

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0222 CAF**

**NORTHSTAR ELITE CONSTRUCTION
& CONSULTING LLC,**

Complainant

v.

FORD MOTOR COMPANY,

Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Northstar Elite Construction & Consulting LLC (Complainant) seeks relief and reimbursement of monies expended pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their 2015 Ford F-250. Complainant asserts that the vehicle was defective and that they should be reimbursed for the costs of repair. Ford Motor Company (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 via telephone and the record was closed on July 28, 2016, before Hearings Examiner Edward Sandoval. Complainant was represented by Michael Hornsby, Corporate Vice-President. Respondent was represented by Maria Diaz, Legal Analyst for Consumer Affairs.

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

If a manufacturer is unable to conform a vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of a vehicle after a reasonable number of attempts, then reimbursement for incidental expenses resulting from the loss of use of the motor vehicle due to the defect can be ordered if the vehicle is ordered to be repurchased or replaced.⁷

B. Complainant's Evidence and Arguments

Complainant purchased a new 2015 Ford F-250 from Bluebonnet Ford in New Braunfels, Texas on April 10, 2015, with no mileage at the time of delivery.⁸ Respondent's bumper-to-bumper warranty for the vehicle provides coverage for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent's powertrain warranty provides coverage for the powertrain for five (5) years or 100,000 miles.

Michael Hornsby, Corporate Vice-President, testified that he is the primary driver of the vehicle. On March 23, 2016, he was driving the vehicle on I-37 outside of San Antonio when it shut down. No warning lights illuminated prior to the vehicle shutting down. However, Mr. Hornsby did see a warning that stated: "Vehicle powering down – pull over." The vehicle wouldn't start, so Mr. Hornsby called Ford assistance to have the vehicle towed to a dealer for repair.

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 Tex. Occ. Code § 2301.604.

⁸ Complainant Ex. 1, Lemon Law complaint dated April 1, 2016.

The vehicle was taken to Northside Ford in San Antonio, Texas for repair. Mr. Hornsby testified that the vehicle was at the dealer's location for approximately five (5) weeks while repairs were being performed. He also stated that he was initially told by the dealer's representative that there was diesel exhaust fluid in the gas tank. However, this was later changed to there being an abundance of water in the fuel which had caused the vehicle to shut down. Mr. Hornsby was then told that the repairs were not warranted by Respondent and that the cost to repair the vehicle was in excess of \$11,000. Mr. Hornsby also testified that he was informed that his company's commercial insurance policy might cover the cost of repairs.

Mr. Hornsby needed the vehicle for work, so he filed an insurance claim to have Complainant's insurance company cover the cost of the repairs. The repair required that the vehicle's entire fuel system be replaced.⁹ The final cost of the repairs was \$11,893.30.¹⁰ Complainant paid the insurance deductible of \$2000.¹¹

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles on April 1, 2016.¹² Complainant never sent written notice to Respondent indicating their dissatisfaction with the vehicle.

Mr. Hornsby testified that the dealer's service technician never tested the fuel in the vehicle to verify that there was excessive water in the fuel system. He stated that the technician just looked at the fuel. The vehicle has a water and fuel separator in the fuel system and a warning light should have illuminated advising him of a problem prior to the vehicle shutting down.

During cross-examination, Mr. Hornsby stated that he has had regular maintenance performed on the vehicle. The maintenance is not always performed by Respondent's dealers, though. He's not aware if the maintenance performed at locations other than the dealership was done according to Respondent's procedures and specifications. In addition, Mr. Hornsby doesn't know if Respondent's authorized parts were utilized when maintenance was performed at the non-Respondent locations.

Mr. Hornsby also testified that he saw the photos taken by the dealer's service technician showing water in the fuel. In addition, he stated that the vehicle was in the dealer's possession for approximately four (4) weeks, from March 26, 2016 to April 23, 2016.

⁹ Respondent Ex. 1, Repair Order dated March 26, 2016.

¹⁰ *Id.*

¹¹ *Id.* The repair order indicates that Complainant was responsible for \$2007.00. The extra \$7 was to pay for the cost of a state inspection for the vehicle.

¹² Complainant Ex. 1, Lemon Law Complaint dated April 1, 2016. Complainant signed and dated the complaint on March 29, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until April 1, 2016, which is the effective date of the complaint.

C. Respondent's Evidence and Arguments

Maria Diaz, Legal Analyst for Consumer Affairs, testified for Respondent. She stated that she received the Lemon Law complaint from the Texas Department Of Motor Vehicles on April 26, 2016. She contacted Complainant on April 27, 2016, and spoke to Ryan Penlerick, co-owner, about the complaint. Ms. Diaz asked that Respondent be allowed to send a technician to inspect the vehicle and determine what repairs were necessary. Mr. Penlerick advised Ms. Diaz that the vehicle was repaired and that the repairs were paid for by Respondent's insurance company. Mr. Penlerick asked that Complainant be reimbursed \$2000 for the out-of-pocket deductible. Ms. Diaz informed Mr. Penlerick that Respondent could not reimburse Complainant for the cost of the deductible.

Ms. Diaz testified that the repair order indicated that the damage to the vehicle was due to excessive water in the fuel system. Such damage is not covered by Respondent's warranty. As such, Complainant was responsible for the cost of the repair to the vehicle.

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 on April 10, 2015, and presented the vehicle to an authorized dealer of Respondent on March 26, 2016, due to the vehicle shutting down. The vehicle was repaired during this repair visit and there is no longer any problem with the vehicle.

The Lemon Law requires that in order for a vehicle to be determined to be a "lemon" the "nonconformity continues to exist" after the manufacturer has made repeated repair attempts.¹³ In the present case, the evidence reveals that the vehicle has been fully repaired and that it currently conforms to the manufacturer's warranty. Therefore, the hearings examiner finds that

¹³ Tex. Occ. Code § 2301.605.

there is no defect with the vehicle that has not been repaired and, as such, repurchase or replacement relief for Complainant is not warranted.

Complainant indicated that the primary impetus behind the filing of the complaint was a desire to be reimbursed for the \$2000 insurance deductible which was paid by Complainant to repair the vehicle. Both Occupation Code § 2301.604 and 43 Texas Administrative Code § 215.209 require that Complainant be awarded replacement or repurchase of the vehicle in order to be granted reimbursement of incidental expenses. In this case, the vehicle was repaired and ownership retained by Complainant. Therefore, reimbursement of the insurance deductible cannot be ordered.

Respondent's express warranty applicable to Complainant's vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for five (5) years or 100,000 miles. The Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranties.

Complainant's request for repurchase or replacement relief is denied. In addition, Complainant is not entitled to reimbursement of incidental expenses.

III. FINDINGS OF FACT

1. Northstar Elite Construction & Consulting LLC (Complainant) purchased a new 2015 Ford F-250 on April 10, 2016, from Bluebonnet Ford in New Braunfels, Texas, with mileage of 0 at the time of delivery.
2. The manufacturer of the vehicle, Ford Motor Company (Respondent) issued a bumper-to-bumper warranty for three (3) years or 36,000 miles, whichever occurs first and a separate powertrain warranty for five (5) years or 100,000 miles.
3. On March 23, 2016, the vehicle stopped running with no warning lights illuminating.
4. Michael Hornsby, Corporate Vice-President, took the vehicle to Respondent's authorized dealer, Northside Ford in San Antonio, Texas, on March 26, 2016, in order to have it repaired.
5. The dealer's service technician indicated that the vehicle had excessive water in the fuel which had caused the engine to die and that the repair would require the vehicle's entire fuel system to be replaced at a cost of \$11,893.30.

6. Respondent refused to cover the repairs under the warranty, since fuel contamination is a non-warrantable issue.
7. Complainant's insurance company covered the cost of the repair to the vehicle.
8. The vehicle has been repaired.
9. Complainant was required to pay the insurance deductible which totaled \$2000.
10. On April 1, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. On May 16, 2016, 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 via telephone and the record was closed on July 28, 2016, before Hearings Examiner Edward Sandoval. Complainant was represented by Michael Hornsby, Corporate Vice-President. Respondent was represented by Maria Diaz, Legal Analyst for Consumer Affairs.

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.
9. Complainant is not entitled to reimbursement of incidental expenses. 43 Tex. Admin. Code § 215.209.

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 §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED August 15, 2016



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