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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 05/17/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PROTRACKGPS, INC.,) 1 CA-CV 11-0606
)
Plaintiff/Counterdefendant/) DEPARTMENT E
Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
BHFC FINANCIAL SERVICES, INC.,) of Civil Appellate
) Procedure)
Defendant/Counterclaimant/)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-019654

The Honorable Edward O. Burke, Judge (Retired)

AFFIRMED

Michael J. Fuller Phoenix
Attorney for Plaintiff/Counterdefendant/Appellee

Poli & Ball, P.L.C. Phoenix
By Michael N. Poli
Kesha A. Hodge
Attorneys for Defendant/Counterclaimant/Appellant

J O H N S E N, Judge

¶1 BHFC Financial Services, Inc. ("BHFC") appeals from
the superior court's judgment in favor of ProtrackGPS, Inc.

("Protrack") on Protrack's claim and BHFC's counterclaim for breach of contract. BHFC also appeals from the denial of its motions for new trial and to amend the judgment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 BHFC makes "high risk" used-car loans, and Protrack sells and installs global positioning system ("GPS") units for cars. In July 2006, BHFC contracted to buy Protrack GPS units to install in cars financed by BHFC. In June 2010, Protrack filed a complaint alleging BHFC failed to pay for some of the GPS units it purchased. BHFC answered and counterclaimed, arguing many of the GPS units it received were defective and that Protrack had failed to repair or replace them as the contract required. The dispute was subject to compulsory arbitration. An arbitrator awarded Protrack \$37,363, and BHFC appealed the decision to the superior court.

¶3 A month before trial, BHFC sent a letter to Protrack asking where BHFC could deliver the allegedly defective units so that Protrack could evaluate them pursuant to the contract. The letter, however, was returned as undeliverable. Approximately one month later - four days before trial - BHFC delivered the letter to Protrack's CEO during his deposition. BHFC's letter was its only attempt to return the allegedly defective units to Protrack. BHFC's owner testified at trial that 73 GPS units

were defective and that BHFC paid \$210 for each unit. He admitted, however, that BHFC did not return any of the 73 units for failure evaluation.

¶4 The superior court entered judgment in favor of Protrack without any offset on BHFC's claim, finding that the contract required BHFC to return any assertedly defective units to Protrack for evaluation before claiming a refund of the purchase price.¹ After some other offsets, the superior court awarded Protrack \$28,161. The court later denied BHFC's motions for new trial and to amend the judgment.

¶5 We have jurisdiction of BHFC's appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1), (2), (5)(a), and 12-2101.01(A)(4) (West 2012).²

DISCUSSION

¶6 BHFC argues the superior court erred in finding that BHFC did not comply with the warranty provision of the sales

¹ After the conclusion of the trial, BHFC filed a separate action against Protrack in which it alleged Protrack failed to repair or replace the allegedly defective units.

² Absent material revisions after the relevant date, we cite a statute's current Westlaw version. Although the superior court's order denying BHFC's motion for new trial was unsigned, pursuant to A.R.S. § 12-2102(B) (West 2012), we may review the denial of a motion for new trial in our review of the signed final judgment. See *Bauer v. Crotty*, 167 Ariz. 159, 163 n.1, 805 P.2d 392, 396 (App. 1991).

agreement because it failed to return the 73 GPS units to Protrack for a failure evaluation. We review the interpretation of a contract *de novo*. *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000).

¶7 The plain language of the contract's warranty provision unambiguously required BHFC to return any defective units to Protrack to enable Protrack to comply with its warranty obligations:

Hardware is covered by a limited lifetime warranty against defects in parts and workmanship. Defective units will be repaired or replaced at [Protrack's] discretion. Warranties will be voided if product is subject to misuse, abuse, or damage due to collision, faulty installation or any natural act of god. *Defective units must be returned by [BHFC] to [Protrack] for failure evaluation.*

(Emphasis added.)

¶8 Despite the contract provision requiring that BHFC "must" return defective units to Protrack for a failure evaluation, BHFC admitted it returned none of the units to Protrack. Although BHFC wrote to Protrack in February 2011 requesting information about where to deliver the units, its letter was sent approximately eight months after BHFC filed its counterclaim, two months after the arbitrator issued his judgment and only one month before trial in the superior court. Furthermore, when the letter was returned to BHFC as

undeliverable, BHFC did nothing to pursue the matter, but waited nearly another month before handing the letter to the CEO of Protrack during his deposition four days before trial.

¶9 BHFC argues that Protrack "ran out of" its inventory of GPS units and argues the parties agreed that under the warranty, Protrack could not require BHFC to accept a unit from a different manufacturer as replacement for a unit purchased under the contract. But the contract did not entitle BHFC to replacement of any defective unit; it allowed Protrack to repair any unit that did not work rather than replace it. For all of these reasons, we agree with the superior court that because BHFC did not return the units to Protrack as the contract required, its counterclaim for breach of warranty fails.

¶10 BHFC argues Protrack waived the right to insist on compliance with the return requirement by failing to ask BHFC to deliver the units for a failure evaluation and then using BHFC's failure to do so as a "shield." BHFC argues it violates public policy to allow a seller to avoid its warranty obligation by waiting until trial to claim the buyer did not comply with a return requirement.

¶11 A party may waive any provision of a contract by express or implied conduct. *Am. Cont'l Life Ins. Co. v. Ranier Const. Co., Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980). "One who prevents the fulfillment of a condition precedent, or

its performance by the other party, may not take advantage of his act, and the performance of the condition is excused." *Tyson v. Tyson*, 61 Ariz. 329, 333, 149 P.2d 674, 676 (1944).

¶12 BHFC, however, cites no act by Protrack that supports its contention that Protrack waived its contractual right to evaluate the units before deciding to repair or replace them under the warranty provision. Instead, BHFC seems to argue, without citation to any authority, that Protrack was obligated to remind BHFC of its obligation to return the defective units. Nor is there evidence that Protrack used BHFC's failure to return the units as a "shield" to avoid a meritorious claim. Instead, Protrack's CEO testified that on average, 49 of 50 returned GPS units are "simple fixes." Nor does BHFC offer any authority for the proposition that it violates public policy for a seller to refuse to issue a refund when the buyer has not complied with a contract term requiring it to return allegedly defective units for repair evaluation.

¶13 BHFC argues its counterclaim entitled it to an offset representing what it paid for GPS units that were defective because it made a prima facie showing that the units were defective and Protrack offered no rebuttal evidence. But BHFC was not entitled to damages under the contract absent a showing that Protrack had breached its warranty, and Protrack's warranty obligation was not triggered until BHFC returned the allegedly

defective units for evaluation. Having failed to return the allegedly defective units for evaluation, BHFC was not entitled to damages.

¶14 Because we agree with the superior court's interpretation of the contract, we need not address BHFC's other arguments related to the denial of its counterclaim. Furthermore, because we conclude the language of the warranty provision is plain, we decline BHFC's request to strike Protrack's brief for failing to cite legal authority.

CONCLUSION

¶15 For the foregoing reasons, we affirm the superior court's judgment and its denial of BHFC's motion for new trial and motion to amend judgment. Citing a provision in the contract that entitles it to "reasonable attorney fees incurred . . . in the collection or attempted collection of . . . unpaid balances," Protrack asks for an award of fees. We grant Protrack its costs and reasonable attorney's fees on appeal, upon compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/

DIANE M. JOHNSEN, Judge

CONCURRING:

/s/

MAURICE PORTLEY, Presiding Judge

/s/

PHILIP HALL, Judge