IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO.: CVA1 09-62
Lower Court Case No.: 2009-SC-6641-O

THE AUTO SOURCE, INC.,
Appellant,

v.

MICHAEL DEMARCO,
Appellee.
_____/

Appeal from the County Court,
for Orange County,
Wilfredo Martinez, Judge.

Christopher J. Atcachunas, Esquire,
for Appellant.

No appearance for Appellee.

Before POWELL, SHEA, MIHOK, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT'S FINAL JUDGMENT

Appellant, The Auto Source, Inc., timely appeals the trial court's Final Judgment for Plaintiff, dated November 14, 2009, awarding damages and costs in favor of Appellee, Michael Demarco. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. Appellee did not favor this Court with an answer brief.

According to the documents in the appellate record, Appellant/Seller and Appellee/Buyer entered into a written sale and purchase agreement on January 19, 2009, for a used 2005

Mitsubishi Galant automobile. The purchase price was $11,490.94, payable as follows: trade-in of Appellee's used 2001 Kia Sephia automobile, valued at $500; $1,500 cash deposit at signing; and payment of the balance of $9,990.94 plus finance charges of $112.78 due on February 18, 2009. Appellee immediately took delivery of the Mitsubishi automobile. Appellee's application for financing with McCoy Federal was denied on February 10, 2009. Appellee did not make the final payment on February 18, 2009. Appellee returned the Mitsubishi automobile more than thirty days after the loan denial, during which time Appellee used the Mitsubishi automobile and that the Kia trade-in was resold to someone else.[1]

Appellee filed a small claims action for a "refund of the down payment after a loan denial." Appellant did not file a written answer or counter-claim. Following the bench trial, during which both parties called witnesses and presented evidence and exhibits, the trial court took the matter under advisement and entered a final judgment in favor of Appellee in the amount of $2,000 plus $225 court costs. This appeal followed.

The final judgment failed to contain any findings of fact or conclusions of law. There was no memorandum of decision accompanying the final judgment. Appellant did not file a transcript of the trial proceedings or a stipulated statement pursuant to Rule 9.200(a)(4), Florida Rules of Appellate Procedure.[2]

We have before us a record which is not sufficient enough to determine how the trial court arrived at its decision and whether it was correct. Thus, we are left with a number of

[1] Appellant's brief contains a section titled "STIPULATED FACTS" but there is nothing in the record to show that Appellee stipulated to it.

[2] The trial clerk's minutes reflect that no court reporter was present at the trial, and we believe that it would be futile to remand this case with directions to attempt to obtain a proper stipulated statement pursuant to Rule 9.200(a)(4), Florida Rules of Appellate Procedure. It is unlikely that Appellee would agree with the statement or that the trial judge could recollect the testimony given after such a lapse of time.

significant factual and legal questions unanswered. For example, was there a mutual rescission of the contract?[3] At what price was Appellee's trade-in sold for? Was there a condition precedent in the contract that Appellee obtain financing from McCoy Federal?[4] If so, was the condition oral or written? If oral, was it barred by a clause in the contract?[5] If written, where does it appear in the record? Was the contract breached by Appellee, and if so, did Appellant immediately notify Appellee that it considered the contract breached and demand immediate return of the Mitsubishi? If so, what damages did Appellant suffer and how are they to be measured?

Consequently, given the state of this appellate record, we think the proper course of action to take is to set aside the final judgment, and remand this case for a new trial.[6] Appellant shall have fifteen days from receipt of the mandate to file a written answer and/or counterclaim, if he so desires. When the case is at issue, the trial court shall set the case for a new trial.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Final Judgment, dated November 14, 2009, is **REVERSED** and this case is **REMANDED** for further proceedings consistent with this opinion.

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[3] Appellant's brief states that after the loan application was denied and Appellee did not pay the balance due, "the parties attempted to reach an agreement on another vehicle that Appellee could afford." This suggests that there might have been a mutual rescission of the contract. If so, it seems that Appellee would be entitled to return of his $1500 deposit plus his trade-in vehicle (or value thereof if it had been resold), less the fair market rental value of the Mitsubishi and any incidental expenses incurred by Appellant for cleaning, repairs, etc.

[4] Appellant's brief states that "[t]he deal was consummated . . . with the assurance that financing was obtained through McCoy Federal." Also, the contract reflects a finance charge, the record contains a written loan denial, and Appellee's statement of claim requests a refund of the down payment because Appellant refused to pay it "after a loan denial." This suggests that there may have been a condition precedent.

[5] This clause provided that "[a]ny change to this contract must be in writing and we must sign it. No oral changes are binding."

[6] Had Appellee filed an answer brief agreeing or disagreeing with Appellant's "Stipulated Facts," or adding additional facts, we might have been able to decide this case. This Court entered two Orders to Show Cause for Appellee's failure to file an Answer Brief and he failed to comply with both. We think granting a new trial is an appropriate sanction.

DONE AND ORDERED at Orlando, Florida this __14___day ____September_____, 2010.

_____/s/_____
ROM W. POWELL
Senior Judge

_____/s/_____
TIM SHEA
Circuit Judge

_____/s/_____
A. THOMAS MIHOK
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 14 day of September, 2010, to the following: **Christopher Atcachunas, Esquire**, 840 North Highland Avenue, Orlando, Florida 32803 and **Michael Demarco,** 803 Beverly Avenue, Altamonte Springs, Florida 32701.

_____/s/_____
Judicial Assistant