



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 15, 2010

CBCA 1986

TOMAS OLIVAS IBARRA,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Tomas Olivas Ibarra, pro se, El Paso, TX.

Blake K. Heraghty, Office of Chief Counsel, Customs and Border Protection, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **McCANN**, and **DRUMMOND**.

GOODMAN, Board Judge.

Thomas Olivas Ibarra (the appellant) appeals the decision of the contracting officer for the Department of Homeland Security, Customs and Border Protection (the respondent) denying his claim for a refund of the purchase price of a vehicle he purchased at an agency auction. The respondent has filed a motion to dismiss for failure to state a claim upon which relief can be granted.

Background

On March 2, 2006, the respondent seized a 1996 Oldsmobile Bravada (the vehicle) in accordance with 8 U.S.C. § 1324. Appeal File, Exhibit 2. The vehicle was subsequently inventoried and inspected, and a title search was performed. *Id.*, Exhibits 3-4.

The title search indicated that the vehicle was registered in the State of Colorado. Appeal File, Exhibits 3, 10. After the registered owner failed to make a claim for the vehicle in response to the respondent's notice of seizure and intent to forfeit, the vehicle was administratively forfeited to the United States. *Id.*, Exhibits 6, 8-9, 11.

The respondent held a public auction on June 28, 2006. The vehicle was included in the articles for sale at auction and was described by its year, make, model, and Vehicle Identification Number (VIN) number. Appeal File, Exhibit 15. The General Sales Terms and Conditions stated:

The Government warrants to the original Purchaser that the property listed in the sales catalog for bids will conform to its description. This warranty is in place of all other guaranties and warranties, expressed and implied. The Government does not warrant the condition, quality, or merchantability of the property or its fitness for any use or purpose. The Purchaser understands and agrees that all property/merchandise is purchased and accepted "AS IS, WHERE IS" and "WITH ALL FAULTS."

The amount of recovery under this provision is limited to the purchase price of the inaccurately described property. The purchaser is not entitled to any payment for loss of profit or any other direct money damages.

Id., Exhibit 18.

The appellant purchased the vehicle at this auction for \$1100 and signed an acknowledgment form stating that he agreed to the terms and conditions of sale and that he agreed to purchase the vehicle "as is, where is." Appeal File, Exhibit 15.

On March 11, 2009, the appellant submitted a claim for reimbursement. Appeal File, Exhibit 23. In his claim, the appellant stated that after purchasing the vehicle at the auction, he sold it to an individual (the purchaser) for an undisclosed amount. *Id.* The appellant states that when the purchaser subsequently applied for a license plate in Ciudad Juarez, Chihuahua, Mexico, the vehicle was confiscated by the Mexican authorities because it was reported stolen in Mexico. *Id.* The appellant claims to have refunded to the purchaser \$1100 for the vehicle, as well as \$500 for the cost of the license

plate. *Id.* While the appellant did not state in his letter that he was requesting a refund of the \$1600, the letter was treated as a claim.

The respondent investigated the allegations in the letter, confirmed that the vehicle was registered in Colorado through August 2006, and also discovered that the vehicle had been simultaneously registered in Mexico and reported stolen on February 17, 2006. Appeal File, Exhibits 23-26. On October 19, 2009, the respondent's Asset Forfeiture Office in El Paso, Texas, advised the appellant that he would need to bring additional documentation to the Asset Forfeiture Office so that his claim could be evaluated. *Id.*, Exhibit 28. After almost six months, the respondent's Asset Forfeiture Office still had not received the requested documentation from the appellant. The respondent's contracting officer then issued a final decision dated March 3, 2010, denying the claim. *Id.*, Exhibit 35.

On April 22, 2010, the appellant filed an appeal of the contracting officer's final decision, requesting that the respondent refund the \$1100 purchase price of the vehicle. The appellant did not file a complaint as required by the Board, nor did the appellant designate his notice of appeal as a complaint.

On July 14, 2010, the respondent filed a motion to dismiss for failure to state a claim upon which relief can be granted. By letter dated July 17, 2010, to the parties, the Board designated the appellant's notice of appeal and accompanying documentation as the complaint and directed the appellant to file a response to the motion to dismiss. The appellant has not filed a response to the motion.

Discussion

In general, a case can only be dismissed for failure to state a claim upon which relief may be granted when that conclusion can be reached by looking solely upon the pleadings. In this case, materials outside the pleadings have been submitted and referred to in the motion to dismiss, so we consider this motion as a motion for summary relief. *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 282-ISDA, 09-2 BCA ¶ 34,279. Summary relief is appropriate only where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. Any doubt on whether summary relief is appropriate is to be resolved against the moving party. The moving party shoulders the burden of proving that no genuine issue of material fact exists. *Patrick C. Sullivan v. General Services Administration*, CBCA 936, 08-1 BCA ¶ 33,820. In this case, respondent has met its burden.

The only warranty contained in the General Sales Terms and Conditions was that the vehicle would be properly described. The vehicle was properly described, by year, make, model, and VIN number. The warranty of merchantability, i.e., that the purchaser would be able to resell the vehicle, was specifically disclaimed. The fact that the vehicle was seized in Mexico as previously-stolen property after appellant sold it does not obligate the respondent to refund the purchase price to appellant.

Decision

Respondent's motion to dismiss is granted. The appeal is **DENIED**.

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ALLAN H. GOODMAN
Board Judge

We concur:

R. ANTHONY McCANN
Board Judge

JEROME M. DRUMMOND
Board Judge