IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

MITCHELL SEAN PEAK and MELISSA PEAK,	) C/A NO. EI999-00286-COA-R3-CV
Plaintiffs-Appellants,	) KNOX CIRCUIT
vs.	) HON. WHEELER A. ROSENBALM, JUDGE
TED RUSSELL ENTERPRISES, INC., (A/K/A TED RUSSELL FORD, INC.,) D/B/A WALKER SPRINGS MOTORS, TED RUSSELL MANAGEMENT, INC., BENNIE SATTERFIELD, and CAROL HEATLEY,	)
Defendants-Appellees.	) AFFIRMED AND REMANDED

SAMUEL J. HARRIS, Cookeville, for Plaintiffs-Appellants.

J. DOUGLAS OVERBEY, ROBERTSON, INGRAM & OVERBEY, Knoxville, for Defendants-Appellees.

O P I N I O N

Franks, J.

This appeal arises from a summary judgment granted to defendants in an action by plaintiffs based on an agreement to purchase a 1993 Nissan pickup truck from Walker Springs Motors in Knoxville.

Plaintiffs signed a Retail Installment Contract and Security Agreement and a Supplement to Purchase Contract, which included the payment of $800.00 down and the approval of financing. The Supplement to the Contract specifically stated that Walker Springs remained the owner of the truck until the transaction was completed,

including obtaining financing, and the Peaks would have to return the truck to Walker Springs if they failed to make a payment on time or failed to complete the sales transaction.

At the time the contract was executed, plaintiffs paid $500.00 of the down payment and signed a Promissory Note which states:

> I, Sean and Melissa Peak, promise to pay Walker Springs Motors the sum of $300.00 in down payment on the 93 Nissan PU, stock number F1157A and serial number 1N6SD11S5PC347106. I agree to pay this down payment amount by June 26, 1997. If my down payment is not paid by the above agreed date, I further agree to forfeit any other down payment, whether it be in the form of cash or trade-in and also pay any fees associated with repossession of the above vehicle if such fees apply.

Plaintiffs sent a money order in the amount of $300.00 to Walker Springs on June 30, 1997.

The record reveals that Walker Springs was unable to find a lender to finance the vehicle under the original terms of the agreement. Bennie Satterfield, an employee of Walker Springs, stated in his deposition that he had contacted several lenders in his attempts to secure the financing, and was finally able to find financing for the Peaks, but under different terms. Those terms included paying the same monthly payments, a lower purchase price, but a higher interest rate. He further stated that he communicated this to the Peaks, but they failed to come in and sign the new papers that would be required due to the change in terms. The Peaks in their depositions stated that they were told that they needed to sign a new contract, and that the monthly payments would be higher than what they had originally agreed to.

On July 11, 1997, Walker Springs repossessed the vehicle from the parking lot of Mr. Peak's employer. At the time of the repossession there were various items of personal property belonging to the Peaks in the truck. These items were eventually returned to the Peaks, along with their down payment.

Plaintiffs, in their complaint, allege that defendants violated the Tennessee Consumer Protection Act by making representations and by engaging in unfair and deceptive practices. Also, an action was asserted for intentional/fraudulent misrepresentations, conversion of personal property, violation of the Uniform Commercial Code, and breach of contract and duty of good faith.

Upon considering a motion for summary judgment the trial court should consider whether a factual dispute exists, whether the disputed fact is material to the outcome of the case, and whether there is a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). If the court determines there is no genuine issue as to

any material fact, the movant is entitled to summary judgment as a matter of law. *Id.* at 215. No presumption of correctness attaches to granting summary judgment. *Hembree v. State*, 925 S.W.2d 513 (Tenn. 1996). On appeal, we are required to view the evidence in the light most favorable to the opponent of the motion and all legitimate conclusions of fact must be drawn in favor of the opponent. *Gray v. Amos*, 869 S.W.2d 925 (Tenn. Ct. App. 1993).

> Plaintiffs contend that various acts of the defendants violated sections (b)(2) and (b)(27) of the TCPA. These sections prohibit the following:
>
> (2) Causing likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification by, another...
>
> (27) Engaging in any other act or practice which is deceptive to the consumer or to any other person.

T.C.A. §47-18-104(b)(2), (27).

Plaintiffs offered no evidence that defendants violated TCPA or that they suffered any injury. The contract to purchase had no efficacy, because the conditions precedent were not met. The plaintiffs, alleged that they thought financing was in place, but they took possession of the truck, read and signed the bailment provisions that stated that the deal was subject to financing and that defendants retain ownership of the truck until such financing was in place.

Plaintiffs claim that defendants used deceptive practices in an attempt to lure them into a costlier contract, but they did not offer any proof of deceit, and rely solely on their own conclusions. The undisputed evidence shows that the defendants attempted to find financing under the original agreement, but were unsuccessful, which would necessarily require renegotiation of the original agreement. Plaintiffs also claim that the non-delivery of the tags was a ploy by the defendants to gain leverage over them, as driving the truck would be illegal. Again, plaintiffs offered no evidence that this was done deliberately, or even negligently.

Plaintiffs further insist that defendants made misrepresentations regarding the $225.00 service/documentary fee, and that this constituted a deceptive practice. However, there is no evidence that they were not properly informed about this fee. Moreover, plaintiffs never paid this fee. They were not required to pay the fee because the agreement became a nullity because of a failed condition precedent.

Plaintiffs assert that defendant dealership breached the agreement by failing to renew the temporary tags and repossessing the truck when the plaintiffs were not in default.

In contemplation of the purchase of the truck, plaintiffs signed a

Supplemental to Purchase Contract that contained a Bailment Agreement providing:

> Pending credit approval of Buyer(s) financing institution and completion of the sales transaction, delivery of said vehicle by Dealer is hereby made to Buyer(s) as a convenience to Buyer(s)...Said vehicle shall remain the property of the Dealer.

By affixing their signatures to the document, plaintiffs agreed that if they did not complete the transaction, Walker Springs retained ownership of the truck.

A contract subject to a condition precedent does not come into being unless that condition is performed. *Guilbert v. Phillips Petroleum Co.*, 503 F.2d 587, 590 (6th Cir. Tenn. 1974) (citing *Real Estate Management v. Giles*, 293 S.W.2d 596, 599 (Tenn. Ct. App. 1956)). The existence of the contract between the parties was based on the condition precedent that the buyers obtain financing as set forth in the agreement. Defendants offered evidence that they made an effort to find a lending institution willing to finance the purchase of the vehicle, but were unable to find one willing to finance on the terms agreed to between the dealership and plaintiffs. Plaintiffs offered no evidence to show otherwise. Because there was no contract to enforce, there can be no action for breach.

Plaintiffs argue that repossession of the vehicle was "an unwarranted, unconscionable business practice," and amounted to a conversion and was in violation of the Uniform Commercial Code. But the agreement signed by plaintiffs authorized the dealer to repossess the vehicle if plaintiffs' credit was not approved, as the title to the vehicle remained with the dealership.

The Uniform Commercial Code provides for the repossession of collateral where the debtor is in default under a security agreement. T.C.A. §57-9-501. Plaintiffs claim that the provisions of the Code have been violated because they were not in default, having made necessary payment. However, the provisions of the Code do not apply, because there was never a valid security agreement, due to the fact that certain conditions precedent were not met.

Finally, plaintiffs insist that defendants made fraudulent and intentional misrepresentations that constitute common law fraud. To sustain a claim for fraudulent misrepresentations, plaintiffs must show the following:

> 1) the defendant made a representation of an existing or past fact; 2) the representation was false when made; 3) the representation was in regard to a material fact; 4) the false representation was made either knowingly or without belief in its truth or recklessly; 5) plaintiff reasonably relied on the misrepresented material fact; and 6) plaintiff suffered damages as a result of the misrepresentation.

Metro. Gov't of Nashville, Davidson Co. v. McKinney, 852 S.W.2d 233, 237 (Tenn. Ct. App. 1992) (citing *Graham v. First American National Bank*, 594 S.W.2d 723, 725 (Tenn. Ct. App. 1979).

Plaintiffs claim of fraud fails because it does not meet this test. They offered no evidence of false statements, no reasonable reliance, and no damages suffered.

Accordingly, we affirm the summary judgments entered by the Trial Court and remand with the cost of the appeal assessed to appellants.

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Herschel P. Franks, J.

CONCUR:

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Houston M. Goddard, P.J.

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Charles D. Susano, Jr., J.