Not Reported in Cal.Rptr.3d, 2004 WL 2943968 (Cal.App. 5 Dist.)

Court of Appeal, Fifth District, California.
Fidelmar DIAZ et al., Plaintiffs and Respondents,
v.
FRESNO DODGE, INC., Defendant and Appellant.

No. F043574.
(Super.Ct.No. 626515-1).
Dec. 21, 2004.

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Hamlin, Judge.
Helon & Manfredo and James D. Burnside III for Defendant and Appellant.

William M. Krieg & Associates, William M. Krieg and Kimberly L. Mayhew for Plaintiffs and Respondents.

OPINION

LEVY, J.

***1** The question presented by this appeal is whether, by describing a vehicle lease program as "special," appellant, Fresno Dodge, Inc., assumed a duty to disclose all components of the lease price. Although Fresno Dodge fully complied with the disclosure requirements under both federal and state law, the trial court concluded that Fresno Dodge engaged in an unfair, deceptive and misleading business practice when it did not itemize two components of the lease price after labeling its lease program as "special."

Fresno Dodge argues the trial court erred as a matter of law in ruling that it violated the California Unfair Competition Law (Bus. & Prof.Code,[FN1] §§ 17200 and 17500). According to Fresno Dodge, characterizing the leases as "special" was not a misleading representation that required a corrective disclosure of additional facts. Rather, it was merely sales puffery. Fresno Dodge further asserts that this alleged "misrepresentation" was not material. Additionally, Fresno Dodge contends the Unfair Competition Law does not authorize the restitution ordered by the trial court.

FN1. Further statutory references are to the Business and Professions Code unless otherwise indicated.

As discussed below, Fresno Dodge did not engage in an unfair business practice. Based on the undisputed facts, it must be concluded that an ordinary consumer would not be deceived, misled, or confused by Fresno Dodge's use of the term "special" in connection with its lease program. Consequently, the judgment will be reversed.

BACKGROUND

When a consumer leases a vehicle, he or she is paying only to use, not own, that vehicle. Thus, the monthly payments are lower than if the vehicle were purchased. Accordingly, leasing can be an attractive option for certain consumers and, in fact, has

increased in popularity in recent years. (<http:// www.leaseguide.com/lease01.htm> [as of Dec. 16, 2004].)

Lease payments are made up of three general parts, a depreciation charge, a finance charge, and sales tax. The depreciation charge portion of the payment compensates the leasing company for the loss in value of the vehicle, spread over the term of the lease. The starting point for this calculation is the capitalized cost or lease price of the vehicle. This cost is the sales price as negotiated by the parties plus certain fees, such as a lease acquisition fee. From this amount, the residual value of the vehicle, i.e., its estimated wholesale value at the end of the lease term, is subtracted. Dividing this remainder by the number of months in the lease term determines the depreciation charge. (<http://www.leaseguide.com/lease07.htm> [as of Dec. 16, 2004].)

The finance charge, also referred to as the lease factor, is analogous to interest on a loan. The consumer is essentially paying interest on the money the leasing company has tied up in the vehicle during the term of the lease. (<http://www.leaseguide.com/lease07.htm> [as of Dec. 16, 2004].)

Fidelmar and Aida Diaz, leased a new Dodge Ram pickup truck from Fresno Dodge in 1997. Fresno Dodge entered into this lease as the lessor and then assigned it to Wells Fargo Auto Finance, Inc. (Wells Fargo) under Wells Fargo's express auto lease program.

2 Under this lease program, Wells Fargo sets the lease factor at which it will buy a lease, i.e., the "buy rate." However, a dealer can elect to set the lease factor above this "buy rate." In that case, Wells Fargo will either pay the dealer the entire difference between the lease factor and the "buy rate," known as the "participation," over the life of the lease, or 60 percent of the "participation" in the form of a "dealer reserve" when the lease is assigned to Wells Fargo.

On each lease assigned to it under the express auto lease program, Wells Fargo charges a nonrefundable $525 lease acquisition fee. When preparing the lease, Fresno Dodge adds this amount to the capitalized cost of the vehicle. However, Fresno Dodge does not retain any portion of this fee.

The Diazes were dissatisfied with their transaction with Fresno Dodge and filed the underlying action in 1999. The Diazes claimed that they intended to purchase, not lease, the truck. The complaint alleged a variety of individual claims and two causes of action under the Unfair Competition Law (UCL) on behalf of the general public.

Before trial, the Diazes settled and dismissed all claims against co-defendant Wells Fargo and all individual claims against Fresno Dodge. Thus, only the UCL claims against Fresno Dodge prosecuted on behalf of the general public were tried. According to the Diazes, Fresno Dodge violated the UCL by engaging in certain practices, including: failing to provide a Spanish version of the lease to Spanish speaking customers; misrepresenting the manufacturer's warranty; failing to disclose certain charges such as the $525 acquisition fee; failing to disclose charges for after-market options; charging a price for the vehicle above the advertised or agreed to price; and charging and failing to disclose a lease rate in excess of the rate charged by the lender, i.e., the dealer reserve.

Following a bench trial, the court entered its statement of decision. The court ruled in favor of Fresno Dodge on all but two of the business practices that were challenged by the Diazes. However, the court found that, under the circumstances of the subject transactions, Fresno Dodge engaged in an unfair, misleading and deceptive practice when it failed to separately disclose the $525 loan acquisition fee and the dealer reserve.

In reaching this decision, the court determined that Fresno Dodge had complied with all state and federal disclosure requirements with respect to the lease agreements at issue. Neither state nor federal law required separate disclosure of the existence or amount of the lease acquisition fee or dealer reserve. Nevertheless, the court found Fresno Dodge was in violation of the UCL because it represented to every customer during the relevant time period that it had a "special" lease program. The addendum sticker affixed to each vehicle's window showing the dealer markup over the manufacturer's suggested retail price also stated "Ask us about the *SPECIAL* lease programs available for this vehicle!!!" According to the trial court, having made the affirmative representation that it had a "special" lease program, Fresno Dodge assumed a duty to disclose all of the material components that made up that lease program, including any acquisition fee or dealer reserve, in order for the representation to not be deceptive and misleading.

***3** Fresno Dodge moved for a new trial arguing that the court improperly relied on a theory that was neither pleaded nor prosecuted by the plaintiffs. Moreover, Fresno Dodge maintained that this theory was legally incorrect. In denying Fresno Dodge's motion and rejecting the alleged procedural irregularity, the court further explained the original ruling as follows:

"It was not the charging of loan acquisition fees and a dealer reserve alone that was deceptive here; it was the charging of those undisclosed fees in the context of promoting a ' *SPECIAL* ' lease program to consumers, where there was absolutely nothing 'special' about the lease program and where the fees were charged only for the convenience and increased profit of Fresno Dodge and its lender, that constituted an unfair and deceptive business practice prohibited by the UCL. The consumers who were victimized by that practice are entitled to restitution of those fees actually paid.''

Fresno Dodge contends the trial court erred in concluding that it violated the UCL as a matter of law.

DISCUSSION

In general, what constitutes unfair competition or an unfair business practice under any given set of circumstances is a question of fact. (*Californians for Population Stabilization v. Hewlett-Packard Co.* (1997) 58 Cal.App.4th 273, 286, overruled on another ground in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 175.) However where, as here, there is no dispute or conflict in the relevant evidence, the trial court's finding with respect to the UCL amounts to a conclusion of law. (*Ibid.*) Thus, review is de novo.

The purpose of the UCL is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) To this end, the UCL is broad in scope. It defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising ...." (§ 17200.) Thus, independently actionable violations of other laws can be treated as unfair competition. (*Kasky v. Nike, Inc., supra,* 27 Cal.4th at p. 949.) Section 17500, the false advertising law, specifically makes advertising real or personal property or services by "untrue or misleading" statements unlawful. Accordingly, a violation of section 17500 is a violation of the UCL. (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 98.)

To state a claim under the UCL, based on false or misleading advertising or promotional practices, it is only necessary to show that the advertisement or practice is likely to deceive members of the public. (*Kasky v. Nike, Inc., supra,* 27 Cal.4th at p. 951.) It is immaterial whether a consumer has been *actually misled* by the representation at issue. (*Day v. AT & T Corp.* (1998) 63 Cal .App.4th 325, 334.) However, "likely to

deceive" implies more than a mere possibility that some few consumers viewing the advertisement in an unreasonable manner might conceivably be misled. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 508.) Rather, unless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer. (*Id.* at pp. 506-507.) In evaluating whether an advertisement is deceptive under the UCL, the primary evidence is the advertisement itself. (*Brockey v. Moore, supra,* 107 Cal.App.4th at p. 100.)

***4** As noted above, neither federal nor state law requires an itemized disclosure of the lease acquisition fee or dealer reserve. Thus, Fresno Dodge's conduct was not unlawful.

Further, as found by the trial court, Fresno Dodge did not engage in an unfair or deceptive business practice simply by imposing these charges. The acquisition fee is included in most lease transactions and covers a variety of administrative or insurance costs. Without an acquisition fee, lessors have to charge higher rental charges. (<http://federalreserve.gov/pubs/leasing/glossary.htm> [as of Dec. 16, 2004].)

Similarly, section 17200 does not prohibit a dealer reserve. The dealer reserve is merely the difference between the wholesale and retail price of the lease. (*Kunert v. Mission Financial Services Corp.* (2003) 110 Cal.App.4th 242, 263.) The UCL was not intended to eliminate retailers' profits by requiring them to sell at their cost, whether the product is vehicles or vehicle financing. (*Id.* at p. 265.) Moreover, a reasonable consumer would not expect the lease factor on a direct lease to be the same as the lease factor on a dealer-arranged lease. Rather, such a consumer would be aware of and anticipate the dealer seeking a profit on the financing as well as on the underlying sale. (*Id.* at pp. 264-265.)

Nevertheless, the trial court found that, by not itemizing the acquisition fee and dealer reserve in the lease, Fresno Dodge engaged in an unfair, deceptive and misleading business practice. The court's rationale for this conclusion was that Fresno Dodge assumed a duty to make these disclosures when it promoted its lease program as "special." According to the court, Fresno Dodge's failure to make these disclosures caused that "special" representation to be deceptive and misleading. In other words, if Fresno Dodge had not used the word "special" to describe its lease program, the court would not have found that Fresno Dodge violated the UCL.

However, contrary to the trial court's conclusion, a reasonable consumer would not have been misled by the characterization of the lease as "special." Rather, as discussed below, this representation falls into the category of "puffing."

It is common knowledge, and may always be assumed, that sellers will express favorable opinions concerning what they have to sell. (*Presidio Enterprises v. Warner Bros. Distributing* (5th Cir.1986) 784 F.2d 674, 682.) When this praise is in general terms, without specific content or reference to facts, buyers are expected to understand that they are not entitled to rely literally upon the words. (*Ibid.*) Thus, such statements of opinion, or "puffing," are non-actionable. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111.)

One form of non-actionable puffery is a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion. (*Pizza Hut, Inc. v. Papa John's Intern., Inc.*. (5th Cir.2000) 227 F.3d 489, 497.) In other words, if the descriptive term at issue is unquantifiable, it qualifies as an opinion. (*Id.* at p. 499.) In contrast, a statement of fact is one that can be adjudged true or false with empirical verification. (*Presidio Enterprises v. Warner Bros. Distributing, supra,* 784 F.2d at p. 679.)

***5** Case law is replete with examples of sellers puffing their wares. (*Hauter v. Zogarts, supra,* 14 Cal.3d at pp. 111-112, fn. 5.) Such puffing includes claiming that a satellite system will provide " 'crystal clear digital' video, or 'CD quality' audio" (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1361); representing that a health plan will provide " 'high standards' of medical service" (*Pulvers v. Kaiser Foundation Health Plan, Inc.* (1979) 99 Cal.App.3d 560, 564-565); representing a marina as a " 'first class harbor' " and " 'the best berthing facility in Northern California' " (*Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401, 412, overruled on another ground in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743); and advertising " 'Better Ingredients [,] Better Pizza' " (*Pizza Hut, Inc. v. Papa John's Intern., Inc., supra,* 227 F.3d at p. 499.).

Here, referring to a lease program as "special" falls within the realm of puffery. When Fresno Dodge called its lease "special" it was claiming that the lease was "distinguished by some unusual quality," "in some way superior," or "unique." (<http://www.merriam-webster.com> [as of Dec. 16, 2004].) This description is nothing more than a vague claim of superiority. Whether a lease is "special" cannot be empirically verified as true or false. Rather, Fresno Dodge was expressing an opinion that would not be relied on by a reasonable consumer. Moreover, since this puffery was not misleading, Fresno Dodge was under no obligation to make additional disclosures not otherwise required by law.

In sum, the leases at issue complied with federal and state law. Further, the description of these leases as "special" would not mislead a reasonable consumer. Rather, such a vague superlative cannot be interpreted as anything but an expression of opinion. Therefore, Fresno Dodge did not violate the UCL as a matter of law. Consequently, the judgment must be reversed.

Respondents were awarded attorney fees as the prevailing party under Code of Civil Procedure section 1021.5. However, since respondents are no longer the prevailing party, the order awarding attorney fees must also be reversed. (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1274.)

DISPOSITION

The judgment and the order for attorney fees are reversed. The trial court is directed to enter judgment in favor of appellant, Fresno Dodge, Inc. Costs on appeal are awarded to appellant.

WE CONCUR: VARTABEDIAN, Acting P.J., and HARRIS, J.

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