

TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 14-0307 CAF

BRUCE SMITH, Complainant	§ § § § § §	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
v.		
FORD MOTOR COMPANY, Respondent		

DECISION AND ORDER

Bruce Smith (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.204 (Warranty Performance) for an alleged defect in his 2011 Lincoln MKS. Complainant asserts that the vehicle makes a “harmonic” noise when being driven between 58 and 62 miles per hour at about 1600 rpm’s. Ford Motor Company (Respondent) asserts that the noise that Complainant hears is normal for the vehicle. The hearings examiner concludes that the vehicle does not have an existing warrantable defect, and Complainant is not eligible for relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on October 17, 2014 in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself at the hearing. Respondent was represented by Steve Kyle, Field Service Engineer. Also present for Respondent was Malcolm Barrett, Operations Manager.

II. DISCUSSION

A. Applicable Law

Occupations Code § 2301.002(24) provides that a “[n]ew motor vehicle” means a motor vehicle that has not been the subject of a retail sale regardless of the mileage of the vehicle.” Occupations Code § 2301.603(a) provides that “[a] manufacturer, converter, or distributor shall make repairs necessary to conform a **new motor vehicle** to an applicable manufacturer’s, converter’s, or distributor’s express warranty.” (Emphasis mine.) Therefore, repurchase or replacement relief for defects in a vehicle is available only for new vehicles as defined in the Code. However, relief is available for purchasers of used vehicles under Occupations Code § 2301.204(a) which provides that “[t]he owner of a motor vehicle or the owner’s designated agent may make a complaint concerning a defect in a motor vehicle that is covered by a manufacturer’s, converter’s, or distributor’s warranty agreement applicable to the vehicle.” The relief available under this section of the Code is repair of the vehicle in question.

B. Complainant's Evidence and Arguments

Complainant purchased a certified pre-owned 2011 Lincoln MKS from Bayway Lincoln-Mercury in Houston, Texas, on January 14, 2013, with mileage of 39,428 at the time of delivery.¹ On the date of hearing the vehicle's mileage was 62,324. Respondent has provided a basic warranty for the vehicle for the first four (4) years of ownership or the first 50,000 miles, whichever comes first.² In addition, Respondent has provided a six (6) year/100,000 mile warranty for this vehicle as part of their certified pre-owned vehicle program.³

Complainant testified that he noticed a problem with the vehicle soon after purchasing it. While driving the vehicle, Complainant noticed a "harmonic" noise from the vehicle when driving between 58 and 62 miles per hour (at approximately 1600 rpm's). He took the vehicle to the Respondent's authorized dealer (Bayway Lincoln-Mercury) on January 25, 2013, due to some concerns he had with the vehicle, including the noise issue. One of the dealer's service technicians drove the vehicle in an attempt to duplicate Complainant's concerns regarding the noise issue. The technician could not duplicate the concern and could not detect that the vehicle made any abnormal noises when being driven on the freeway. The mileage on the vehicle on this date was 39,918.⁴ Complainant's other concerns regarding the vehicle were addressed by the service technician and the vehicle was returned to Complainant on February 1, 2013. Complainant was provided with a loaner vehicle during this period of time.

After the vehicle was returned to Complainant, he felt that it was still making an unusual noise. So, he returned the vehicle to Bayway on February 13, 2013. Complainant informed the dealer's service advisor that he was hearing a noise when driving the vehicle at speeds of between 58 and 62 miles per hour. The dealer's service technician verified Complainant's concerns regarding the noise and performed some repairs on the vehicle. The technician disassembled the vehicle's transmission and determined that the torque converter was making excessive noise and was "coming apart internally."⁵ He also determined that some of the bearings in the transmission were scored. As a result, the technician replaced the torque converter and three bearings. He then reassembled and reinstalled the vehicle's transmission. The mileage on the vehicle when

¹ Complainant Ex. 1, Motor Vehicle Buyer's Order, Retail Purchase Agreement, Odometer Disclosure Statement, and Sales Sticker.

² Complainant Ex. 10, Lincoln 2011 Model Year (except Hybrid) Warranty Guide.

³ Complainant Ex. 1, Motor Vehicle Buyer's Order, Retail Purchase Agreement, Odometer Disclosure Statement, and Sales Sticker.

⁴ Complainant Ex. 2, Repair Order dated January 25, 2013.

⁵ Complainant Ex. 3, Repair Order dated February 13, 2013.

Complainant took it to the dealer on this occasion was 40,610.⁶ The vehicle was returned to Complainant on March 7, 2013. Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant continued to hear noises from the front of the vehicle when he was driving it. So, he took the vehicle back to Bayway on April 18, 2013. Complainant informed the dealer's service advisor that he was hearing an unusual noise when driving the vehicle at around 58 miles per hour which was at about 1600 rpm's. In addition, Complainant informed the service advisor that the vehicle would make an unusual noise when going over bumps. Also, the vehicle's battery needed service, since Complainant had to jump start the vehicle. The vehicle was inspected and driven by dealer's service technician who determined that the vehicle was not making any abnormal noises. However, the technician contacted Ford's hotline to help troubleshoot the concern. The technician was advised to check the air conditioning, brake, and transmission cooler lines.⁷ The technician checked the lines and repositioned the air conditioning line. In addition, the battery in the vehicle was replaced by the technician. The mileage on the vehicle when Complainant delivered it to the dealer on this occasion was 42,504.⁸ The vehicle was returned to Complainant on April 29, 2013. Complainant was provided with a loaner vehicle while his vehicle was in the dealer's possession.

On May 6, 2013, Complainant returned the vehicle to Bayway because he was still hearing the same noise as he had previously complained about. The vehicle was inspected by a service technician who test drove the vehicle. The technician stated:

HEARD NOISE WHEN IN GEAR AT 1600 ENGINE RPM. TRIED TO ISOLATE CONCERN BY NEUTRALIZING ENGINE MOUNTS, AND EXHAUST. NO CHANGE. REMOVED SERPITINE [sic] BELT TO ELIMINATE ACCESSORIES. CHECKED AIR FILTER HOUSING , [sic] INLET TUBE AND REPLACED MANIFOLD WITH KNOWN GOOD MANIFOLD. NO CHANGES. ISOLATED BRAKE BOOSTER, PCV SYSTEM AND EVAP SYSTEM. NO CHANGES. CONTACTED HOT LINE, WAS ADVISED TO CHECK FOR VACUUM LEAKS. NO LEAKS FOUND. TEST DROVE TWO OTHER LIKE VEHICLES TO COMPARE. BOTH VEHICLES HAD SAME NOISE. NOISE IS CHARACTERISTIC OF VEHICLE AND IS CONSIDERED NORMAL.⁹

⁶ *Id.*

⁷ Complainant Ex. 4, Repair Order dated April 18, 2013.

⁸ *Id.*

⁹ Complainant Ex. 5, Repair Order dated May 6, 2013.

The service advisor informed Complainant that the noise he was hearing was normal and returned the vehicle to him on May 21, 2013. The vehicle's mileage when it was turned over to the dealer for repairs was 42,916.¹⁰ Complainant was provided with a loaner vehicle while his vehicle was being repaired.

After Complainant received the vehicle from the dealer on this occasion, he asked the dealer's representatives to remove him from any of their mailing lists. However, Complainant continued to receive mail and e-mails from the dealership. So, in June of 2014, Complainant contacted dealer's general manager, Joe McKinney, and again asked to be taken off the dealer's mailing list. Mr. McKinney spoke to Complainant and asked him to return the vehicle to the dealer so it could be checked again, since Complainant was still hearing the "harmonic" noise under the same circumstances as he had described to the service advisors previously. In addition, Mr. McKinney informed Complainant that he wanted to have a field service engineer from Ford look at the vehicle to determine if there was a defect in the vehicle. Three days later (June 17, 2014), one of the dealer's representatives picked up the vehicle from Complainant so that it could be inspected again. A service technician test drove the vehicle and heard a "roaring" noise from the vehicle's left front side. The car was then put on a rack and inspected the left front hub. The technician determined that the hub felt rough when spinning the wheel, so the hub bearing was replaced. When the vehicle was retested, it was determined that there were no more abnormal noises coming from the vehicle.¹¹ The vehicle was returned to Complainant on June 30, 2014. The mileage on the vehicle when it was taken to be serviced was 58,124.¹² Complainant was provided with a loaner vehicle from the dealer while his vehicle was being repaired.

On July 9, 2014, Ford's field service engineer, Steve Kyle, inspected Complainant's vehicle. Mr. Kyle took the vehicle on a test drive with a member of the dealer's service staff. He did verify that there was a noise coming from the vehicle under the circumstances described by Complainant. However, Mr. Kyle felt that the noise was normal and that no repairs to the vehicle were necessary. The vehicle's mileage when it was delivered to the dealer for Mr. Kyle's inspection was 58,647.¹³ The vehicle was returned to Complainant on the same day.

Dwayne Dossett, Bayway's service manager, informed Complainant about the option of filing a Lemon Law complaint with the state if he still wasn't satisfied with the vehicle. He was also informed that Bayway would not look at the vehicle again for any noise complaint because the field service engineer's decision was final. Complainant contacted the Texas Department of

¹⁰ *Id.*

¹¹ Complainant Ex. 6, Repair Order dated June 17, 2014.

¹² *Id.*

¹³ Complainant Ex. 7, Repair Order dated July 9, 2014.

Motor Vehicles to obtain information regarding the Lemon Law complaint procedures. He was informed that he had to send the vehicle manufacturer a certified letter informing them of his unhappiness with the vehicle. Complainant did send a letter to Lincoln Customer Relations on July 11, 2014. Complainant filed a Lemon Law complaint regarding the vehicle with the Texas Department of Motor Vehicles on July 15, 2014.¹⁴

Complainant testified that he still hears the “harmonic” noise when driving the vehicle. He says that the noise is more prominent in the driver’s seat when he is driving between 58 and 62 miles per hour and the engine is between 1600 and 1700 rpm’s. He stated that the noise gets louder when accelerating up an incline or a bridge.

C. Respondent’s Evidence and Arguments

Steve Kyle testified that he works as a Field Service Engineer for Respondent. He has a Bachelor’s degree in automotive engineering from Ferris State University in Michigan. He also has an associate degree in automotive service technology. He worked on Ford’s technical hotline for approximately two years and has been working as a field service engineer for approximately one and a half years. Mr. Kyle has earned several Ford training credits. He has two Automobile Service Excellence (ASE) certifications: one for brakes and one for steering and suspensions.

Mr. Kyle was dispatched by Respondent to inspect Complainant’s vehicle on July 9, 2014, as a final repair attempt. He test drove the vehicle to determine if Complainant’s concerns were warranted and to determine if any repairs needed to be performed on the vehicle. Complainant described what he heard in the vehicle as a “harmonic” noise in the front of the vehicle. Mr. Kyle testified that he was able to verify that the vehicle emitted a faint noise when being driven on a smooth, flat surface at between 55 and 60 miles per hour. The noise would disappear if the driver either increased or decreased their speed. Mr. Kyle felt that the noise was normal under the conditions that the vehicle was being operated. Mr. Kyle characterized the noise as a “slight humming” noise which he felt was due to the transmission going in to an overdrive state which increases the speed, but brings the engine rpm’s down in order to save on fuel. The same day, Mr. Kyle drove another vehicle with a similar drive train and mileage as Complainant’s vehicle and felt that the noises in both cars were similar and normal sounds for the model and year vehicle. Mr. Kyle was not able to hear the noise when driving on a rougher surface. He feels that the vehicle is operating as intended and that there is no defect in the vehicle. Mr. Kyle also pointed out that when he inspected the vehicle no diagnostic trouble codes came up nor did any service lights. He feels that there are no safety concerns with the vehicle.

¹⁴ Complainant Ex. 8, Complainant’s Lemon Law complaint, Letter to Lincoln Relations Center, and Certified Mail Receipt dated July 11, 2014.

D. Analysis

In order to determine whether Complainant has a remedy under Section 2301.204 of the Occupations Code, there first has to be evidence of a defect or condition in the vehicle that has not been repaired by Respondent. The evidence provided by the parties establishes that there is a humming or "harmonic" noise when driving the vehicle at between 58 and 62 miles per hour. The dispute arises due to the fact that Complainant feels that the noise is evidence of a defect in the vehicle, while Respondent feels that the noise is normal for this model and year vehicle.

Respondent, through its authorized dealer, has inspected the vehicle several times due to Complainant's concerns regarding the "harmonic" noise that he hears when driving the vehicle. Respondent has determined that this is a normal noise for the vehicle due to the fact that it occurs when driving the vehicle at around 60 miles per hour and that it occurs because the vehicle's transmission is going to an overdrive state. In addition, the noise disappears if the driver increases or decreases the vehicle's speed slightly. Given that Complainant only hears this noise at the described speeds, it's logical that the noise is a result of the vehicle's transmission going into an overdrive state.

The preponderance of the evidence establishes that the vehicle noise heard by Complainant is normal and not a defect. Therefore, the hearings examiner finds that there is no defect with the vehicle as defined in the Occupations Code and, as such, is not grounds to grant relief for Complainant.

Respondent's warranty applicable to Complainant's certified pre-owned vehicle provides coverage for six (6) years or 100,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 62,324 and it remains under this warranty. As such, the Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

Complainant's request for repair relief is denied.

III. FINDINGS OF FACT

1. Bruce Smith (Complainant) purchased a certified pre-owned 2011 Lincoln MKS on January 14, 2013, from Bayway Lincoln-Mercury of Houston, Texas, with mileage of 39,428 at the time of delivery.
2. The vehicle's mileage on the date of hearing was 62,324.

3. At the time of hearing the vehicle was still under the certified pre-owned vehicle warranty which allows for coverage for six (6) years or 100,000 miles.
4. Soon after purchasing the vehicle in question, Complainant noticed that there was a "harmonic" noise coming from the front end of the vehicle when he was driving between 58 and 62 miles per hour.
5. Complainant's vehicle was serviced by Bayway Lincoln-Mercury in Houston, Texas, one of Respondent's authorized dealers, on the following dates because of Complainant's concerns regarding the noise he heard from the front end of the vehicle:
 - a. January 25, 2013, at 39,918 miles;
 - b. February 13, 2013, at 40,610 miles;
 - c. April 18, 2013, at 42,504 miles;
 - d. May 6, 2013, at 42,916 miles; and
 - e. June 17, 2014, at 58,124 miles.
6. Complainant was provided with a loaner vehicle from Bayway Lincoln-Mercury for all of the service visits.
7. On the January 25, 2013 service visit, Respondent could not duplicate Complainant's concerns and no repairs were performed.
8. On the February 13, 2013 service visit, after disassembling the vehicle's transmission it was determined that the transmission's torque converter was making excessive noise and that some bearings scored. As a result, the items were replaced.
9. During the April 18, 2013 service visit, an air conditioning cooler line was repositioned.
10. During the May 6, 2013 service visit, the service technician could not duplicate Complainant's concerns and determined that the noise heard by Complainant was normal for the vehicle.
11. During the June 17, 2014 service visit, the service technician determined that he heard a "roaring noise" from the vehicle's left front side. As a result, the left front hub bearing was replaced.

12. On July 9, 2014, Respondent inspected the vehicle to determine if there were any issues that could be repaired. Respondent determined that the noise Complainant was hearing was normal and did not attempt any repairs to the vehicle during this visit.
13. On July 15, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On September 2, 2014, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
15. The hearing convened on October 17, 2014, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant was represented by himself. Respondent was represented by Steve Kyle, Field Service Engineer. Also present for Respondent was Malcolm Barrett, Operations Manager. The hearing adjourned and the record closed on October 17, 2014.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.204(a) (Warranty Performance).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter.

6. Complainant failed to prove by a preponderance of the evidence that the vehicle has a verifiable defect or condition that is covered by Respondent's warranty. Tex. Occ. Code § 2301.204.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.204 is hereby **DISMISSED**.

SIGNED October 23, 2014.



EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES