SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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Re: Meyer & Meyer, Inc. v. Mule-Hide Products Company, Inc. and ABC Supply Co., Inc.
C.A. No. N10A-12-011-RRC

Submitted : July 14, 2011
Decided : October 12, 2011

On Plaintiff Below/Appellant's Appeal from a Decision of the Court of Common Pleas.

AFFIRMED.

Dear Counsel:

I. INTRODUCTION

Meyer & Meyer, Inc. appeals a decision of the Court of Common Pleas holding that both a manufacturer and retailer of commercial goods were not liable for express warranty claims under Delaware's Commercial Code. On appeal, this case requires the Court to decide whether to uphold the lower court's holding by determining whether an alleged verbal statement of product effectiveness was a

valid express warranty when contrasted with express written disclaimers of verbal warranties. Secondly, this case requires analysis of whether the lower court's reasoning was based upon substantive errors of fact. This Court affirms the decision of the lower court by finding that the warranties were effectively disclaimed and that any factual errors were at most harmless error.

II. FACTS[1]

Meyer & Meyer, Inc., Plaintiff Below/Appellant, ("Meyer & Meyer" or "Appellant") is a Delaware corporation that constructs and remodels buildings. Meyer & Meyer was employed to remodel a building located at 250 New Garden Road, Toughkenamon, Pennsylvania ("the structure"). The roof of the structure was a sloping A-frame metal roof, with an addition on the back-side of the building that contained a flat roof. As part of the remodeling process, Meyer & Meyer installed a new metal roof on one-half of the building, while keeping the original portion of the metal roof on the other half.

Additionally, as part of the remodeling, Meyer & Meyer installed sprayed-on foam insulation against the underside of the sloping metal roof on the A-frame portion. Once installed, the sprayed-on insulation acted as a seal, which prevented air and moisture from passing through it to the roof. During remodeling, Meyer & Meyer did not use the same insulation for both the A-frame portion of the roof and the flat portion of the roof. Rather, instead of the sprayed-on foam insulation, the flat portion of the roof was insulated with fiberglass insulation. Unlike the sprayed-on foam insulation, the fiberglass insulation did not create an airtight seal between the underside and the roof. Therefore, the fiberglass insulation allowed moisture and condensation to vent through from the underside to the roof.

Once the insulations had been applied, Meyer & Meyer sought to coat the metal roof with a substance that would repel water so as to prevent leakage into the structure's interior. To obtain a recommendation on a potential roof coating, the President of Meyer & Meyer, Peter Meyer, contacted ABC Supply Co, Inc. ("ABC") and spoke with salesman Michael Balay ("Balay").

Balay recommended a product made by Defendant Below/Appellee, Mule-Hide Products Co., Inc. ("Mule-Hide" or "Appellee"), known as A-300. Meyer claimed at the trial in the Court of Common Pleas that Balay verbally instructed him

[1] The facts set forth below are largely taken from Appellant's "Statement of Facts" as well as from Appellee's "Statement of Relevant Facts."

that the A-300 product would be warranted for five to ten years.[2] During the discussion, Balay handed Meyer the Mule-Hide Application Handbook, which contained provisions regarding warranties and limitations of those warranties.[3] At some point in the process of installing the A-300, Meyer also received an instructional videotape explaining the installation process and a brochure about the A-300 product.

Meyer explained that he read the entire Application Handbook, brochure, and watched the entire instructional video. Meyer also received invoices from ABC when purchasing the A-300 product, which contained a paragraph disclaiming all express and implied warranties. Additionally, the A-300 containers included a similar disclaimer of warranties.

The Application Handbook provided in pertinent part:

> "[N]o statement made by anyone may supersede this information, except when done in writing by Mule-Hide Products Co., Inc. Since the manner of use is beyond our control, Mule-Hide does not make nor does it authorize anyone to make any warranty, guarantee or representation, expressed or implied, concerning this material ***except that it conforms to Mule-Hide physical properties*.** Buyer and user accept the products under these conditions and assume the risk of any failure…loss or liability resulting from the…use of the product whether or not it is…used in accordance with the directions or specifications."[4](emphasis added)

Specifically the Application Handbook described the product's effectiveness: "This [product's] liquid applied membrane completely bonds to the surface as it dries; yet remains elastomeric. It stretches as the substrate moves and then returns to its original shape without deformation." [5] (internal quotation marks omitted)

The Application Handbook also explained in pertinent part:

> "The statements provided concerning the material shown are intended as a guide for ***material usage*** and are believed to be true and accurate. No statement made by anyone may supersede this information, except when done in writing by Mule-Hide Products Co., Inc."[6](emphasis added)

[2] Appellant's Ex. A. at 69.
[3] Appellant's Ex. B.
[4] Appellant's Ex. B at 29.
[5] Appellant's Ex. B at 5.
[6] Appellant's Ex. B. at 29.

Meyer & Meyer purchased A-300 and applied it to the roof. Meyer & Meyer claims that the product was applied to the roof in accordance with the instructions provided to Meyer.[7] Within six months, Appellant alleges that the A-300 product began to bubble, crack, and peel.[8] Meyer contacted Balay of ABC, who in turn contacted Mule-Hide employee Richard Barbeau ("Barbeau"). After Barbeau inspected the roof, Meyer contended that Barbeau suggested that the bubbling, cracking, and peeling required Meyer & Meyer to purchase and apply more A-300 in a thicker fashion.[9]

Conversely, and relying on facts not included in Appellant's brief, Defendants contend that neither Balay nor Barbeau saw any blistering or bubbling on the roof and had no reason to believe that there was a manufacturing defect with the A-300 product. Barbeau claimed he did not witness any blistering or bubbling, but rather observed roof problems related to a roof-leak emanating from improper flashing between two portions of the roof.

In following the recommendation that Meyer contended at trial that he had received, he purchased additional A-300 and applied it according to instructions provided by Barbeau. Despite the additional application, the product bubbled, cracked and peeled within months.[10] Barbeau conceded that when he inspected the roof after the second application of A-300, he noted that while water bubbles appeared on the A-frame roof, the flat roof remained in perfect condition. While present for the second visit, Barbeau inspected the insulation underlying the A-frame roof and based upon his observations, determined there was not a manufacturing defect with the A-300, but rather concluded that the reason for the bubbling and blistering was the spray foam insulation underneath the A-frame roof. Barbeau surmised that the sprayed-on foam insulation did not allow any condensation buildup to vent, which resulted in the roof defects.

Barbeau took a sample of the A-300 that was then present on the roof and sent it to Mule-Hide's headquarters for testing. The results of those samples indicated that the samples "exhibited good overall appearance with no sign of blisters or other film defects and intercoat adhesion is good."[11] Mule-Hide concluded that there was no product defect and that the cause of the suffered damages was most likely

[7] Appellant's Ex. C at 16.
[8] Appellant's Ex. D.
[9] Appellant's Ex. E at 29.
[10] Appellant's Ex. F.
[11] Appellee's Br. at 5.

condensation buildup.[12] Between the two purchases of A-300, the parties have stipulated that Meyer & Meyer has spent over $15,000 for the product.

III. PROCEDURAL POSTURE

This action originated from Plaintiff Below Meyer & Meyer's suit in a Justice of the Peace Court. As such, recovery for the Plaintiff is limited to the Justice of the Peace's statutory limit of $15,000. On February 18, 2009, a Justice of the Peace issued an Opinion and Order entering judgment in favor of Meyer & Meyer and against Mule-Hide in the amount of $15,000 plus court costs and post-judgment interest. Additionally, the court entered judgment in favor of Meyer & Meyer against ABC in the amount of $15,000 plus court costs and post-judgment interest.

On March 5, 2009, Mule-Hide and ABC timely appealed the Justice of the Peace judgment to the Court of Common Pleas in and for New Castle County, Delaware. On October 29, 2010, the Court of Common Pleas submitted a decision after trial reversing the decision of the Justice of the Peace and entering judgment in favor of ABC and Mule-Hide. The Court of Common Pleas concluded as follows: "This Court is not convinced by a preponderance of the evidence that the product contained a material defect and that any warranty was breached in this case. As such, no liability can be attributed to the Defendants."[13] On December 22, 2010, Meyer & Meyer filed this Appeal to the Delaware Superior Court.

IV. STANDARD OF REVIEW

Appeals from the Court of Common Pleas to this Court "shall be reviewed on the record and shall not be tried de novo."[14] The Superior Court's function when addressing an appeal from the Court of Common Pleas is similar to that of the Delaware Supreme court.[15] The Superior Court must limit its review to correcting errors of law and determining whether the Trial Judge's factual findings "are adequately supported by the record and are the product of orderly and logical deductive process."[16] If a Court of Common Pleas decision is supported by sufficient evidence, it must be accepted by the Delaware Superior Court.[17]

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[12] Appellee's Ex. P at 7.
[13] *ABC Supply Co. v. Meyer & Meyer*, C.A. No. 4-09-001271 (Del. Com. Pl. Nov. 24, 2010).
[14] 10 Del C. § 1326(c).
[15] *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985).
[16] *Romain v. State Farm Mutual Auto. Ins. Co.*, 1999 WL 1427801, at *1 (Del.Super.Dec.2,1999) (citing *Wyatt v. Motorola, Inc.*, 1994 WL 714006, at *2 (Del.Super.Mar.11, 1994)).
[17] *Levitt v. Bouvier,* 287 A.2d 671, 673 (Del.1972).

DISCUSSION

A. THE COURT OF COMMON PLEAS DID NOT ERR AS A MATTER OF LAW BY RULING ON WARRANTY CLAIMS COLLECTIVELY, RATHER THAN BY ANALYZING EACH WARRANTY INDIVIDUALLY

Meyer & Meyer first argues that the Court of Common Pleas erred as a matter of law by analyzing the warranty claims collectively, rather than by analyzing each alleged express warranty individually. In total, Meyer & Meyer alleged four separate express warranties. Three of the Appellant's asserted warranties were made in writing either on the exterior of the bucket of the A-300 product itself, or contained within the Application Handbook. The fourth asserted warranty was an alleged verbal warranty made by Mule-Hide employee Barbeau, and is the focus of the Appellant's first question presented on appeal.

Appellant asserts that the statement made by Barbeau, while he was on site observing the roof for the first time, constituted an express warranty. The warranty in question involved Barbeau's alleged suggestion that the best solution to the roof problems observed would be to apply more A-300 product. Meyer & Meyer's asserts that this recommendation constituted an express affirmation that the additional application of A-300 would remedy the roof issues.

The Uniform Commercial Code at 6 Del C. § 2-313 governs the creation of express warranties. In pertinent part, it provides:

> "(1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."

Appellant argues that because Barbeau is a Mule-Hide employee, and was sent to address the roof's issues, any unconditional affirmations stand alone as express

warranties. As such, Appellant argues the suggestion that a thicker application was the solution stands alone as an express warranty.

Appellant argues that the Court of Common Pleas erred when it analyzed the written language contained on the A-300 container and the Application Handbook without separately considering the verbal affirmations of Barbeau. Appellant cites 6 Del C. §2-317, as stating that warranties made by a manufacturer are cumulative. However, the statute in fact reads in pertinent part, that "warranties whether express or implied shall be construed as consistent with each other and as cumulative."[18]

Additionally, while Appellant asserts that the impact of warranties are to be understood cumulatively, Appellant stresses that each warranty itself is mutually exclusive and independent.[19] Under these circumstances, Appellant argues that cumulative must mean that Meyer & Meyer is permitted to enforce verbal affirmations made by Mule-Hide, through its agent, Barbeau, even if the written warranties limit an inconsistent verbal warranty.

Appellant relies on a New Jersey case, *Cooper v. Cities Service Oil Co.,* 55 A. 2d 239 (N.J. Super. 1947) for the proposition that cumulative means that Appellant is entitled to enforce the verbal affirmations even if the written warranties are inconsistent. [20] However, this case was overturned by the New Jersey Court of Appeals and Errors in *Cooper v. Cities Service Oil Co.*, 137 N.J.L. 181, 181-82 (1948). Furthermore, it is inapposite because it is a worker's compensation case.

Appellee initially counters by asserting that Barbeau never made any such verbal affirmation. Instead, Barbeau contends that when he was contacted to check on the roof, the problems were related to roof-leakage. Rather than the problem being caused by a lack of A-300, Barbeau contends that the problem was caused by improper flashing where two different portions of the roof were improperly connected. Barbeau contends that the improper flashing was quite obvious and that he immediately noticed the problem once he was on the roof.

In the alternative, Appellee argues that even if one assumes that Barbeau did make such a verbal affirmation, the Application Handbook and the sales brochure specifically explain that no statements made by any party may supersede the

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[18] 6 Del C. §2-317.
[19] *Townsend Grain & Feed Co. (In re LB. Trucking, Inc.*) 163 Bank. 709 (Bank. D.Del. 1994).
[20] *Cooper v. Cities Serv. Oil Co*., 55 A. 2d 239 (N.J. Super. 1947), *rev'd* 137 N.J.L. 181 (1948).

written warranties and limitations. Appellee asserts that Meyer & Meyer's arguments are weakened because, while Meyer & Meyer contends that Barbeau's verbal confirmation was a warranty, the language of the sales brochure and Application Handbook validly disclaim the precise type of alleged verbal warranty made by Barbeau. Therefore, Appellee asserts that legal propositions stating that the warranties are cumulative or mutually exclusive are irrelevant because those two propositions are not at issue.

The Appellant responds that the exception provided which affirmatively warrants that the Mule-Hide will conform to physical properties, was also breached under the circumstances of this case. Appellant argues that because Barbeau allegedly claimed that a thicker application would be necessary for the A-300 to bond to the roof, the physical properties of the product were unfulfilled under the express warranty exception.

Furthermore, Appellant argues that there is no requirement that statements altering the disclaimer of verbal warranties be in writing. Appellant points to additional language in the Application Handbook relating to material usage and argues that the application of a thicker coating and even improper roof flashing does not constitute a modification of the A-300's material usage, and as such, a writing is not required to supersede the general disclaimer.

This Court finds that the Court of Common Pleas did not err by ruling on the warranty claims collectively, rather than individually. The express written warranties included on the A-300 packaging as well as within the Application Handbook directly address and completely disclaim the exact type of verbal warranty in question.

As to the alleged verbal warranty, even if one accepts Appellant's argument that Barbeau's suggestion constituted an express warranty, the warranty is ineffective because this Court must analyze warranties both cumulatively as well as consistently. Here, any express verbal warranty by Barbeau is disclaimed by multiple writings which make it impossible to understand them as consistent with each other.

Regarding Appellee's argument that Barbeau's verbal warranty addressed the physical properties, and as such that it was a valid verbal warranty, this Court is similarly not persuaded. Even if this Court assumes that Barbeau made the statement in question, the suggestion to apply the A-300 in a thicker fashion is not a statement regarding the physical properties of the product. The Appellant has not

demonstrated by a preponderance of the evidence that the A-300 failed because of inconsistency in the product's physical properties. Finally, the Court is not convinced by Appellant's contentions regarding whether the alleged verbal affirmation by Barbeau was related to the product's material usage. Therefore, the Court finds that the Court of Common Pleas did not err as a matter of law by ruling on the warranty claims collectively.

B. IT WAS NOT AN ERROR OF FACT FOR THE COURT OF COMMON PLEAS TO HAVE FOUND THAT WATER PONDED ON THE ROOF OF THE STRUCTURE, AND THEREFORE THAT WRITTEN EXPRESS WARRANTIES DID NOT APPLY.

Appellant separately argues that it was an error of fact for the Court of Common Pleas to find that water ponded on the roof of the structure, and that therefore, written express warranties are inapplicable. Appellant argues that because no evidence of roof ponding was presented in this case, the lower court's finding that the roof incurred ponding and blistering is a error of fact. The appellant argues that the lower court erred in relying upon that fact in reaching a conclusion.

Appellant argues that this factual analysis is an error of fact, because a metal roof does not blister and is not constructed to allow for water to pond. Furthermore, no such evidence was presented to explain that any ponding was present. Rather, according to Appellant, the A-300 product was what blistered and water collected and ponded within the blistering A-300 product, not the roof itself. Appellant argues this error of fact makes it impossible for the Court to exculpate the appellant from the warranties.

Appellee responds that despite Appellant's assertions, ponding was present upon the subject roof and points to Barbeau's statements to that effect. Furthermore, Appellee contends that the Appellant's conclusion that a factual error was made because the roof itself is incapable of blistering misconstrues the lower court's finding that the blistering was outside the scope of the warranty. According to Appellee, when the disclaimer provision is read correctly, it states that "any damages ***to the coatings system***…including but not limited to blistering…are outside the scope of the warranty."[21](emphasis added)

[21] Appellant's Ex. B.

Even assuming, arguendo, that the Court of Common Pleas factually erred in a belief that the roof bubbled and cracked, rather than the A-300 product, this constitutes at most harmless error. Assuming a factual misunderstanding regarding which of either the roof or the A-300 was suffering the damage, nothing changes in this Court's reasoning.

This Court agrees with the well-reasoned decision of the Court of Common Pleas. While it is not disputed that the product bubbled, cracked and peeled when applied to the Appellant's roof, Appellant has not sufficiently fulfilled the burden of demonstrating by a preponderance of the evidence that the product was solely responsible for the damages. In assessing the lower court's ruling, this Court must consider the entirety of the evidence and each of the possible factors which may have contributed to the product's failures. Under the facts of this case, the possible factors which may have contributed to the product's failures include the application process, the roof's surface and underlying insulation, as well as the A-300 product. Understanding all those variables as potential reasons for the product's failure, the A-300's failures are not established beyond the burden required. Therefore, in assessing the lower court's conclusions, the factual findings of the Court of Common Pleas "are adequately supported by the record, are credible and are the product of an orderly and logical deductive process."[22]

CONCLUSION

For the foregoing reasons, Plaintiff Below, Appellant's Appeal from a Decision of the Court of Common Pleas is **AFFIRMED.**

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary

[22] *Romain,* 1999 WL 1427801, at *1.