

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0355 CAF**

CATHY L. MOYA,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
NISSAN NORTH AMERICA, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Cathy L. Moya (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2015 Nissan Murano. Complainant asserts that the vehicle’s air conditioning system intermittently doesn’t cool the vehicle adequately. Nissan North America, Inc. (Respondent) argued that the vehicle has been repaired, does not have any defects, and that no relief is warranted. 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 was closed on December 8, 2015, in Austin, Texas, before Hearings Examiner Edward Sandoval. Complainant, Cathy L. Moya, represented herself. Mike D. Terrill, Dealer Technical Specialist, appeared and testified for 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 manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to the five 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.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new 2015 Nissan Murano from Town North Nissan (Town North) in Austin, Texas on December 27, 2014, with mileage of 37 at the time of delivery.^{7, 8} On the date of hearing the vehicle's mileage was 6,761. At this time, Respondent's warranty coverage for the vehicle remains in place, with coverage for three (3) years or 36,000 miles from the date of purchase, whichever comes first.

Complainant testified that she feels that the vehicle's air conditioning system intermittently fails to cool the vehicle adequately.

Complainant testified that she first noticed a problem with the vehicle's air conditioner not blowing cold air in early 2015. On March 16, 2015, Complainant took the vehicle to Town North for repair to the air conditioner. Complainant informed the dealer's service advisor that the air conditioner was not blowing cold air at all. The service technician determined that the vehicle was low on Freon, so he put Freon in the air conditioning system.⁹ In addition, the technician determined that the low side Schrader valve was loose, so he tightened it.¹⁰ The vehicle's

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ 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.

⁷ Complainant Ex. 1, Purchase Order dated December 27, 2014.

⁸ Complainant Ex. 2, Odometer Disclosure Statement dated December 27, 2014.

⁹ Complainant Ex. 3, Repair Order dated March 16, 2015.

¹⁰ *Id.*

mileage at the time of the repair was 1,914.¹¹ The vehicle was in the dealer's possession for one day. Complainant did not receive a loaner vehicle from the dealer while her vehicle was being repaired.

Complainant testified that about a month after getting the vehicle back from Town North, the air conditioner began blowing hot air. On April 27, 2015, Complainant took the vehicle to Clay Cooley Nissan of Austin (Cooley), an authorized dealer for Respondent, for repair. Cooley's service technician was able to duplicate Complainant's concern. He searched the air conditioning system for Freon leaks and determined that the vehicle's evaporator assembly was leaking.¹² The technician replaced the assembly and then determined that the new evaporator assembly was cracked, so he had to replace the second assembly also.¹³ The vehicle's mileage at the time of the repair was 2,874.¹⁴ The vehicle was in the dealer's possession for eighteen (18) days. Complainant was provided with a rental vehicle from the dealer for this period of time.

After the April 27, 2015, repair visit, the air conditioner blew cold air for a while. However, in July of 2015, the air conditioner stopped blowing cold air. So, on July 13, 2015, Complainant took the vehicle to Cooley for repair. Cooley's service technician determined that a high pressure tube/hose needed replacement.¹⁵ The vehicle's mileage at the time of the repair was 4,498.¹⁶ The vehicle was in the dealer's possession for 31 days. Complainant was provided with a rental vehicle while her vehicle was being repaired.

On August 3, 2015, Complainant mailed a letter to Respondent informing them of her dissatisfaction with the vehicle.¹⁷ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles on August 10, 2015.¹⁸

After filing the Lemon Law complaint, Complainant was contacted by Respondent's representative in regard to a final repair attempt on the vehicle. The final repair attempt was conducted on September 1, 2015, at Cooley. After inspecting the vehicle, Respondent's technical specialist could not find any problems with the vehicle's air conditioning system and determined

¹¹ *Id.*

¹² Complainant Ex. 4, Repair Order dated April 27, 2015.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Complainant Ex. 5, Repair Order dated July 13, 2015.

¹⁶ *Id.*

¹⁷ Complainant Ex. 6, Letter to Nissan North America, Inc. dated August 3, 2015.

¹⁸ Complainant Ex. 5, Lemon Law Complaint dated August 10, 2015. Complainant signed and dated the complaint on August 5, 2015. However, the complaint was not received by the Texas Department of Motor Vehicles until August 10, 2015, which is the effective date of the complaint.

that the vehicle was operating as designed.¹⁹ No repairs were performed on the vehicle. The vehicle's mileage on this occasion was 4,893.²⁰ The vehicle was in the dealer's possession for a few hours on this occasion.

Complainant testified that the air conditioner intermittently works correctly. Sometimes it does not blow cold air. She checked the temperature for the air coming out of the vents and found that it was measuring 49 degrees. Complainant feels that the air temperature should be cooler, since her husband's air conditioner will blow air at 32 degrees.

During cross examination Complainant testified that she first noticed a problem with the vehicle's air conditioner about two (2) weeks after purchasing the vehicle. However, she could not get time off of work in order to take the vehicle for repair until March of 2015.

C. Respondent's Evidence and Arguments

Mike D. Terrill, Dealer Technical Specialist, has worked in the automotive industry for over 30 years. He's been employed by Respondent for the past four (4) years. He is an Automotive Service Excellence (ASE) Master Technician. In addition, he is a master engine machinist.

Mr. Terrill testified that he first became involved in this case when he was contacted by Respondent's consumer affairs decision to perform a final repair attempt on Complainant's vehicle. The final repair attempt was performed on September 1, 2015, at Clay Cooley Nissan. During the final repair attempt, he took the vehicle for a test drive with Complainant. He did not find any problems with the vehicle during the test drive. Mr. Terrill then took the vehicle to the dealer's shop and attached an air conditioner diagnostic machine to the vehicle. He checked the temperature of the air blowing out of the air conditioner vents and determined that it was normal for the vehicle. The temperature of the air blowing out of the vent was about 44 degrees at the time. Mr. Terrill also stated that as the vehicle's interior cools down the temperature of the air blowing out of the vents may increase to keep the vehicle's interior at the required temperature. In addition, Mr. Terrill stated that if an air conditioner was blowing air at 32 degrees, the evaporator would ice up and not be able to blow any air at all. Mr. Terrill determined that the vehicle's air conditioning system is operating as designed. In addition, he feels that the Murano is a solid vehicle that experiences few problems.

¹⁹ Complainant Ex. 8, Repair Order dated September 1, 2015.

²⁰ *Id.*

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 the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or 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 or condition, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant purchased the vehicle in question on December 27, 2014 and presented the vehicle to Respondent's authorized dealers due to her concerns with the vehicle's air conditioner not cooling properly on: March 17, 2015; April 27, 2015; and July 13, 2015. 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)(1) 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 for the air conditioner issue only three 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.

Respondent's express warranty applicable to Complainant's vehicle provides coverage for three (3) years or 36,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 6,761 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.

Complainants' request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Cathy L. Moya (Complainant) purchased a new 2015 Nissan Murano on December 27, 2014, from Town North Nissan (Town North) in Austin, Texas, with mileage of 37 at the time of delivery.
2. The manufacturer of the vehicle, Nissan North America, Inc. (Respondent), issued a warranty for the vehicle for three (3) years or 36,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 6,761.
4. At the time of hearing the vehicle was still under warranty.
5. Complainant took the vehicle to Respondent's authorized dealers in order to address her concerns with the vehicle's air conditioning system not cooling properly on the following dates:
 - a. March 17, 2015, at 1,914 miles;
 - b. April 27, 2015, at 2,874 miles; and
 - c. July 13, 2015, at 4,498 miles.
6. On March 17, 2015, Town North's service technician found the low side Schrader valve was loose, so he tightened it in order to address a loss of Freon in the vehicle's air conditioning system.
7. On April 27, 2015, Clay Cooley Nissan's service technician found a leak in the air conditioner's evaporator assembly, so the assembly was replaced in order to address Complainant's concern.
8. On July 13, 2015, Clay Cooley Nissan's service technician replaced a high pressure tube/hose in order to address the issue that the vehicle's air conditioner was not blowing cold air.
9. On August 10, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
10. On September 1, 2015, Respondent's dealer technical specialist, Mike Terrill, performed a final repair attempt on the vehicle. Mr. Terrill determined that the vehicle did not have a defect and was operating as designed.

11. On September 14, 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.
12. The hearing in this case convened and the record was closed on December 8, 2015, in Austin, Texas, before Hearings Examiner Edward Sandoval. Complainant, Cathy L. Moya, represented herself. Respondent was represented by Mike D. Terrill, Dealer Technical Specialist.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (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 Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a 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. 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 December 23, 2015



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