Docket: **2016-01227-BLS1**
Date: **June 14, 2019**
Parties: **CARLOS CABRERA, individually and on behalf of all others similarly situated vs. AUTO MAX PREOWNED, INC. and others[1]**
Judge: **/s/Mitchell H. Kaplan Justice of the Superior Court**

REVISED MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff Carlos Cabrera filed this action against defendants Auto Max Preowned, Inc., New England Auto Max, Inc., and Auto Max, Inc. (collectively, "Auto Max"), on his own behalf as well as on behalf of all other allegedly similarly situated individuals. Cabrera alleges that Auto Max sold him and others used vehicles without disclosing that the vehicles had suffered structural/frame damage and all suffered loss as a result. The case is presently before the court on Cabrera's motion for class certification. For the following reasons, the motion is DENIED.

BACKGROUND

On November 24, 2009, Auto Max, a used car dealer based in Massachusetts, purchased a 2008 Infiniti FX35 from the Manheim Auto Auction for $26,005 (the Vehicle). Documentation concerning the Vehicle provided to Auto Max by the auction noted that the Vehicle had a damaged rocker panel.

In late January, 2010, Auto Max sold the Vehicle to Cabrera for $27,995, plus taxes and fees. Prior to the sale, Cabrera requested a Carfax report from Auto Max and allegedly asked an

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[1]New England Auto Max, Inc. and Auto Max, Inc.

Auto Max salesperson whether the Vehicle had structural damage.[2] The Carfax report did not include this damage and the salesperson allegedly told Cabrera that the car had not suffered any frame damage. Between 2010 and 2015, Cabrera drove the Vehicle without incident.

In October, 2015, Cabrera attempted to trade in the Vehicle to a Honda dealership. Cabrera thought the trade in value of the Vehicle was $18,000-$19,000. According to Cabrera, the dealership only offered $6,000 because a Carfax report on the Vehicle now stated that it had previously sustained structural damage. The Carfax report stated that the structural damage had been "disclosed by seller at auction on November 24, 2009."

Cabrera commenced this action on April 14, 2016 and filed a Second Amended Complaint in November, 2016. That complaint asserts claims for breach of contract and the implied covenant of good faith and fair dealing (Count I), breach of express warranty (Count II), breach of the implied warranty of merchantability (Count III), revocation of acceptance (Count IV), unjust enrichment (Count V), false advertising (Count VI), and violation of G. L. c. 93A (Count VII). He alleges that Auto Max engaged in a deceptive practice by failing to disclose to consumers that the vehicles they purchased had structural damage.

Through discovery, Cabrera obtained information (reflected in Exhibit 33) showing that, beginning in 2009, Auto Max purchased 192 vehicles that had structural damage reports associated with them from the Manheim Auto Auction and two other auctions. Cabrera next conducted a review of Auto Max's sales files and found files for 88 of the 192 vehicles. These files did not contain written notice to the purchaser of the damage noted in the materials received from the auctions.

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[2] Carfax is a commercial, web-based service that supplies vehicle history reports for used cars.

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In September, 2018, Auto Max moved for summary judgment on Cabrera's claims, arguing that the allegedly undisclosed damage to his vehicle was de minimis and immaterial and therefore could not support any of his claims. Cabrera opposed the motion. He produced an expert report in which his expert opined that the damage to the rocker panel rendered the Vehicle unsafe and not in merchantable condition at the time of purchase and that the Vehicle remains unsafe. Cabrera argued that this evidence created a genuine dispute as to whether the Vehicle suffered from a material, undisclosed defect at the time of sale. The Court (Davis, J.) denied the motion in November, 2017, explaining:

> The Court agrees with Plaintiff that a genuine dispute exists as to whether the Vehicle suffered from a material, undisclosed defect at the time Plaintiff purchased it in January 2010. The question is an extremely close one because the fact that Plaintiff subsequently drove the Vehicle for over 100,000 miles seriously calls into question whether any alleged defect in the Vehicle was "material." .... Furthermore, photos of the purported structural damage to the Vehicle's rocker panel show what appears to be a de minimus deflection in a small area of the panel that likely does not pose a safety hazard of any kind. ... It is not this Court's role in deciding a motion for summary judgment, however, to act as factfinder.

Decision and Order Regarding Defendant's Motion for Summary Judgment (Dkt No. 40), at 2 (internal citations omitted). Auto Max moved for reconsideration, but the Court denied the motion on December 26, 2018 with a margin endorsement that stated: "Plaintiff's claims may be extremely weak, but they have enough support in the record to overcome the low summary judgment threshold."

Soon thereafter, Cabrera filed the present motion in which he seeks to certify a class under G. L. c. 93A, § 9(2) and Mass. R. Civ. P. 23 of:

> All Massachusetts residents who since November 1, 2009[,] purchased from Automax one of the used vehicles identified by VIN on [Plaintiff's] Exhibit 33; and as to such identified vehicle Automax does not possess a written disclosure that it provided to purchaser prior to consummation of the sale disclosing that the vehicle had been identified as having frame or structural damage.

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DISCUSSION

To certify a class of plaintiffs with respect to Counts I-VI, Cabrera must satisfy Mass. R. Civ. P. 23. To do so, he must demonstrate that (1) the class is sufficiently numerous to make joinder of all parties impracticable, (2) there are common questions of law and fact, (3) the claims or defenses of the representative party are typical of the claims or defenses of the class, and (4) the named plaintiff will fairly and adequately protect the interests of the class. See Mass. R. Civ. P. 23(a). Additionally, he must show that common questions of law and fact predominate over individualized questions and that the class action is superior to other available methods for fair and efficient adjudication of the controversy. See Mass. R. Civ. P. 23(b).

With respect to Count VII, the c. 93A claim, Cabrera must demonstrate that "the use or employment of the [defendants'] unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated" and that he would "adequately and fairly represent[] such other

persons." G. L. c. 93A, § 9(2). See also Bellermann v. Fitchburg Gas & Elec. Light Co., 470 Mass. 43, 52 (2014). This standard shares similarities with the requirements set out in Rule 23, id. at 53, but "[t]he c. 93A class certification standard has a more 'mandatory tone' than rule 23 . . . as the statute lacks the additional predominance and superiority requirements found in the rule. . . . That is to say, a certification that fails under c. 93A would fail under the requirements of rule 23 as well." Kwaak v. Pfizer, Inc., 71 Mass. App. Ct. 293, 298 (2008) (internal citations omitted). Accordingly, the Court will first address the question of whether a class can be certified under Count VII, as if Cabrera fails to meet the requirements for class certification under c. 93A, he will also fail under Rule 23 in connection with his non-93A claims, which are based on the same conduct.

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Whether certification is sought under c. 93A or Rule 23, a plaintiff is only required to provide information sufficient to enable the motion judge to form a reasonable judgment that certification requirements have been met. Id at 297. Applying this standard, Cabrera has not satisfied this burden.

Cabrera seeks to certify a class consisting of those consumers who purchased vehicles from Auto Max with reported frame damage and did not receive a written disclosure informing them of that damage. He contends that the failure to provide such written disclosure violated 940 Code Mass. Regs. §§ 3.05(1) and 3.16(2) and therefore violated G. L. c. 93A.[3] To establish a violation of either regulation, a plaintiff must prove that the defendant failed to disclose a "material" fact. See 940 Code Mass. Regs. § 3.05(1); Mayer v. Cohen-Miles Ins. Agency, 48 Mass. App. Ct. 435, 443 (2000) ("Section 3.16(2) adds little, if anything, to the provisions of [G. L. c. 93A] . . . itself. . . . A violation of the statute requires a material, knowing, and wilful nondisclosure. . . and addresses conduct likely to mislead consumers acting reasonably under the circumstances.") (internal quotations and citations omitted, emphasis added). In the instant case, however, materiality cannot be established on a class wide basis because whether the failure to provide a written or oral disclosure of structural damage was "material" to the purchase of any of these vehicles is entirely contingent upon the circumstances of each transaction.

First, there is no statutory or regulatory requirement that used car dealers provide written disclosure of structural damage to buyers. See 940 Code Mass. Regs. § 5.04(2)(c) (specifying

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[3] 940 Code Mass. Regs. 3.05(1) provides in relevant part: "No claim or representation shall be made by any means concerning a product which. . . by failure to adequately disclose additional relevant information[] has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect." 940 Code Mass. Regs. § 3.16(2) similarly provides: "Any person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction."

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the obligatory pre-sale disclosures pertaining to a used vehicle's condition). If such a rule existed, there might be no need for individualized proof. The lack of a written notice in the sales file would prove a violation, and the nondisclosure would be material as a matter of law. However, a court should not engage in rule making by means of class certification.

Moreover, here materiality is context dependent and there is little evidence that the experience of the putative class members mirrored that of Cabrera. Indeed, other than a few consumer complaints to the Attorney General, Cabrera failed to provide evidence that the problem Cabrera experienced with the Carfax report for his vehicle was pervasive. Compare Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 344-346 (2008) (plaintiffs augmented their affidavits alleging "time shaving" with an expert's analysis of business records obtained in discovery and evidence from other hourly employees including, among other things, letters, records of telephone calls to an internal "grass roots" complaint hotline for hourly employees, and other communications to superiors). It is equally possible that the nondisclosure was in fact immaterial to many, if not most, of the putative class members. Some putative class members may have learned of the structural damage prior to purchase through conversations with a sales person or an accurate Carfax report for his/her vehicle.[4] Others may have paid a price that reflected the structural damage. There is simply no class wide means of determining materiality.[5]

The individualized nature of the inquiry is aptly illustrated by Judge Davis' summary judgment decision. Cabrera only survived summary judgment because he introduced evidence concerning his particular vehicle, namely, the affidavit of an expert who opined that the damage

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[4] Auto Max posts links to Carfax reports on its website.

[5]There is also no evidence in the record regarding the standards that the auctions use in deciding whether to label damage as "structural."

to his vehicle's rocker panel had devalued the car and rendered it unsafe and non-merchantable; stated differently, evidence that, if credited by a finder of fact, could establish that in his particular situation the non-disclosure was material. Similar evidence would be necessary for each putative class member not only to determine the amount of damages, but whether a claimant suffered any damages at all and therefore could be a member of the class. See Aspinall v. Philip Morris Cos., 442 Mass. 381, 397 n.19 (2004) (permitting certification under c. 93A because the issue was one of economic damage, rather than personal injury, and the damage was exactly the same for each class member, but noting "[w]ere it otherwise, unique and different experiences of each individual member of the class would require litigation of substantially separate issues and would defeat the commonality of interests in the certified class.").[6]

Accordingly, Cabrera has failed to provide information sufficient for a reasonable judgment to be made that the putative class members are similarly situated and injured and therefore is not entitled to class certification under c. 93A. The failure to obtain certification

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[6] There is another individual proof issue raised by Auto Max. A four year statute of limitations applies to plaintiffs c. 93A claim. However, the plaintiff proposes a class that includes members who purchased vehicles "from November 1, 2009 to the present," which would include individuals who purchased their vehicles more than four years before the plaintiff filed the present action. While the discovery rule could potentially toll the statute for some class members, for the reasons discussed above, it is very difficult to see how Cabrera could establish tolling on a class wide basis. A finder of fact would have to consider the circumstances of each putative class members' purchase. Even

assuming a purchaser experienced the same issue the plaintiff encountered with the Carfax report for his vehicle, i.e., the damage was not yet reported at the time of his purchase, that purchaser may have discovered the frame damage soon after the purchase through an updated Carfax report or from his/her mechanic. Here, although the plaintiff allegedly learned of the frame damage in 2015, it had been listed on the Carfax report for his vehicle since 2011. Cf. Salvas, 452 Mass. at 377-378 (application of the discovery rule did not necessitate an individual inquiry and presumptively operated as to all class members because most class members made the minimum wage, had only small amounts of time allegedly shaved from their records, and therefore the individual losses were likely too small to be readily detectable).

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under c. 93A, necessarily means Cabrera cannot obtain certification under Rule 23 for his non-93A claims, which are premised on the same alleged nondisclosures.[7]

There is another way to think about the problems that arise when individualized fact finding is required to determine who is a member of a putative class. Federal case law applying FRCP 23 suggests that there is an implicit element that must be established before a class may be certified, i.e., that the class is "ascertainable." In Dononvan v. Philip Morris USA, Inc., a Federal District Court described this requirement as follows: "While not explicitly mentioned in Rule 23, an implicit prerequisite to class certification is that a 'class' exists—in other words, it must be administratively feasible for the court to determine whether a particular individual is a member. . .. To be ascertainable, all class members need not be identified at the outset; the class need only be determinable by stable and objective factors." 268 F.R.D. 1, 9 (D. Mass. 2010) (internal quotation marks and citations omitted). However, when "class members [are] impossible to identify prior to individualized fact-finding and litigation, the class fails to satisfy one of the basic requirements for a class action under Rule 23." Shanley v. Cadle, 277 F.R.D. 63,68 (D. Mass 2011), quoting Crosby v. Social Sec. Admin. of US., 796 F.2d 576, 580 (1st Cir. 1986). See also Kwaak, 71 Mass. App. Ct. at 300-302 (where class certification was reversed when individual proof would be required to determine whether a particular purchaser of Listerine was exposed to deceptive advertising that affected the decision to purchase the product as the advertising was not uniform during the class period).

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[7] Further to this point, the Court notes that Cabrera would fail the predominance test under Rule 23(b). "The predominance test expressly directs the court to make a comparison between the common and individual questions involved in order to reach a determination of such predominance of common questions in a class action context." Salvas, 452 Mass. at 363, quoting Newberg, Class Actions § 4.23, at 154 (4th ed. 2002). For the same reasons described above, the question of whether a putative class member suffered damage as a result of Auto Max's nondisclosure would introduce individualized and predominant questions of fact.

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In Carrera v. Bayer Corp., the Third Circuit Court of Appeals discussed the concept of ascertainability at length and its importance in determining whether a class may be certified. 727 F.3d 300, 306-308 (3rd Cir. 2013). Of relevance to this case, the Third Circuit explained: "A defendant in a class action has a due process right to raise individual challenges and defenses

to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues. . . . A defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim." Id. at 307 (internal citations omitted). No Massachusetts appellate decision has yet specifically addressed the question of whether ascertainablity should be considered in determining whether a class may be certified under Rule 23 or c. 93A, but these concerns appear to underlay the Appeals Court's decision not to certify a class under either Rule 23 or c. 93A in Kwaak cited above.

In this case, while auction documents and Auto Max's sales files identify the individuals who purchased cars that were labeled as having structural damage, those records are inadequate to identify which of those purchasers, if any, suffered a loss as a result of nondisclosure. Such a determination would require individualized fact finding regarding the circumstances of the sale, specifically whether the plaintiff had prior knowledge of the structural damage, whether the nature of the damage was material, and whether the sale price reflected that damage. Accordingly, certification is also inappropriate because the class is not ascertainable.

ORDER

For the forgoing reasons, the Plaintiff's Motion for Class Certification is DENIED.

/s/Mitchell H. Kaplan Justice of the Superior Court