

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0193 CAF**

**T. J. ROBINSON, III,
Complainant**

v.

**NISSAN NORTH AMERICA, INC.,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

T. J. Robinson, III (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2014 Nissan Maxima. Complainant asserts the vehicle's paint job is mismatched, the side view mirrors retain water, and that the sunroof vibrates when he attempts to close it. Nissan North America, Inc. (Respondent) argued that the vehicle's paint job is a normal condition for the vehicle and that the sunroof has been repaired. The hearings examiner concludes that although the vehicle does have a currently existing warrantable defect, Complainant is not eligible for repurchase or replacement relief since he did not meet all of the statutory requirements for such relief under the Lemon Law.

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 August 12, 2015, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself in the hearing. Respondent was represented by Neal Barnes, Dealer Technical Specialist.

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, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty 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.⁵

B. Complainant's Evidence and Arguments

Complainant purchased a 2014 Nissan Maxima, from Central Houston Nissan (Central) in Houston, Texas on August 26, 2014. The vehicle had mileage of 17 at the time of purchase.⁶ On the date of hearing the vehicle's mileage was 22,217.

Complainant testified that the vehicle's paint is mismatched and that the rear and front bumpers are a different color from the rest of the vehicle. In addition, the vehicle's sunroof vibrates when he closes it. Also, Complainant indicated that the vehicle's side view mirrors retain water after it rains.

When Complainant purchased the vehicle he raised the issue that the vehicle's paint job looked unusual. Complainant was told by Central's salesperson that the paint job looked unusual because the vehicle was parked next to some shrubbery and this was reflecting off the paint. Complainant elected to purchase the vehicle after viewing it on the lot. Complainant denies knowing at the time that the vehicle's paint was mismatched.

Shortly after purchasing the vehicle, Complainant began experiencing a problem with the sunroof. The sunroof opened normally. However, when he attempted to close the sunroof, it

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). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁶ Complainant Ex. 1, Motor Vehicle Purchase Order dated August 26, 2014.

would vibrate as it closed. As a result, Complainant took the vehicle to Mossy Nissan (Mossy), Respondent's authorized dealer, in Houston, Texas for repair.

Complainant took the vehicle to Mossy on October 6, 2014. He raised the issue of the sunroof vibrating to the dealer's service advisor. In addition, Complainant informed the service advisor that the headlamps, side mirrors, and tail lamps were retaining moisture.⁷ The dealer's service technician lubed the sunroof's run channel to address the vibration issue.⁸ In addition, the technician replaced both side mirror assemblies to address the issue of water retention in the mirrors. Complainant was advised that the headlamps and tail lamps were not retaining moisture but were just foggy and that this was normal for the vehicle.⁹ The vehicle's mileage when Complainant delivered it to Mossy was 1,926.¹⁰ The vehicle was retained by Mossy for a day and a half. Complainant was provided with a rental vehicle while his vehicle was being repaired.

Complainant testified that he has not had an issue with the vehicle's headlamps or tail lamps since this visit. However, the vehicle's sunroof continues to vibrate periodically when he closes it and the side view mirrors are still retaining water.

Sometime in October of 2014, Complainant contacted Respondent to complain about the paint job on the vehicle. Complainant testified that he was informed by a technician who works at Mossy that the paint on the vehicle was mismatched. On November 4, 2014, Complainant was contacted by Respondent's representative at which time Complainant indicated that he was not satisfied with the vehicle's paint job. On December 8, 2014, Complainant spoke to Anthony Zacharyasz, Arbitration Specialist for Respondent, regarding the vehicle. Mr. Zacharyasz asked Complainant to take the vehicle to Mossy so that photographs could be taken of the vehicle's paint job.

Complainant took the vehicle to Mossy on December 19, 2014. During this visit Complainant informed Mossy's service advisor that the sunroof was vibrating again. In addition, photos were taken of the vehicle as requested. Complainant did not raise any other concerns regarding the vehicle at the time. Complainant testified that Mossy's service technician lubed the sunroof's run channel again. The vehicle's mileage at the time of this repair was 3,155.¹¹ The vehicle was in the dealer's possession for two days. Complainant was provided with a rental vehicle while his vehicle was being repaired.

⁷ Complainant Ex. 2, Repair Order dated October 6, 2014.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Complainant Ex. 3, Vehicle Service History. See also, Respondent Ex. 1, Repair Order dated December 19, 2014.

Complainant testified that at some time he spoke to Mossy's shop manager regarding the paint issue. The manager stated that some parts would have to be taken off the vehicle in order to paint them. The manager told that if they took the vehicle apart in order to repaint it, that it would disturb the vehicle's integrity. As a result, the vehicle could later develop different issues.

Complainant attempted to negotiate a resolution of his concerns with Respondent. Complainant testified that Respondent offered to either repaint the vehicle or give him a cash settlement to address his concerns. Complainant refused both offers. Complainant testified that he attempted to trade in the vehicle for a different vehicle, but all of the other Nissan Maximas that Complainant looked at had similar paint issues.

Complainant filed a Lemon Law complaint regarding the vehicle with the Texas Department of Motor Vehicles (TxDMV) with an effective date of March 16, 2015.¹² On March 10, 2015, Complainant mailed a letter to Respondent informing them of his dissatisfaction with the vehicle.¹³

C. Respondent's Evidence and Arguments

Neal Barnes, Dealer Technical Specialist, testified that he provides technical support for the Respondent to their authorized dealers. He's been performing this job for the past eleven (11) years. He's worked for Respondent for approximately 17 years. Mr. Barnes has over thirty (30) years of automotive experience. He is an Automotive Service Excellence (ASE) master certified mechanic.

Mr. Barnes testified that he did not know why the vehicle's sunroof vibrates. He indicated that it could be a misalignment or misadjustment of the sunroof glass that could cause the vibration.

Regarding the vehicle's paint issue, Mr. Barnes testified that the paint job complained of by Complainant is a normal characteristic of the vehicle. He testified that most vehicle bumper's color don't totally match the vehicle's color, regardless of the vehicle. All of Respondent's vehicles body panels are painted in one plant, while the bumpers are painted in another. Although Respondent attempts to ensure that the paint is uniform, due to slight variations in lighting or mixing the paint can cause slight variations in the colors. He testified that pearl white (the color of Complainant's vehicle) is particularly difficult to match. Mr. Barnes also testified that Respondent did offer to completely repaint the vehicle. However, Complainant refused the offer.

¹² Complainant Ex. 4, Lemon Law complaint signed March 10, 2015. Although the complaint was signed by Complainant on March 10, 2015, it was not received by Texas Department of Motor Vehicles until March 16, 2015, which is the effective date of the complaint.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant purchased the vehicle on August 26, 2014, and presented the vehicle to Respondent's authorized dealer due to his concerns with the vehicle's paint job, sunroof vibration, and moisture retention in the side view mirrors on the following dates: October 7, 2014 and December 19, 2014. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a) specifies that a rebuttable presumption that a reasonable number of attempts to repair have been made if "two or more repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt." The evidence presented at the hearing establishes that Complainant has not met the requirements of this test since Complainant has presented the vehicle for repair only two times since the date of purchase. As such, Complainant has not met the presumption that Respondent has been provided with a reasonable number of attempts to repair the vehicle.

From the evidence presented, it is apparent that Complainant has not met the requirements for replacement or repurchase relief under the Occupations Code, since only two repair attempts were made on the vehicle prior to filing the complaint and because he did not allow Respondent a final opportunity to repair the vehicle. However, there is obviously an issue with the vehicle's sunroof, since the sunroof vibrated when it was being closed. However, the vibration does not constitute a serious safety hazard or substantially impair the use or market value of the vehicle.

Regarding the paint issue, the evidence indicated that Complainant purchased the vehicle after seeing it on Central's lot. He raised the issue of the paint job looking unusual, but still purchased the vehicle. In addition, testimony presented at the hearing indicates that the condition is a

¹³ Complainant Ex. 5, Letter to Nissan North America, Inc., dated March 10, 2015.

normal characteristic of the vehicle. Since it is a normal characteristic, it cannot be considered to be a defect or nonconformity. Thus, the condition would not be grounds for replacement or repurchase of the vehicle.

Complainant also raised the issue of water retention in the vehicle's side view mirrors at the time of hearing. However, he did not include this issue in the original Lemon Law complaint. Since the issue was not included on the complaint, it cannot be addressed in this decision.

On the date of hearing, the vehicle's mileage was 22,217 and it is still under warranty. As such, the Respondent is under an obligation to repair the vehicle's sunroof under the terms of the express warranty. In addition, any other issue covered under warranty should be repaired by Respondent.

Complainant's request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. T. J. Robinson, III (Complainant) purchased a 2014 Nissan Maxima on August 26, 2014, from Central Houston Nissan in Houston, Texas with mileage of 17 at the time of purchase.
2. The vehicle's mileage on the date of hearing was 22,217.
3. Complainant is dissatisfied with the vehicle because he feels that the paint job is mismatched, the sunroof vibrates when closing, and water is retained in the side view mirrors.
4. The side view mirror water retention issue was not included in the Lemon Law complaint filed by Complainant.
5. Complainant's vehicle was serviced by Respondent's authorized dealer, Mossy Nissan (Mossy), on the following dates because of Complainant's concerns with the vehicle:
 - a. October 7, 2014, at 1,926 miles; and
 - b. December 19, 2014, at 3,155.

6. On October 7, 2014, Mossy's service technician lubed the run channel to address the sunroof vibration issue. In addition, the side mirror assemblies were both replaced. The issue of the mismatched paint job was not addressed at the time.
7. On December 19, 2014, Mossy's service technician lubed the run channel for the sunroof. The technician also took photographs of the vehicle's paint job to verify Complainant's concerns regarding the paint issue.
8. On March 16, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
9. On April 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.
10. The hearing in this case convened and the record closed on August 12, 2015, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself in the hearing. Respondent was represented by Neal Barnes, Dealer Technical Specialist.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.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 the vehicle has a verifiable defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Complainant did not meet the presumption that a reasonable number of repair attempts were undertaken by Respondent prior to the filing of the Lemon Law complaint. Tex. Occ. Code § 2301.605(a).
8. Complainant did not provide Respondent with a final opportunity to cure any defects. Tex. Occ. Code § 2301.606(c)(2).
9. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
10. 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-.613 is hereby **DISMISSED**.

SIGNED August 24, 2015



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