D”.**

The results of the inspection showed that there were 14 separate mechanical issues that required repair, replacement or attention, and 7 of these issues required attention before the vehicle could pass the safety inspection. The repair estimate for the vehicle is attached as Exhibit "E". The vehicle therefore did not pass safety inspection.

I returned the vehicle to Your Mechanic Auto Corner and Mr. Hoyeck, who promised to make the repairs necessary for the vehicle to pass the safety inspection. Mr. Hoyeck demanded \$300 in advance to replace the turbo actuator on the engine, despite the powertrain warranty. The receipt for this work is attached as Exhibit "F".

I took possession of the vehicle after the warranty servicing, and noted that the vehicle had been given a new safety inspection sticker. However, on driving the vehicle, the turbo actuator that Mr. Hoyeck had serviced seized up, and I discovered that the repairs were not properly completed.

I returned to Steele Volkswagen on July 22, 2011 to have an evaluation of the work that had been completed by Mr. Hoyeck and Your Mechanic Auto Corner. I paid \$194.92, which invoice is dated July 25, 2011 and attached as Exhibit "G".

The estimated cost for the repairs to return the vehicle to roadworthy condition was \$3823.34, which estimate for repairs is attached as Exhibit "H".

I brought the vehicle for safety inspection on July 26, 2011, and the vehicle again did not pass. The reasons for the rejection involved the brakes, suspension, and exhaust systems of the vehicle. The vehicle report and rejected inspection certificate are attached as Exhibit "I".

To date, the repairs promised by Mr. Hoyeck and Your Mechanic Auto Corner have not been carried out, and the vehicle remains not roadworthy.

I am informed by my solicitor, Jason May ("Mr. May") and do verily believe that a Small Claims Notice of Claim in this matter was filed on my behalf on January 4, 2012, to recover \$6,194.92, plus pre-judgment interest, general damages and costs.

I am informed by Mr. May and do verily believe that service was attempted on the Defendants unsuccessfully on multiple occasions, as evidenced by the Affidavit of Attempted Service of John Elliot, attached as Exhibit "J". The invoice for the attempted service is attached as Exhibit "K".

I am informed by Mr. May and do verily believe that an Order for substituted service on the Defendant was granted by the Court on February 15, 2012, which Order is attached as Exhibit "L".

I am informed by Mr. May and do verily believe that a copy of the Notice of Claim and Order for substituted service was delivered to the Defendant's home and work addresses, as set out in the Order for substituted service. The Affidavits of Service are attached as Exhibits "M" and "N". The invoice for this service is attached as Exhibit "O".

I am informed by Mr. May and do verily believe that 20 days have expired since the date of service.

I have had no communication, either written or oral, from the Defendant to the effect that the Defendant intends to defend this action.

That no payments have been credited.

That the following breakdown of my claim is a true and accurate statement of the account owing by the Defendant, and documentation supporting my claim is attached:

Debt (cost of vehicle, inspections, and faulty turbo actuator)	\$ 6320.31 (\$5600+\$225.39+\$300+\$194.92)
Cost of filing claim	\$ 182.94
Cost of service	\$ 258.75 (86.25+172.50)
General Damages	\$100
Interest to date (4% per annum as per s.16 of Small Claims Court Forms and Procedures Regulations)	\$ 251.60
<b>TOTAL</b>	<b>\$7113.60</b>

4. The defendant in his cross-examination referred the claimant to the form 29 entitled sale of vehicle not safety approved. The claimant acknowledged having signed that form.
5. The form stated that the vehicle is being sold not safety approved and requires a safety inspection approval sticker prior to applying for registration and operating the vehicle.

6. He goes on to state that "by Michael Philip Maloney am responsible for the cost of having the vehicle inspected prior to registration and that is understood that the vehicle may need repairs in order to obtain an inspection certificate.
7. The defendant again through cross examination introduced evidence of similar vehicles listed for sale on Kijiji which were worth more than what the claimant paid for the vehicle he received.

**Analysis:**

8. I accept the fact that the vehicle was sold not safety approved.
9. The form 29 does not state that the vehicle is sold "where is as he is" as contented by the defendant.
10. It simply says the vehicle is not sold safety approved and that the claimant has to assume the cost for getting that the vehicle inspected. The document does say that it is understood that the vehicle may need repairs order to obtain an inspection certificate. That does not in itself say that the claimant is responsible for those repairs.
11. In any event the *Consumer Protection Act* prevails over the sale of a vehicle in this case notwithstanding any contract to the contrary. Section 21 of the act deals with contracting out of the and states:

**"This Act applies notwithstanding any agreement or waiver to the contrary. R.S., c. 92, s. 21."**

Section 26 subsection 3 of the act outline specific warrantees and conditions which are applicable in any consumer sale, which this is. That section states: (3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:

- (a) a condition that the seller has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
- (b) a warranty that the purchaser shall have and enjoy quiet possession of the goods;
- (c) a warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made;
- (d) where there is a contract for the sale of goods by description, there is a condition that the goods shall correspond with the description; and if the sale be by sample as well as by

description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description;

(e) where the purchaser, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the purchaser relies on the seller's skill or judgement and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, a condition that the goods shall be reasonably fit for such purpose; provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(f) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, a condition that the goods shall be of merchantable quality, provided that, if the purchaser has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

(g) in the case of a contract for sale by sample

(i) a condition that the bulk shall correspond with the sample in quality,

(ii) a condition that the purchaser shall have a reasonable opportunity of comparing the bulk with the sample,

(iii) a condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample;

(h) a condition that the goods are of merchantable quality, except for such defects as are described;

(i) a condition that the goods, whether bought by description or otherwise, are new and unused unless otherwise described;

(j) a condition that the goods shall be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale.

12. In this particular case subsections e,h,and j would be applicable to the fact situation.

13. It is clear from the evidence submitted that the car was simply not durable for a reasonable period of time notwithstanding it was a use vehicle.

14. The claimant still has the vehicle in his possession because the defendant will not accept delivery of it. The mechanics of dealing with the vehicle will be not for

this court to determine. However I do note that the defendant's main contention was that the vehicle was worth a lot more than what the claimant paid for it. Therefore along with the repairs to the vehicle both parties may end up with no actual loss.

15. At any rate the Order of this court will be in this case the same as the Quick Judgment Order.

**It Is Therefore Ordered That** the defendant pay the claimant the following sums.

\$6320.31

\$ 541.69 court costs and service costs

\$ 251.60 interest

**\$7113.60 Total**

Dated at Halifax this 29 day of August 2012