FSM SUPREME COURT TRIAL DIVISION

STEVE ETSE, Plaintiff, vs. POHNPEI MASCOT, INC., Defendant.	)	CIVIL ACTION NO.2011-009

FINDINGS, CONCLUSIONS OF LAW, AND DECISION

Martin G. Yinug
Chief Justice

Trial: November 21, 2013
Decided: August 21, 2014

APPEARANCES:

For the Plaintiff: Salomon M. Saimon, Esq.
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For the Defendants: Joseph Phillip, Esq.
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HEADNOTES

Civil Procedure – Motions

When the plaintiff timely filed an unopposed motion for enlargement of time to file closing arguments because his counsel was traveling in Chuuk and since the defendant consented to the motion by electing not to respond, the motion for enlargement of time was granted *nunc pro tunc*. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 471 (Pon. 2014).

Civil Procedure – Pleadings – Amendment; Evidence

When the plaintiff's claim for damages to his car from a break-in were not tried by the parties' consent during the trial on the plaintiff's claim for failure to repair his car; when the break-in damages claim was not raised by the pleadings and admitting evidence about it would prejudice the defendant who had not had adequate notice that the issue would be tried; when excluding the evidence about the break-in would not prejudice the plaintiff; and when the break-in was not part of a common nucleus of operative fact with the defendant's alleged behavior in failing to properly repair the plaintiff's vehicle but represented an entirely new claim that the plaintiff could file against the defendant for failure to properly safeguard his property, all evidence that pertained to the alleged break-in would be excluded

and not considered. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 471-72 (Pon. 2014).

Contracts – Formation

A contract is a promise between two parties for the future performance of mutual obligations. For the promise to be enforceable there must be an offer, acceptance, consideration and definite terms. When a contract's existence is at issue, the trier of fact determines whether the contract did in fact exist. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 475 (Pon. 2014).

Contracts – Formation

A series of verbal agreements entered into by the parties may constitute a series of valid contracts. The terms of the agreements were the parties' intentions at the time they entered into the contracts. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 475 (Pon. 2014).

Contracts – Formation

Agreements that lack price and duration terms may be found to be sufficiently certain to form a valid contract. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 475 (Pon. 2014).

Contracts – Definite Terms

Whether contractual terms are sufficiently certain to support contract formation is a field of inquiry grounded in the common law of contracts. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 475 (Pon. 2014).

Contracts

The court will consider United States decisions as an appropriate source of guidance in considering unresolved questions arising in the area of contracts, and, under 1 F.S.M.C. 203, the Restatements may be used when applying common law rules in the absence of written law. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 476 (Pon. 2014).

Contracts – Definite Terms

The terms of a contract are sufficiently certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 476 (Pon. 2014).

Contracts – Definite Terms

Absent a negotiated time of performance, when the contract calls for a single performance such as the rendering of a service or the delivery of goods, the time for performance is a "reasonable time." Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 476 (Pon. 2014).

Contracts – Definite Terms

When the parties intend to conclude a contract for the sale of goods and the price is not settled, the price is a reasonable price at the time of delivery if nothing is said as to price. Similar principles apply to contracts for the rendition of service where, if the parties manifest an intent to be bound, the price is a reasonable price at the time for doing the work. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 476 (Pon. 2014).

Contracts – Definite Terms

Because the defendant contacted the plaintiff before starting each additional repair so that the plaintiff's agreement to pay for the work could be secured and the plaintiff then agreed to each additional repair, knowing and intending to compensate the defendant for the work and the defendant then proceeded to undertake reasonable efforts to perform the repair, there was a series of valid contracts since the parties' behavior manifested their intent to be bound by such a contract, and for

each contract, the parties agreed to perform within a reasonable time, and the price was set as a reasonable price at the time for doing the work. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 476 (Pon. 2014).

Contracts – Breach

The defendant did not breach the contracts when it is clear that the parties' contracts required only that the defendant undertake reasonable efforts to repair the plaintiff's vehicle, but did not require the defendant to guarantee success. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 476 (Pon. 2014).

Contracts – Breach

The defendant did not breach the contracts since the repairs performed by the defendant were completed within a reasonable time and since the price charged by the defendant was a reasonable price. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 476-77 (Pon. 2014).

Contracts – Breach

When the $250 additional labor charge constituted the reasonable charge demanded by the defendant as compensation for work performed under valid contracts with the plaintiff, the plaintiff's claim for breach of contract must fail. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 477 (Pon. 2014).

Torts – Fraud

In order to make a prima facie case of intentional misrepresentation, a plaintiff must produce some evidence of: 1) a misrepresentation by the defendant; 2) scienter or the defendant's knowledge that the statements were untrue; 3) intent to cause the plaintiff to rely on the misrepresentations; 4) causation or actual reliance by the plaintiff; 5) justifiable reliance by the plaintiff; and 6) damages. The misrepresentation must be a false and material representation of a past or present fact. In some cases, the misrepresentations may be made by failure to disclose information. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 477 (Pon. 2014).

Torts – Fraud

When the plaintiff proffered no evidence that would support a conclusion that the defendant knew the repairs suggested to the plaintiff were unnecessary or insufficient, the plaintiff failed to present evidence that would satisfy the scienter requirement for intentional misrepresentation and that claim must fail. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 477-78 (Pon. 2014).

Torts – Negligent Misrepresentation

It is clear that the plaintiff's claim for negligent misrepresentation must fail when the plaintiff cannot show that the defendant's representations were incorrect. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 478 (Pon. 2014).

Torts – Conversion

When it has been established that the plaintiff was contractually obligated to pay the sum specified in the invoice, the plaintiff's claim that the defendant's refusal to return his vehicle to his possession until the invoice was paid in full amounted to conversion must fail. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 478 (Pon. 2014).

Torts – Negligence

Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 478 (Pon. 2014).

Torts – Duty of Care; Torts – Negligence

When the plaintiff has not demonstrated that the defendant's actions reflect a standard of care

that is unreasonable under the circumstances, the plaintiff's negligence claim must fail. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 478 (Pon. 2014).

Contracts; Remedies

Since the plaintiff formed a series of valid and enforceable contracts with the defendant, the plaintiff cannot find relief in equity. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 478 (Pon. 2014).

Costs – When Taxable

When the defendant is the prevailing party, it shall be awarded its reasonable costs. Este v. Pohnpei Mascot, Inc., 19 FSM R. 468, 478 (Pon. 2014).

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COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

I. Background

Trial in this matter was held on November 21, 2013. The Plaintiff Steve Etse was represented by Salomon M. Saimon of the Micronesian Legal Services Corporation (MLSC). The Defendant Pohnpei Mascot, Inc. was represented by Joseph Phillip.

At the conclusion of the trial the parties agreed to the submission of written closing arguments. Plaintiff's closing arguments were filed on December 16, 2013. Defendant's closing arguments were filed on December 4, 2013.

The Court having reviewed the exhibits that were stipulated to, or otherwise entered into evidence at trial, as well as the arguments of counsel, and having reviewed the parties' closing arguments and other briefs, now finds and determines as follows:

II. Preliminary Matters

A. *Motion for Enlargement of Time*

On December 10, 2013, Plaintiff filed an unopposed motion for enlargement of time to file closing arguments in this matter. Additional time was requested because Plaintiff's counsel was traveling in Chuuk. Since Plaintiff's motion was filed in time, and Defendant consented to the motion by electing not to respond, Plaintiff's motion for enlargement of time is hereby granted *nunc pro tunc*.

B. *Evidentiary Ruling*

At trial Plaintiff testified that on February 7, 2011, while Plaintiff's vehicle was parked at Defendant's place of business, thieves broke the window of the vehicle causing $110 in damage, and stole items worth $100 from the vehicle. Plaintiff argues that he should be compensated by Defendant for these losses, because a bailee is liable for the cost of replacement or repair of bailed property that is damaged due to his neglect or lack of care. Palik v. PKC Auto Repair Shop, 13 FSM Intrm. 93, 96 (Kos. S. Ct. Tr. 2004).

Defendant has not produced evidence to contest the facts presented by Plaintiff, but objected at trial that this claim is outside the scope of this litigation because this issue was not raised in the

pleadings. Indeed, the Complaint was filed on February 4, 2011, three days before the incident on February 7, and Plaintiff did not file an amended complaint. In response to Defendant's objection to the admissibility of this evidence, Plaintiff argued that this jurisdiction has liberal pleading rules, and so the Court should look beyond the narrow confines of the pleading. Having been presented with these arguments for the first time at trial, the Court informed the parties that it would consider the issue and rule on the admissibility of this evidence at a later date.

Having considered the arguments of the parties, the Court now decides to exclude the evidence presented at trial pertaining to the break-in on February 7, 2011. While it is established in this jurisdiction that issues not raised in the pleadings may be tried by consent of the parties, *see* Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 619 (App. 1996), here it is clear that Defendant did not consent. Therefore, Plaintiff must rely on FSM Civ. R. 15(b) which provides in relevant part that,

> [i]f evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of the evidence would prejudice the party in maintaining the party's action or defense upon the merits.

In this instance it is apparent that allowing Plaintiff to amend the complaint to include a cause of action for the February 7 incident would have prejudiced Defendant. Defendant was not provided with adequate notice that damages for the break-in would be requested at trial, and so did not have an adequate opportunity to prepare evidence to contest this issue. In order to cure this prejudice to Defendant, the Court would have had to grant an appropriate extension of time to allow Defendant to prepare. Due to the travel plans of the presiding justice, such an extension would have resulted in a substantial delay of several months before the trial could be re-convened, thereby causing substantial interruption to the proceedings and leading to a risk that crucial witnesses would no longer be available to testify.

In contrast to the prejudice against Defendant that would result from admitting the evidence under FSM Civ. R. 15(b), there is no reason to suppose that excluding the evidence would prejudice Plaintiff. The break-in that occurred on February 7, 2014 is not part of a common nucleus of operative fact with the alleged behavior of Defendant in failing to properly repair Plaintiff's vehicle. The alleged break-in represented an entirely new claim, and therefore Plaintiff could file a fresh claim against Defendant for failure to properly safeguard Plaintiff's property.

For all these reasons, Defendants objection is SUSTAINED, and all evidence presented at trial that pertains to the events that allegedly transpired on February 7, 2011, is excluded. Plaintiff's exhibits "C," "E" and "F" are excluded from evidence and will not be considered.

III. Findings of Fact

Plaintiff owned a maroon Isuzu Escudo that Plaintiff bought approximately six years ago for about $4,700

Plaintiff's vehicle broke down on or about December 15, 2010 while Plaintiff was driving. Plaintiff then called Defendant on the telephone and explained that his car had broken down. Defendant sent two employees to diagnose the problem. After a cursory examination these employees told Plaintiff the problem was likely caused by a problem with the timing belt in the vehicle. After hearing this diagnosis, Plaintiff requested that Defendant's employees tow his car to Defendant's auto repair shop.

The next day Plaintiff went to Defendant's auto repair shop and was told again that the problem was caused by a defective timing belt. He was instructed to buy a new timing belt from an outside vendor. Plaintiff complied and brought the new timing belt to Defendant for installation.

After the new timing belt was installed by Defendant, the vehicle still did not run properly. Defendant then informed Plaintiff that the valve located in the engine was damaged, and that consequently the vehicle needed a new engine.

Testimony at trial from Charlie Hsu, manager of Pohnpei Mascot, Inc., established that mechanics employed by Defendant could not have known that the engine had problems in addition to the timing belt without first replacing the timing belt and observing that the engine was still defective.

An employee of Defendant, during a chance encounter away from Defendant's auto shop, informed Plaintiff that a replacement engine might be available from a third party, a private individual named Billy Jonas. Billy Jonas owned a Suzuki Escudo that was not operational, and Plaintiff reached an agreement with him to purchase the engine directly for $300.

Plaintiff then arranged for the engine purchased from Mr. Jonas (herein "engine no. 2") to be brought to Defendant. Although Plaintiff knew that engine no. 2 was defective, he did not know the specific problem with it. Evidence presented at trial did not establish whether Plaintiff informed Defendant that the engine was defective, or whether he asked Defendant to diagnose the defect in engine no. 2 before proceeding.

Upon receiving engine no. 2 from Plaintiff, Defendant explained to Plaintiff that the planned repairs would include taking out Plaintiff's original engine (herein "engine no. 1"), and inserting engine no. 2 in its place. Defendant further informed Plaintiff that the cost of the planned repairs would be $300, and that the repairs would take two weeks to complete.

Plaintiff then provided Defendant with a deposit of $300, establishing a valid contract between Plaintiff and Defendant.

Relying on Defendant's representation that the repairs would take two weeks to complete, Plaintiff elected to rent a vehicle for the duration of the repairs. The alternative option available to Plaintiff was to borrow a vehicle from his nephew. However, Plaintiff did not wish to be a burden to his nephew, and concluded that he could afford to rent a vehicle for the two week duration.

Upon receipt of engine no. 2, Defendant proceeded to remove engine no. 1 from Plaintiff's vehicle and install engine no. 2 in its place. The process of installing a new engine is known as "dropping" an engine, and is labor intensive.

Defendant then informed Plaintiff that, after dropping engine no. 2 in Plaintiff's vehicle and running tests, it was determined that the crank shaft in engine no. 2 was not working properly and needed to be replaced. Defendant recommended that the crank shaft from engine no. 1 be placed in engine no. 2.

Replacing the crank shaft in engine no. 2 would require that Defendant first remove the engine from the vehicle, before replacing the crank shaft with that from engine no. 1, and then dropping engine no. 2 for the second time.

Evidence presented at trial established that Defendant did not provide a price quotation to Plaintiff for the specific task of replacing the crank shaft.

Plaintiff accepted Defendant's recommendation regarding repair of the crank shaft, thereby forming a valid contract, and Defendant proceeded to replace the crank shaft in engine no. 2 with that from engine no. 1.

Defendant then dropped engine no. 2 for the second time. After running some tests Defendant concluded that a piston was not firing properly. Defendant contacted Plaintiff and recommended that a piston from engine no. 2 be replaced with a working piston from engine no. 1. Plaintiff agreed, thereby establishing a valid contract.

Evidence presented at trial established that Defendant did not provide a price quotation to Plaintiff for the specific task of replacing the piston.

Defendant then replaced the piston in engine no. 2, but the engine was still faulty. Defendant concluded that the oil inside the engine was not circulating properly. Defendant contacted Plaintiff and recommended that additional repairs be conducted to fix this problem. Plaintiff agreed, thereby establishing a valid contract.

Evidence presented at trial established that Defendant did not provide a price quotation to Plaintiff for the specific task of fixing the circulation of the oil inside the engine.

Defendant then fixed the problem with the oil circulation. Still, the engine would not run properly, but rather was sputtering. Defendant diagnosed that the transmission was faulty, and needed to be repaired.

Defendant then recommended to Plaintiff that repairs should be undertaken on the faulty transmission. At this point the vehicle had been under Defendant's care for well over one month.

Plaintiff, upon being informed of the latest diagnosis by Defendant, lost faith in the abilities and integrity of Defendant, and decided that he would transport his vehicle to Three Star auto shop, so that repairs would be completed there.

Plaintiff informed Defendant of his desire that the repairs be completed at a different auto shop, and requested that he be provided with an invoice for the labor costs, parts and towing services incurred to that point.

Defendant obliged and provided Plaintiff with an invoice ("Invoice") that demanded payment of $ 754.96. The sum of $300 had previously been transferred to Defendant as a deposit, which left a balance of $454.96.

The Invoice included two pre-printed categories of charges. The first category was "LABOR COSTS," which was specified as $389.95. Many tasks were lumped together under this heading, including the task of, "removing whole engine."

The second category of charges on the Invoice was "PARTS COSTS," which was specified as $115.01. Seven separate items were listed under this heading.

The Invoice has a line at the bottom titled "GRAND TOTAL," which added the labor costs and parts costs for a total of $504.96. Under this line Defendant inserted a hand written category of, "ADDITIONAL LABOR" in the amount of $250. The Invoice then adds the $250 charge to the $504.96 for a total charge of $754.96.

The Invoice is silent as to the specific tasks that justified the $250 charge. However, Mr. Charlie Hsu testified at trial that the $250 charge reflected the additional labor costs of dropping engine no. 2 for a second time. This testimony is credible.

After receiving the Invoice, Plaintiff paid the balance of $454.95 on February 21, 2011, but the $250 charge for unspecified ADDITIONAL LABOR was paid under protest.

Plaintiff then arranged for his vehicle to be towed to Three Star auto shop.

Three Stars auto shop diagnosed the problem as a transmission problem. Three Star was then able to fix the transmission and render the car operational in under one week, and charged Plaintiff $450 for the repairs.

Throughout the period from December 16, 2010 until repairs were completed by Three Stars auto shop around March 1, 2011, Plaintiff paid to rent a car. The total cost of renting a car during this period was not established at trial.

IV. Conclusions of Law

Plaintiff raised seven causes of action in the Complaint, but the cause of action for infliction of emotional distress was dismissed at the onset of trial pursuant to FSM Civil Rule 41. The remaining causes of action were for breach of contract, intentional misrepresentation, negligent misrepresentation, conversion, negligence and a claim in equity. The Court will examine each cause of action in turn.

A. *Breach of Contract*

1. *Contract Formation*

A contract is a promise between two parties for the future performance of mutual obligations. For the promise to be enforceable there must be an offer, acceptance, consideration and definite terms. Livaie v. Weilbacher, 13 FSM Intrm. 139, 143 (App. 2005). Where the existence of a contract is at issue, the trier of fact determines whether the contract did in fact exist. Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 620 (App. 1996). In this instance, the Court in its role as fact finder found that the series of verbal agreements entered into by the parties constituted a series of valid contracts. The terms of the agreements were the intentions of the parties at the time they entered into the contract. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 79, 86 (Pon. 1997).

2. *Contract Terms are Sufficiently Definite*

As explained supra, for a promise to be enforceable there must be definite terms. Livaie, 13 FSM Intrm. at 143. In this instance the Court in its role as finder of fact found that the parties agreed on a price of $300 for the initial work in removing engine no. 1 from the vehicle and dropping engine no. 2 in its place. The parties also agreed that the work should be completed in approximately two weeks. However, the Court also found that the parties did not specify a price term for the contracts that Defendant performed subsequent to concluding that engine no. 2 was defective, nor did the parties specify deadlines by which Defendant's work must be completed. Although these latter agreements lack price and duration terms, the Court determined as a finding of fact that these agreements were sufficiently certain to form a valid contract.

Whether contractual terms are sufficiently certain to support contract formation is a field of inquiry grounded in the common law of contracts. It is well established in this jurisdiction that this

Court will consider decisions of the United States as an appropriate source of guidance in considering unresolved questions arising in the area of contracts, *see* Black Micro Corp. v. Santos, 7 FSM Intrm. 311, 314 (Pon. 1995), and that under 1 F.S.M.C. 203 the Restatements may be used when applying common law rules in the absence of written law. *See* FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 580 n.14 (Pon. 2011). The Restatement (Second) of Contracts lays out the principles applied in determining whether contractual terms are sufficiently certain to support contract formation: "The terms of a contract are sufficiently certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981).

The Restatement continues by offering guidance applicable to agreements in which the time of performance or the price is not specified. The Restatement instructs that, absent a negotiated time of performance, "[w]here the contract calls for a single performance such as the rendering of a service or the delivery of goods, the time for performance is a 'reasonable time.'" RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. d (1981). The Restatement further instructs that, absent a negotiated price term, "Where the parties intend to conclude a contract for the sale of goods and the price is not settled, the price is a reasonable price at the time of delivery if (a) nothing is said as to price. . . . Similar principles apply to contracts for the rendition of service . . . If the parties manifest an intent to be bound, the price is a reasonable price at the time for doing the work." RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. e; illus. 8 (1981).

Applying the principles set out in the RESTATEMENT (SECOND) OF CONTRACTS to the verbal agreements at issue, it is clear that there were a series of valid contracts, and that for each contract the parties agreed to perform within a reasonable time, and the price was set as a reasonable price at the time for doing the work. The parties' behavior in this instance manifested their intent to be bound by such a contract. The Defendant contacted Plaintiff before commencing each additional repair so that Plaintiff's agreement to pay for the work could be secured. Plaintiff then agreed to each additional repair, knowing and intending to compensate Defendant for the work. Defendant then proceeded to undertake reasonable efforts to perform the repair.

3. *Contracts Were Not Breached by Defendant*

There is no basis for the Court to determine that the contracts formed between the parties were breached by Defendant. It is clear that the contracts between the parties required only that Defendant undertake reasonable efforts to repair Plaintiff's vehicle, but did not require Defendant to guarantee success. This can be inferred from the fact that Plaintiff acquiesced to some of the charges, including the charge for the initial $300 contract, but only disputed the "additional labor" valued at the sum of $250. Since Plaintiff accepted that Defendant performed the initial contract valued at $300 despite the fact that the car had not been completely repaired, the Court can infer that the subsequent contracts between the parties similarly did not require an absolute guaranty from Defendant that the repairs would be sufficient to render the vehicle operational.

As explained earlier, the contracts between Plaintiff and Defendant required that Defendant undertake repairs within a reasonable time and at a reasonable price. Plaintiff has offered no compelling evidence in support of his contention that the repairs performed by Defendant were not completed within a reasonable time. At trial Mr. Hsu testified that substantial time elapsed during which Plaintiff searched for a replacement engine. Furthermore, Plaintiff presented no evidence pertaining to the amount of time the repairs conducted should have reasonably consumed. Although Plaintiff produced compelling testimony that the repairs performed at Three Star auto shop required less than one week to complete, it is undisputed that Three Star auto shop repaired the transmission of the vehicle while Defendant labored on other components. For these reasons the Court cannot determine that the repairs conducted by Defendant were not conducted within a reasonable amount of time.

Similarly, the Court is without a basis to determine that the price charged by Defendant was not a reasonable price. Indeed, the evidence presented at trial leads to the inference that the price charged by Defendant was reasonable. It is undisputed that Plaintiff agreed to pay $300 under the initial contract, which required that Defendant remove engine no. 1 from the vehicle and drop engine no. 2. It is also undisputed that, pursuant to the subsequent contracts between the parties, Defendant removed engine no.2, performed repairs on that engine, and dropped it a second time. At trial Mr. Hsu testified that dropping an engine is a labor intensive process, and that the $250 charge for ADDITIONAL LABOR consisted primarily of a charge for dropping the engine a second time. Based on these facts the Court infers that Defendant could reasonably charge up to $300 for the labor performed under the subsequent contracts. Since Defendant requested only $250, it is clear that compelling evidence supports the reasonableness of this price.

Based on the testimony of the parties at trial, it appears that the dispute between the parties arose largely because the Invoice presented to Plaintiff was deficient. The Invoice did not provide a justification for the ADDITIONAL LABOR charge of $250. Absent such an explanation, Plaintiff understandably inferred that the charge represented a spurious attempt to swindle him, and that Defendant's insistence on withholding Plaintiff's vehicle until paid in full was tantamount to extortion. This inference made by Defendant, however, was incorrect. The ADDITIONAL LABOR charge of $250 constituted the reasonable charge demanded by Defendant as compensation for work performed under valid contracts with Plaintiff.

For all these reasons Plaintiff's claim for breach of contract must fail. Defendant is not required to disgorge the sum of $250 paid by Plaintiff under protest.

B. *Intentional or Negligent Misrepresentation*

Plaintiff seeks judgment and recovery of damages, including punitive damages, on the cause of action of intentional misrepresentation. In order to make a prima facie case of intentional misrepresentation, a plaintiff must produce some evidence of:

1) a misrepresentation by the defendant
2) scienter or the defendant's knowledge that the statements were untrue
3) intent to cause the plaintiff to rely on the misrepresentations
4) causation or actual reliance by the plaintiff
5) justifiable reliance by the plaintiff and
6) damages

The misrepresentation must be a false and material representation of a past or present fact. Isaac v. Palik, 13 FSM Intrm. 396 (Kos. S. Ct. Tr. 2005). In some cases, the misrepresentations may be made by failure to disclose information. *Id.* at 401 (citing Kaminanga v. FSM College of Micronesia, 8 FSM Intrm. 438, 443 (Chk. 1998).

In this instance Plaintiff did not produce sufficient evidence to show that Defendant knowingly misrepresented a past or present fact. The only evidence presented to support misrepresentation on the part of Defendant is that Defendant's efforts were insufficient to return Plaintiff's vehicle to working condition, and that a third party was able to subsequently repair the vehicle at a substantial expense. Plaintiff proffered no evidence that would support a conclusion that Defendant knew the repairs suggested to Plaintiff were unnecessary or insufficient. Based on the evidence presented, Defendant's mechanics may have earnestly, but incorrectly, diagnosed the problems with Plaintiff's vehicle.

Since Plaintiff failed to present evidence that would satisfy the scienter requirement for

intentional misrepresentation, this claim must fail.

Indeed, Plaintiff's evidence was not even sufficient to conclude that Defendant's statements were incorrect to begin with. The evidence presented at trial would support a conclusion that Defendant's mechanics suggested and performed necessary repairs on Plaintiff's vehicle. Testimony at trial established that, subsequent to the completion of the repairs performed by Defendant, Three Star auto shop repaired the transmission in the engine and this was sufficient to render Plaintiff's vehicle operational. This supports an inference that Defendant correctly diagnosed the mechanical problems it revealed to Plaintiff, and performed necessary repairs in a satisfactory manner.

Since Plaintiff could not show that Defendant's representations were incorrect, it is clear that the claim for negligent misrepresentation must also fail. *See* Phillip v. Marianas Ins. Co., 12 FSM Intrm. 301, 308 (Pon. 2004) (a false representation of fact is an element of a prima facie claim for negligent misrepresentation).

C. *Conversion*

Plaintiff argues that Defendant's refusal to return his vehicle to his possession until the Invoice was paid in full amounts to conversion. However, since it has been established, *supra*, that Plaintiff was contractually obligated to pay the sum specified in the invoice, this claim must fail.

D. *Negligence*

Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. Amor v. Pohnpei, 3 FSM Intrm. 519, 531 (Pon. 1988). Since Plaintiff has not demonstrated that Defendant's actions reflected a standard of care that is unreasonable under the circumstances, this claim must fail.

E. *Equity*

As explained supra, Plaintiff formed a series of valid and enforceable contracts with Defendant. Since valid contracts were formed, Plaintiff cannot find relief in equity. Therefore, this claim must also fail.

F. *Costs*

Defendant, as the prevailing party, shall be awarded its reasonable costs. Damarlane v. United States, 8 FSM Intrm. 45, 52 (App. 1997). Defendant shall submit its costs to the Court within 20 days of service of this decision. Plaintiff shall then have 10 days to respond to the submission.

V. CONCLUSION

Accordingly, the clerk shall enter judgment for Defendant Pohnpei Mascot, Inc. and against Plaintiff Steve Etse on the claims for breach of contract, intentional misrepresentation, negligent misrepresentation, conversion, negligence and claim in equity. Defendant is awarded costs, which shall be submitted to the Court as directed above.

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