

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

DUSTIN L. DEAN :
Plaintiff : **CASE NO. 2012 CVH 01554**
vs. : **Judge McBride**
L&A AUTOS INC. dba LA AUTO SALES : **DECISION/ENTRY**
Defendant :

Cramer Legal, LLC, Benjamin D. Cramer, attorney for the plaintiff Dustin L. Dean, 7420 Jager Court, Suite A, P.O. Box 30326, Cincinnati, Ohio 45230.

Mark J. Tekulve, attorney for the defendant L&A Autos, Inc. d/b/a LA Auto Sales, 785 Ohio Pike, Cincinnati, Ohio 45245.

This cause is before the court for consideration of a motion to dismiss the defendant's counterclaim filed by the plaintiff Dustin L. Dean.

The court scheduled and held a hearing on the motion to dismiss on December 14, 2012. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The plaintiff Dustin Dean filed his present action against the defendant L&A Autos, Inc. d/b/a LA Auto Sales (hereinafter “L&A Autos”) setting forth various claims related to his purchase of a vehicle from L&A Autos. In response, L&A Autos filed a counterclaim alleging that the plaintiff is in breach of the sale and security agreement between the parties and claiming damages for the balance due under the contract, as well as costs for repair and repossession of the vehicle and other miscellaneous expenses.

The sale and security agreement between the parties, which is attached to and incorporated as part of the defendant’s counterclaim, states in pertinent part as follows:

“SECTION FOUR

SECURITY

I understand and agree that the goods that I have purchased do not become fully mine to do with as I please until I have made all my payments and fully performed this agreement. I grant to the seller a security interest in the goods I have purchased in accordance with Article 9 of the Uniform Commercial Code as that Code is enacted in OHIO. I understand and agree that the effect of my granting this security interest is that, until I have made all my payments and fully performed this agreement, the goods belong in part to the seller and serve as collateral to make sure that I will make the payments I have promised and will perform this agreement as I have agreed. If I fail to make these payments

or to perform this agreement, you may take the goods back and dispose of them in order to pay off my debt to you. I understand that I remain fully liable at all times for the price of the goods that I have purchased even if they are taken back. If they are taken back and resold, I understand that I become liable for any expenses this may involve and continue to be liable on any part that may still remain due over and above the return made on the sale or disposition.

* * *

SECTION NINE

DEFAULT

* * *The seller may then sell the property and use the proceeds to pay off what I owe the seller and to pay off as well the seller's expenses in having to repossess and sell the goods. These expenses shall include any court costs and attorney fees the seller may have incurred. If the proceeds are not enough to fully cover all this, I agree to pay the seller the difference.* * *¹

The parties agreed at the hearing on this matter that the vehicle at issue was repossessed by L&A Autos due to the plaintiff's failure to pay under the contract. The parties further agreed that L&A Autos is not seeking the full amount owed under the contract but will only be seeking a deficiency judgment to cover the difference between the amount for which the vehicle is sold and any amount still due and owing after the sale. This understanding by the parties settled the initial basis of the motion to dismiss, which was the plaintiff's concern that the defendant was seeking a double recovery. However, at the hearing, the plaintiff maintained that the counterclaim should still be dismissed because the claim was not ripe as the repossessed vehicle has yet to be sold.

¹ Defendant's Answer and Counterclaim, Exhibit B, pages 2 and 4.

LEGAL ANALYSIS

“A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint.”² “Thus, the movant may not rely on allegations or evidence outside the complaint; such matters must be excluded * * *.”³ “The factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom.”⁴ “It must appear beyond doubt that [the counterclaimant] can prove no set of facts entitling [it] to relief.”⁵

The counterclaim seeks damages incurred by the defendant as a result of having to make certain repairs on the vehicle and to obtain a new certificate of title, as well as other miscellaneous expenses. The agreement between the parties specifically makes the plaintiff liable for expenses involved in repossession and resale of the property. As such, the defendant’s counterclaim for these damages pursuant to its breach of contract claim is ripe for adjudication and there is no basis for dismissal.

There may be various legal issues pertaining to the portion of the counterclaim which involves the balance due and owing under the sale agreement, such as application of the Uniform Commercial Code and its relevant provisions. However, in looking only at the allegations in the counterclaim and the language of the sale and

² *Volbers-Klarich v. Middletown Mgt., Inc.* (2010), 125 Ohio St.3d 494, 929 N.E.2d 434, 2010-Ohio-2057, ¶ 11, citing, *Assn. for the Defense of the Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117, 537 N.E.2d 1292.

³ *Id.*, citing Civ.R. 12(B).

⁴ *Id.* at ¶ 12, quoting *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756.

⁵ *Id.*, citing *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280, 649 N.E.2d 182.

security agreement, the court does not find that the defendant can prove no set of facts entitling it to relief; as such, dismissal is not warranted under Civ.R. 12(B)(6).

CONCLUSION

The plaintiff's motion to dismiss the defendant's counterclaim pursuant to Civ.R. 12(B)(6) is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 11th day of January 2013 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride