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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000542-MR

ALEXANDER EVANS, CO-TRUSTEE
OF THE EVANS LIVING TRUST DATED
NOVEMBER 2, 2000; AND PHYLLIS
EVANS, CO-TRUSTEE OF THE EVANS
LIVING TRUST DATED NOVEMBER
2, 2000 APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CI-03680

JNT, INC., D/B/A KAR SMART,
A KENTUCKY CORPORATION;
TONY SPEARS; AND FORD MOTOR
CREDIT COMPANY, A/K/A JAGUAR CREDIT APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; D. LAMBERT AND MAZE, JUDGES.

MAZE, JUDGE: Alexander Evans and Phyllis Evans, as co-executors of the Evans Living Trust (collectively Evans), appeal from a summary judgment by the Fayette Circuit Court dismissing their claims against Tony Spears and JNT, Inc., d/b/a Kar Smart (JNT) arising from the sale of a vehicle. We agree with the trial court that their claims for breach of contract, negligent misrepresentation, and breach of express and implied warranties were precluded based upon the "As Is" clause in the purchase contract. However, we conclude that the "As Is" clause did not preclude the claim for intentional misrepresentation, or for violations of the damage disclosure requirements of KRS 186A.540 and the Kentucky Consumer Protection Act (KCPA). Hence, we affirm in part, reverse in part, and remand for additional proceedings.

JNT is a Kentucky corporation with its principal place of business in Lexington, Kentucky. Spears is a principal of JNT and a salesman for Kar Smart. On November 29, 2006, Spears, acting on behalf of JNT, purchased a 2004 Jaguar XKR S/C from Manheim Corporate Services, Inc., an automobile auction located in Nashville, Tennessee. Manheim had acquired the Jaguar from a Jaguar dealership in New York State. At the time of the sale, the Jaguar's odometer indicated that the vehicle had been driven 5,793 miles. JNT took possession of the vehicle and had warranty work performed on it at the Jaguar dealership in Lexington.

Thereafter, JNT listed the Jaguar for sale on ebay.com. Shortly thereafter, Alexander Evans, a resident of Reno, Nevada, contacted JNT about the

vehicle. Spears and Evans discussed the vehicle over several conversations. Evans alleges that Spears told him that the Jaguar had a clean repair history, except for minor discrepancy on the odometer mileage. Evans also alleges that Spears told him that the Jaguar dealership in Lexington had conducted a pre-purchase inspection, so it would not be necessary for Evans to inspect the car himself. Spears provided Evans with a vehicle repair history report through AutoCheck, and Evans obtained his own report on the Jaguar through Carfax. Neither report listed any significant damage or repair history.

Evans agreed to purchase the Jaguar for $42,700 and wired the purchase price to JNT. The purchase contract executed on January 26, 2007, expressly stated that the vehicle was being sold "AS IS" with no warranties except for the balance of any factory warranty.[1] Evans then arranged to have the Jaguar transported from JNT's facility in Lexington to his residence in Nevada. The vehicle was delivered to the Evans' residence on February 17, 2007.

Subsequently, Evans discovered that the Jaguar had extensive body and engine damage that substantially diminished its value. After unsuccessfully attempting to have JNT address the issues with the vehicle, Evans filed this action against JNT and Spears, alleging claims for breach of contract, intentional misrepresentation, negligent misrepresentation, breach of express and implied

[1] The Evans Living Trust was listed as the purchaser of the Jaguar, and the Purchase contract was signed by Alexander and Phyllis Evans, in their capacities as co-trustees of the Trust.

warranties, violation of the KPCA, KRS 367.170, and violation of the damage disclosure requirements of KRS 186A.540.[2]

After an extended period of discovery, JNT filed a motion for partial summary judgment regarding Evans's claims arising from KRS 186A.540. JNT separately sought summary judgment on the other claims, arguing that the "AS IS" language in the purchase agreement precluded the claims for breach of contract, misrepresentation, and breach of warranty. On October 1, 2013, the trial entered an order granting summary judgment with respect to the claims arising under KRS 186A.540. Thereafter, on March 13, 2014, the trial court entered an order granting JNT's motion for summary judgment on the remaining claims. This appeal followed.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. *See*

[2] JNT and Spears filed a third-party against Ford Motor Credit Company for any damages caused by its failure to disclose damage to the Jaguar. The claims against Ford Motor Credit were dismissed as a part of the summary judgment in favor of JNT. While Ford Motor Credit is a nominal party to this appeal, Evans does not seek any direct relief against that entity.

also Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991). Since summary judgment involves no fact-finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

We shall first address the trial court's order granting the summary judgment dismissing Evans's claims arising under KRS 186A.540, which provides as follows:

> (1) An individual, or a dealer required to be licensed pursuant to KRS Chapter 190, shall disclose all damages to a motor vehicle:
> (a) Of which the individual or the dealer has direct knowledge;
> (b) Which result in repairs or repair estimates that exceed one thousand dollars ($1,000); and
> (c) That occur while the motor vehicle is in the individual's or the dealer's possession and prior to delivery to a purchaser.
> (2) Disclosure under this section shall be in writing and shall require the purchaser's signature acknowledging the disclosure of damages.

The statute imposes an affirmative duty on a dealer to disclose repairs to a vehicle that exceed $1,000. *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 727 (Ky. App. 2008). In support of his claim that JNT violated this duty, Evans submitted the report of Barry Roberts, a certified master body and refinish technician who inspected the vehicle. Roberts found evidence that the Jaguar had prior and major collision damage. Roberts found further evidence of improper repairs which substantially diminished the value of the vehicle. Evans also points to invoices from Ford Motor Credit and Manheim Auto Auction showing pre-sale

repairs to the Jaguar in the amount of $1,868. Evans argues that JNT's failure to disclose the damage and the other repairs amounted to a violation of its duties under KRS 186A.540.

In response, JNT states that there was no evidence that any of the damage occurred while the Jaguar was in its possession. Furthermore, JNT states that it had no knowledge of the body and engine damage to the Jaguar. That damage was not noted by any of the vehicle reporting companies, or by the Jaguar dealership in New York, by Ford Motor Credit, who consigned the vehicle, or by Manheim Auto Auction. The only repairs which were actually billed were paid by Manheim Auto Auction in the amount of $612.60. JNT also argues that any other repairs made under the Jaguar's warranty are not covered by the reporting requirements.

In the current case, the central issue is whether the statute requires a dealer to disclose the value of repairs made but covered under the vehicle's warranty. In enacting KRS 186A.540, the General Assembly found that purchasers buying vehicles are entitled to know if the vehicle has sustained prior severe damage. *Keeton*, 275 S.W.3d at 727, *citing* KRS 186A.500. The Act should be broadly interpreted to accomplish this legislative purpose. *Id., citing Smith v. General Motors Corp.*, 979 S.W.2d 127, 130 (Ky. App. 1998).

Cumulative repair work in excess of $1,000 indicates that a vehicle has been damaged. *Id.* Furthermore, disclosure of such repairs, regardless of when or where the damages occurred, or whether the repairs were paid directly or

covered under the vehicle's warranty, serves the legislative purpose by preventing dealers from hiding the fact that the vehicle has been damaged. *Id.* at 727-28. Therefore, we conclude that KRS 186A.540 imposes a duty on a dealer to disclose cumulative repair work exceeding $1,000 of which it has direct knowledge, regardless of whether the repairs were actually billed to the dealer. Consequently, the trial court erred by granting summary judgment for JNT on this claim.

Evans next argues that the trial court erred in granting summary judgment for JNT on the remaining claims. As a basis for the summary judgment, the trial court relied primarily upon *Roberts v. Lanigan Auto Sales*, 406 S.W.3d 882 (Ky. App. 2013), which involved a factually and legally similar situation. In that case, Roberts, the buyer, and Lanigan, an automobile dealer, executed a purchase contract, which contained a clause stating the vehicle is "sold as is ... without any guarantee express or implied[.]" Following the purchase, Roberts independently obtained a report which indicated that the vehicle had previously been involved in an accident and suffered damage to the undercarriage of the vehicle. Roberts brought an action against Lanigan asserting claims for fraud and violation of the KCPA. The trial court granted Lanigan's motion to dismiss, concluding that claims were precluded by the "As Is" clause in the purchase contract. *Id.* at 883-84.

On appeal, this Court affirmed. The Court pointed to KRS 355.2-316 which provides that, "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all faults' or other

language which in common understanding calls the buyer's attention to the exclusion of warranties[.]" KRS 355.2–316(3)(a). A valid "As Is" clause prevents a buyer from holding a seller liable if the thing sold turns out to be worth less than the price paid, because it is impossible for the buyer's injury on account of this disparity to have been caused by the seller and the sole cause of the buyer's injury is the buyer himself or herself. By agreeing to purchase something "as is," a buyer agrees to make his or her own appraisal of the bargain and to accept the risk that he or she may be wrong, and the seller gives no assurances, express or implied, concerning the value or condition of the thing sold. *Roberts*, 406 S.W.3d at 884, *citing* 67 Am.Jur.2d *Sales* § 772 (2012).

Consequently, this Court held that the "As Is" clause precluded Roberts's claims under the KCPA. Similarly, this Court held that the "As Is" clause precluded the fraud claim because Roberts could not have reasonably relied on Lanigan's misrepresentation. *Id.* at 884-85. In the current case, JNT likewise argues that the "As Is" clause in the purchase agreement precludes Evans's claims.

We agree with JNT that the holding in *Roberts* clearly precludes Evans's claims for breach of contract, and breach of express and implied warranties. For the same reason, we conclude that the holding in *Roberts* precludes Evans's claim for negligent misrepresentation, because justifiable reliance is an element of that claim. *See Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575, 580 (Ky. 2004). However, *Roberts* does not hold that an "As Is" clause bars a claim for fraud in all circumstances. Rather, the case

merely holds that the clause transfers the risk to the buyer that the condition or value of the goods is not what the seller represents. *Roberts*, 406 S.W.3d at 885.

In this case, Evans alleges that Spears told him that the Jaguar had not been wrecked, was in "perfect" condition, and that Evans did not need to inspect the car because a pre-purchase inspection had already been done at the local Jaguar dealership. Based on these representations, Evans contends that he reasonably relied on Spears's assurances to buy the Jaguar without having it inspected by an independent mechanic.

Disclaimers, such as an "As Is" clause, do not insulate a party from his own fraud, but they do put the opposing party on notice that projections ought not to be uncritically relied upon. *Flegles, Inc. v. TruServ Corp.*, 289 S.W.3d 544, 550 (Ky. 2009). But as noted in *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 260-61 (Ky. App. 2007), false and fraudulent representations made by one of the parties to induce the other to enter into the contract are not merged in the contract. "It is a stern but just maxim of law that fraud vitiates everything into which it enters." *Id.* at 550, *quoting Veterans Service Club v. Sweeney*, 252 S.W.2d 25, 27 (Ky. 1952). Consequently, parol evidence is admissible to show that the making of the contract was procured by fraudulent representations, and does not serve to vary the terms of the written contract. *Id.*

We conclude that Evans has presented sufficient evidence to establish an actionable claim for fraud in the inducement. Notwithstanding the "As Is" clause in the purchase contract, Evans has alleged that Spears induced him to buy

the Jaguar without a pre-purchase inspection. Furthermore, Evans also alleges that the "As Is" clause was inserted into the purchase contract after he had transferred the money to JNT for the Jaguar. While it remains to be seen whether Evans can establish all of the elements of intentional misrepresentation, we conclude that summary judgment was not appropriate on the claim at this point in the proceedings. For the same reasons, we conclude that the "As Is" clause did not preclude Evans's claim for violation of the KCPA arising from intentional misrepresentation of the condition of the Jaguar. *Elendt v. Green Tree Servicing, LLC,* 443 S.W.3d 612, 617 (Ky. App. 2014).

Accordingly, the summary judgment of the Fayette Circuit Court is affirmed with respect to the dismissal of Evans's claims for breach of contract, breach of express and implied warranties, and negligent misrepresentation, but is reversed with respect to the dismissal of Evans's claims for violations of the KCPA and KRS 186A.540 and for intentional misrepresentation. Therefore, we remand for additional proceedings on the merits of the latter claims.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
William A. Dykeman Winchester, Kentucky	William H. Partin, Jr. Lexington, Kentucky