APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REINARD SMITH,	:	CIVIL ACTION
	:	NO. 19-4159
v.	:	
	:	
ALEX KERSHENTSEF, et al.	:	

O R D E R

AND NOW this **24th** day of **May, 2023,** upon consideration of (1) Plaintiff's motion under "Federal Rules of Civil Procedure Rule 60(B)(3) Fraud Upon the Court" (ECF No. 82), (2) Plaintiff's "Motion for an Immediate Hearing for Plaintiff's New Action for Fraud Upon the Court under FRCP Rule 60(d)(3)" (ECF No. 90), (3) Plaintiff's "Motion for a Temporary Restraining Order and Preliminary Injunction Federal Rules Civil Procedure, Rule 65(b)"[1] (ECF No. 94), (4) Defendant's "Motion to Strike Plaintiff's Arbitration Award Rejection" (ECF No. 77), and the responses, replies, and sur-replies thereto, and after a hearing on this same date, it is hereby **ORDERED** that:

1. Plaintiff's motions (ECF Nos. 82, 90, and 94) are **DENIED**[2]; and

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[1] Despite its title, this is essentially a motion to recuse.

[2] In these three motions, the pro se Plaintiff again disagrees with the Court's determination that there were genuine disputes as to material facts that precluded granting summary judgment in his favor on one of his claims. Plaintiff fails to

2. Defendants' motion (ECF No. 77) is **GRANTED** and Plaintiff's rejection of the arbitration award and demand for a trial de novo is **STRUCK** as untimely.[3]

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assert any valid grounds for relief or establish any appearance of impropriety on the part of the Court.

[3] Disappointed with the Court's ruling that it would not recuse itself from the case, Plaintiff abandoned the hearing and left the courtroom before the parties could argue Defendants' motion. See attached transcript. Thus, the Court will rule on Defendants' motion on the papers.

Defendants contend that Plaintiff's trial demand was untimely. The Court agrees. The arbitration award was entered on the docket on March 15, 2023. Plaintiff's demand for trial de novo was entered on April 18, 2023 after it was received in the mail by the Clerk's Office. See Fed. R. Civ. P. 5(d)(2)(A) (providing that non-electronically filed papers are deemed filed when delivered to the clerk).

Pursuant to Local Rule of Civil Procedure 53.2(7), Plaintiff was required to file his demand for a trial de novo within thirty days of the arbitration award's entrance on the docket. Pursuant to Federal Rule of Civil Procedure 6(a), "in computing any time period specified in . . . any local rule" the Court will "exclude the day of the event that triggers the period" and will continue the period to the next business day that is not a weekend or holiday. Fed. R. Civ. P. 6(a)(1)(A) & (C). Thus, Plaintiff was required to file his demand by April 17, 2023, which he failed to do.

Plaintiff argues that Federal Rule of Civil Procedure 6(d) adds three days to the deadline because he received the arbitration award by mail (having previously refused to consent to electronic filing). However, Rule 6(d) only applies "[w]hen a party may or must act within a specified time after being served and service is made" pursuant to Rule 5(b)(2)(C), (D), or (F) (which includes service by mail). Service under Rule 5(b) regards the service of papers between parties. See Fed. R. Civ. P. 5(a) (listing which papers must be served). Here, the deadline was set by a rule and triggered by the arbitration award's entry on the docket. Service under Rule 5(b) is not part

The arbitration award is entered as the **FINAL JUDGMENT** of this Court and the Clerk of Court shall mark this case as **CLOSED.**

AND IT IS SO ORDERED.

Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

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of the equation. Thus, Rule 6(d) is inapplicable and cannot make Plaintiff's demand timely.

Moreover, Plaintiff does not argue good cause for his failure to file which might cause the Court to consider extending the deadline. See Fed. R. Civ. P. 6(b)(1). Plaintiff merely states in his response that he previously tried to hand deliver his demand, but the courthouse was closed. This is not good cause for a tardy filing or excusable neglect. See Fed. R. Civ. P. 6(a)(4) (describing the "Last Day" as ending "when the clerk's office is scheduled to close"). It is unclear when Plaintiff attempted to hand deliver his demand and, by walking out on the hearing, he abandoned his opportunity to explain further or argue good cause.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REINARD SMITH,	:	
	:	CIVIL ACTION
Plaintiff,	:	NO. 19-4159
	:	
v.	:	
	:	
ALEX KERSHENTSEF, et al.	:	
	:	
Defendants.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. OCTOBER 19, 2022

This action arises out of the sale and subsequent repossession of a car. Pro se Plaintiff, Reinard Smith, currently seeks summary judgment on two counts of the amended complaint for (1) violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-2 ("UTPCPL"); and (2) unlawful repossession under 13 Pa. C.S.A. § 9609. Defendants have responded to the motion but have not cross-moved for summary judgment. For the reasons that follow, the Court will deny Plaintiff's motion as to the UTPCPL claim and grant the motion as to the unlawful repossession claim.

I. BACKGROUND

On September 1, 2017, Plaintiff purchased a used vehicle from Defendants Alex Kershentsef and Key & V Auto Sales ("Defendants"). On September 7, 2017, Plaintiff was involved in

an accident while driving the vehicle. Plaintiff claims that the steering column of the vehicle became stuck and caused an accident, and that the airbags failed to deploy.

Plaintiff purchased the vehicle as-is with no warranty and signed a non-warranty notice. However, Plaintiff alleges that Defendant Mike, a salesperson, told him prior to purchase that the vehicle was "safe and reliable." MSJ at 4, ECF No. 50; Am. Cmplt. ¶ 20, ECF No 21. Plaintiff also claims that prior to purchasing the vehicle (and signing the non-warranty notice), he "was not afforded a test drive but was told by Defendant Alex [Kershentsef] that, if, [he had] any problems with the car [he had] a 90-day warranty." Am. Cmplt. ¶ 23. Defendants deny that they made any oral warranty promise. As a disputed fact, the Court will view it in the light most favorable to Defendants (e.g. that Defendants did not make such a promise).[1]

Plaintiff further alleges that Defendants failed to provide him with the mandated FTC "Buyer's Guide" when purchasing the vehicle. See 16 C.F.R. § 455.2(a) ("Before you offer a used vehicle for sale to a consumer, you must prepare, fill in as applicable and display on that vehicle the applicable 'Buyers Guide.'"). Defendants also deny this assertion and contend that

[1] As the non-moving parties, the facts are viewed in the light most favorable to Defendants. Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009).

the Buyer's Guide was affixed to the vehicle. In that this fact is also disputed, the Court views it in the light most favorable to Defendants. It is upon these facts that Plaintiff bases his UTPCPL claims.

On December 27, 2017, and after Plaintiff failed to make his car payments, Defendants engaged Siani's Towing[2] to repossess Plaintiff's vehicle. Plaintiff contends that during the repossession, Plaintiff and the repossession agent had a physical altercation. Plaintiff's wife provided an affidavit asserting that she "did not see what started the fight but when [she] came outside of the house [her] husband and the repo agent were engaged in a physical alteration." Am. Cmplt., Ex F, ECF No. 21-1. There is no evidence to dispute this account.

Plaintiff remitted the outstanding payments to Defendants on December 29, 2017, and reclaimed the vehicle. However, after further failures to submit payments, Defendants again engaged Siani's Towing to repossess the vehicle on August 16, 2018. Plaintiff does not contend that a physical altercation occurred during the second repossession and only alleges that the repossession agent arrived with another individual and that he felt threatened because of the second individual's presence. Plaintiff stayed inside of his house while the vehicle was

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[2] Plaintiff has been unable to properly serve Siani's Towing as a defendant.

repossessed. It is upon these facts that Plaintiff bases his unlawful repossession claim.

II. LEGAL STANDARD

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters, 584 F.3d at 581 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)). A fact is material if proof of its existence "might affect the outcome of the suit," and a dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

The Court views the facts "in the light most favorable to the nonmoving party." Am. Eagle Outfitters, 584 F.3d at 581. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010).

While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the nonmoving party who "must

set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250 (quoting Fed. R. Civ. P. 56(e) (1963)).

III. DISCUSSION

A. Unfair Trade Practices and Consumer Protection Law

Plaintiff claims that Defendants breached the UTPCPL by engaging in two types of "deceptive acts or practices." 73 Pa. Stat. Ann. § 201-2(4). Specifically, Plaintiff first claims that Defendants violated the UTPCPL by representing that the vehicle was "of a particular standard, quality or grade" when in fact it was not, Id. § 201-2(4)(vii), because Defendants stated that the vehicle was safe and reliable but did not warn him that the steering components and airbags were defective.

Second, Plaintiff contends that Defendants violated the UTPCPL by "[e]ngaging in . . . fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding," Id. § 201-2(4)(xxi), by failing to affix the FTC "Buyer's Guide" to the vehicle prior to purchase and by orally promising him a 90-day warranty before having him agree in writing that the vehicle was sold as-is and without a warranty.

73 Pa. Stat. Ann. § 201-9.2(a) provides for a private right of action when a purchaser suffers loss due to unfair or deceptive acts, including the two described above. In order to maintain a private cause of action under the UTPCPL, a plaintiff

must establish, inter alia, justifiable reliance on the allegedly deceptive actions. Kirwin v. Sussman Auto., 149 A.3d 333, 336-37 (Pa. Super. 2016).

Viewing the facts in the light most favorable to Defendants, as the Court must when construing Plaintiff's motion, the Court concludes that there are genuine disputes over material facts that prevent summary judgment.

For example, Plaintiff has presented no evidence that Defendants knew or should have known about the alleged steering and airbag defects. See Id. at 336 (providing that deceptive conduct under the UTPCPL can be fraudulent or negligent). Indeed, beyond his own unsworn statements, Plaintiff has not provided any evidence that the steering column malfunctioned before the accident or that the airbags should have deployed in that particular instance.

Likewise, Defendants dispute that they offered Plaintiff an oral 90-day warranty or that the vehicle lacked the FTC Buyer's Guide. Even if Defendants admitted to an oral promise, there would still be a genuine dispute regarding whether Plaintiff could have justifiably relied on the promise after agreeing in writing that the vehicle was being sold as-is and without a warranty. Baumbach v. Lafayette Coll., 272 A.3d 83, 90 (Pa. Super. 2022) ("Whether a party justifiably relied on the representations of another is a question of fact.").

Given the lack of necessary evidence and the disputed nature of these facts, Plaintiff cannot meet his summary judgment burden for his UTPCPL claims.

B. Unlawful Repossession

Under the Pennsylvania Uniform Commercial Code, a secured party may repossess collateral without judicial process if repossession can be accomplished without a "breach of the peace." 13 Pa. C.S.A. § 9609(b)(2). There is little pertinent law on what constitutes a breach of the peace, but "courts consistently look to the following factors to determine if there was a breach of the peace: the use of law enforcement; violence or threats of violence; trespass; verbal confrontation; and disturbance to third parties." Rivera v. Dealer Funding, LLC, 178 F. Supp. 3d 272, 279 (E.D. Pa. 2016) (citing cases). Plaintiff argues that Defendants, through Siani's Towing, breached the peace during both repossessions on December 27, 2017 and August 16, 2018, subjecting Defendants to liability under Section 9609.

The only evidence in the record indicates that on December 27, 2017, Plaintiff and the repossession agent engaged in a physical altercation. Defendants have not disputed this allegation. The Court concludes that a physical altercation in the process of repossessing a vehicle is a breach of the peace. Defendants have not asserted otherwise.

However, as to the August 16, 2018 repossession, Plaintiff contends only that he felt threatened because there were two repossession agents present. He does not allege that they actually threatened him. Plaintiff has not provided, and the Court has not found, any case law establishing that the presence of second repossession agent is a breach of the peace. Thus, the Court concludes that there was no actionable breach of the peace on August 16, 2018.

In response to Plaintiff's arguments, Defendants argue only that they had a right to repossess the vehicle due to Plaintiff's non-payment and that, because Siani's Towing is an independent contractor, Defendants have no liability for their actions. While the first statement may be accurate, especially when viewing the facts in the light most favorable to Defendants, Defendants are incorrect regarding their liability.

Comment three to Section 9609 addresses this situation exactly and provides that "[i]n considering whether a secured party has engaged in a breach of the peace . . . courts should hold the secured party responsible for the actions of others taken on the secured party's behalf, including independent contractors engaged by the secured party to take possession of collateral." 13 Pa. C.S.A. § 9609, cmt 3; see Gen. Motors Acceptance Corp. v. Vucich, 787 N.Y.S.2d 745, 747 (N.Y. App. Div. 2005) (finding under New York's analogous provision that

this section "impose[s] a nondelegable duty on . . . a secured creditor to keep the peace in the course of a repossession"). Therefore, Defendants are liable for the undisputed breach of the peace that occurred on December 27, 2017.

If a secured party fails to comply with Section 9609 by, inter alia, breaching the peace, Section 9625 provides that the secured party is liable for the amount of any loss caused by the breach of peace. 13 Pa.C.S.A. § 9609, cmt. 4, § 9625(b). Plaintiff, however, has not alleged any damages arising from the altercation on December 27, 2017, which was the breach of the peace, such as physical injury or property damage resulting therefrom. Indeed, Plaintiff redeemed the vehicle two days after it was repossessed and has not alleged any specific damages that occurred during that time. Thus, a jury must determine the amount to which, if anything, Plaintiff is entitled for the breach. See Scott v. Fred Beans Chevrolet of Limerick, Inc., 183 F. Supp. 3d 691, 697-98 (E.D. Pa. 2016) (providing that "the question of whether [plaintiff] suffered a compensable injury and, if so, the extent of that injury, is for a jury to decide") (citing Davis v. Mullen, A.2d 764, 768 (Pa. 2001)).

IV. CONCLUSION

Plaintiff's motion for summary judgment is granted in part and denied in part. Plaintiff's motion as to his UTPCPL claim is denied while Plaintiff's motion as to his unlawful repossession

claim is granted. However, a jury will determine the amount of damages, if any, to which Plaintiff is entitled for this claim.

An appropriate order follows.

Additional material from this filing is available in the Clerk's Office.