

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0111 CAF**

**ANDREAS PLESCHUTZNIG,
Complainant**

v.

**GOLDENVALE, INC.,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Andreas Pleschutznic (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2014 Bashan 250cc Storm Enduro dirt bike. Complainant asserts that the vehicle is defective because he believes the engine seized. Goldenvale, Inc. (Respondent) argues that the vehicle's warranty is void because of mechanical tampering by purchaser and that purchaser's tampering caused the issue. The hearings examiner concludes that Complainant failed to prove that the vehicle's problems are the result of a manufacturing defect. Complainant is thus 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 July 29, 2015, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Andreas Pleschutznic, represented himself at the hearing. Respondent was represented by Travis Brown, Head Mechanic. Jun Xu, Parts Manager for Respondent, and Steven Keene, President of Budget Bikes, appeared to offer testimony on behalf of Respondent.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the owner must have mailed written notice of the alleged defect or

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

In addition to these conditions, Section 2301.605 of the Occupation Code specifies that there are three tests which can establish a rebuttable presumption that a reasonable number of attempts have been undertaken by a Respondent to conform a motor vehicle to an applicable express warranty. The first test provides that if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt, then Complainant has established that Respondent has been provided with a reasonable number of attempts to repair the vehicle.⁵ The second test applies to a nonconformity that creates a serious safety hazard as defined in Section 2301.601(4) of the Texas Occupation Code. The third test provides that Complainant can establish a rebuttable presumption that a reasonable number of attempts to conform a motor vehicle to an applicable express warranty if a nonconformity continues to exist which substantially impairs the vehicle's use or market value and (1) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever comes first, following the date of original delivery to the owner and (2) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁶ However, the Occupations Code also provides that the 30 day period described by this section does not include any period during which the manufacturer or distributor lends the owner a comparable motor vehicle while the owner's vehicle is being repaired by a franchised dealer.⁷

B. Complainant's Evidence and Arguments

On June 3, 2014, Complainant purchased a Bashan 250cc Storm Enduro dirt bike from Budget Bikes in Alvin, Texas.⁸ Budget Bikes provided a 90 days full coverage warranty and a six months engine and drive train parts warranty.⁹ Respondent provided a six months warranty for the engine only. The manufacturer, Chongqing Bashan Motorcycle Manufacturing Company, provides a twelve month factory warranty on the engine only.¹⁰

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁶ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

⁷ Tex. Occ. Code § 2301.605(c).

⁸ Complainant Ex. 1, Purchase Invoice dated June 3, 2014.

⁹ Complainant Ex. 4, Budget Bikes Inc. Warranty & Policies.

¹⁰ Complainant Ex. 5, E-mail Correspondence between Complainant and Bashan.

Complainant testified that within the first three months of owning the vehicle, he replaced numerous parts on his own. First, he replaced the ignition unit because the original unit allegedly stopped working. He ordered a \$15.00 capacitor discharge ignition (CDI) unit. He performed the labor himself. He then replaced the carburetor himself; the parts cost about \$30.00 on the internet. At the same time, Complainant put in new jets to increase the "richness" of the fuel mix. Also, Complainant changed the vehicle's air ducts and put in a new air filter. He also installed a LED head light for riding at night. Complainant testified that he chose to replace the parts himself because the cost of taking the bike to Budget Bikes was not economical.

In addition to replacing certain parts, Complainant lowered the sprocket count from 50 to 37 on the back wheel and increased the sprocket count from 14 to 15 on the front wheel. By increasing the front sprocket count and lowering the back sprocket count, the engine's RPMs were reduced by about 20 percent.

On October 26, 2014, Complainant was on a trip outside of Houston and attempted to start the vehicle, but it made a loud screeching sound and refused to start. The vehicle had been driven approximately 1,000 miles at the time. A car battery was used to jump start the internal battery. However, the vehicle continued making a loud sound, so Complainant had the vehicle towed back to his house. He then returned the vehicle to Budget Bikes for repair on October 28, 2014.

Steven Keene, president of Budget Bikes, inspected the vehicle, noticed that it had aftermarket parts, and decided that it did not qualify for warranty service. Because the service department at Budget Bikes only accepts warrantable repairs during the last half of November and all of December due to the holiday rush, the vehicle was not worked on until January. Mr. Keene informed Complainant that the vehicle would be repaired at a maximum cost of \$150. So, Complainant authorized the repair. Sometime later, Complainant received an e-mail from Mr. Keene informing him that the vehicle's warranties had been voided because of the installation of after-market items. In addition, Complainant was informed that the vehicle's generator had failed and disintegrated inside the engine case.

Complainant mailed written notice of the defect to Respondent on December 19, 2014. He filed a Lemon Law complaint with an effective date of December 29, 2014.¹¹ Complainant has refused to retrieve the vehicle from Budget Bikes until this matter is concluded, as the parties have been unable to reach an agreement on the amount that Complainant owes for the repairs. Complainant testified that the vehicle's odometer should currently read about 1,000 miles.

During cross examination, Complainant indicated that although he changed the CDI (ignition module), he did not change the vehicle's stator. Complainant testified that he changed the oil in

¹¹ Complainant Ex. 6, Lemon Law complaint signed December 19, 2014. Although the complaint was signed by Complainant on December 19, 2014, it was not received by Texas Department of Motor Vehicles until December 29, 2014, which is the effective date of the complaint.

the vehicle at 200 kilometers and at 600 kilometers. In addition, he changed the vehicle's sprockets to lower the RPM's. Complainant changed the jets to make them bigger and replaced the entire carburetor. However, he ensured that the air/gas mixture was at the correct ratio.

C. Respondent's Evidence and Arguments

Respondent's argument centers on the fact that the warranty provided by Budget Bikes states, "Mechanical tampering by customer IMMEDIATELY VOIDS THE WARRANTY." Steven Keene, president of Budget Bikes testified for Respondent. Mr. Keene explained that the presence of aftermarket parts installed by Complainant led to a delay in repairing the vehicle due to a company policy regarding repairs over the holidays. Mr. Keene did not attempt to find the source of the problem to see if it was actually related to the aftermarket additions to the vehicle. The warranty states that any tampering voids the warranty, so he did not feel obligated to deduce the cause of the problem at the time the vehicle was brought in.

When the vehicle was inspected in January of 2015, Mr. Keene determined that the engine had not seized, but that the fly wheel, stator, and rectifier needed to be replaced.¹² The rectifier and stator were "fried" according to Mr. Keene.¹³ By installing a higher performance CDI, Complainant may have caused too much power to be drawn out of the stator. Mr. Keene testified that this could also explain why the vehicle is not turning off correctly. Currently, you have to choke it to kill the engine. The vehicle's battery was not charging the last time Mr. Keene checked, either. These electrical issues could have been caused when Complainant messed with the wiring harness when putting in the high performance CDI and the new key switch. Mr. Keene did not measure the amperage or conduct any other diagnostic tests to verify his theories.

Mr. Keene also testified that by changing the carburetors to have substantially bigger jetting and by altering the sprockets, Complainant was designing the bike to go faster than it was built to go. Complainant's explanation that smaller back sprockets make it so that fewer RPMs are needed to hit any given speed is consistent with Mr. Keene's testimony. Mr. Keene points to the presence of heat insulation tape as proof that the engine was being overworked.

It is Respondent's position that Complainant's tampering with the vehicle voided the warranty and likely caused the damage sustained by the stator.

D. Analysis

Under the Magnuson-Moss Warranty Act, a warrantor is not required to remedy a defect if he can prove that the defect resulted from damage caused by the consumer or from unreasonable

¹² Complainant Ex. 2, Service Invoice 3391 dated January 29, 2015.

¹³ Complainant Ex. 3, E-mail chain.

use by the consumer.¹⁴ The Federal Trade Commission reaffirmed this in a notice to consumers reading, “[T]he manufacturer or dealer must show that the aftermarket or recycled part caused the need for repairs before denying warranty coverage.”¹⁵ In the present case, Respondent seeks to deny warranty coverage based on the fact that Complainant performed his own repairs using aftermarket parts. Respondent has not met its burden of proof; it has failed to show that the aftermarket CDI and headlight fried the stator.

Mr. Keene noticed that Complainant had installed a high performance CDI, among other parts, and assumed that it was the source of the vehicle’s problems. Mr. Keene proffers a plausible explanation for why the stator was fried, but does not provide evidence supporting his theory. This is in part because he refused to do a detailed diagnostic test because he did not want to waste his time when only Complainant knew what exact alterations were made. This is logical, but because Mr. Keene took no measurements, there is no evidence to refute Complainant’s testimony that he measured the amperage as only a few milliamps of difference. Complainant’s testimony that problems existed before he replaced the CDI was also not refuted. Respondent has not shown that it is more likely than not Complainant’s fault that the stator was damaged.

Nevertheless, Complainant cannot prevail because he has not shown that it is more likely than not a manufacturing defect that caused the stator to be damaged. His assertion that changing a head light and CDI should not lead to the disintegration of the stator seems reasonable, but without more proof, it is merely an assertion. It is possible that a manufacturing defect caused the damage, but it is just as likely Complainant’s aftermarket parts caused the damage to the stator. Complainant has not met his burden of proof.

Accordingly, Complainant’s request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. On June 3, 2014, Andreas Pleschutznic, Complainant purchased a Bashan 250cc Storm Enduro dirt bike from Budget Bikes in Alvin, Texas.
2. Respondent provided a six months engine warranty.
3. Budget Bikes provided a six months engine and drive train parts warranty.
4. The vehicle’s mileage on the date of the hearing was estimated to be 1000.

¹⁴ Magnuson-Moss Warranty Act, 15 U.S.C. § 2304(c).

¹⁵ *Auto Warranties & Routine Maintenance*, FEDERAL TRADE COMMISSION,

<https://www.consumer.ftc.gov/articles/0138-auto-warranties-routine-maintenance> (last updated May 2015).

5. Complainant performed modifications to the vehicle without notifying Respondent.
6. Complainant personally replaced the standard CDI (ignition module) with a high performance CDI.
7. Complainant personally installed an after-market LED headlight.
8. On October 26, 2014, the vehicle failed to start and made a loud "screeching" sound.
9. Complainant took the vehicle to Budget Bikes on October 28, 2014, to be repaired.
10. In January of 2015, Budget Bikes replaced the vehicle's stator, rectifier, and fly wheel. The vehicle was still not turning off the last time it was inspected. The vehicle remains at Budget Bikes.
11. On December 19, 2014, Complainant mailed written notice of the defect to Respondent.
12. On December 29, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. On March 30, 2015, 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.
14. The hearing in this case convened and the record closed on July 29, 2015, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Andreas Pleschutzign, represented himself at the hearing. Respondent was represented by Travis Brown, Head Mechanic. Jun Xu, Parts Manager, and Steven Keene, President of Budget Bikes, appeared to offer testimony on behalf of Respondent.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
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 a manufacturing defect is the source of the vehicle's problems. Tex. Occ. Code § 2301.604(a).
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED August 24, 2015



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