

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0672

DALE SEVERIO AND DONNA SEVERIO

VERSUS

PPG INDUSTRIES, INC., AND THE HOME DEPOT, INC.

Judgment Rendered: DEC 22 2021

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On Appeal from the 21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Trial Court No. 148916

Honorable Charlotte H. Foster, Judge Presiding

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BEFORE: WHIPPLE, C.J., PENZATO, AND HESTER, JJ.

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PENZATO, J.

In this redhibition suit, plaintiffs appeal a judgment in favor of defendants, PPG Industries, Inc. (“PPG”) and Home Depot U.S.A., Inc. (“Home Depot”), dismissing plaintiffs’ demands with prejudice. For the reasons set forth below, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2014, plaintiffs, Dale and Donna Severio, were building a second home in Maurepas, Louisiana. They contracted with Spier Drywall to perform the sheetrock and finishing on their home. By June 13, 2014, the interior walls of the home had been sheet-rocked, taped and floated, sanded, and textured throughout. The Severios then purchased Glidden Duo Paint + Primer, Egg Shell interior paint (“Glidden Duo Paint”), manufactured by defendant PPG, from three different Home Depot stores in the area. After applying a second coat of the Glidden Duo Paint on the walls of their home, they noticed that the Glidden Duo Paint was not covering properly and was “gummy” when touched. The Severios contacted PPG and received contact information for Sharon Knox, the territory manager for PPG. Ms. Knox worked with the Severios to attempt to fix the problems with the Glidden Duo Paint in their home. Ms. Knox took paint samples from the walls of the Severio home, and forwarded the samples and the Severios’ complaint for analysis. After being advised that there was no problem with the Glidden Duo Paint, the Severios filed this lawsuit, alleging that Home Depot, as the seller of the Glidden Duo Paint, and PPG, as the manufacturer of the Glidden Duo Paint, were presumed to know of all defects of the product and were responsible for express and implied warranties of fitness for the product’s normal use.

PPG filed a third-party demand naming as defendant Spier Drywall, a sole proprietorship owned by Warren Spier, Sr. PPG alleged that Spier Drywall negligently performed the sheetrocking and/or texturing of the interior walls of the

Severio home, which negligence resulted in poor adhesion of the Glidden Duo Paint. PPG sought judgment against Spier Drywall in the event PPG was cast in judgment in connection with the Severios' demand.

A bench trial was held on February 18, 2020. At the conclusion of the testimony, the trial court took the matter under advisement. On March 11, 2020, the trial court issued reasons for judgment indicating that, “[a]fter reviewing the testimony and other evidence submitted at trial, [it was] not convinced by a preponderance of the evidence that the [Glidden Duo Paint] was defective,” and therefore found in favor of the defendants. On April 17, 2020, the trial court signed a judgment in favor of defendants PPG and Home Depot. The Severios appealed, but this court found the April 17, 2020 judgment lacked sufficient decretal language, and dismissed the appeal. On March 29, 2021, the trial court signed an amended judgment in favor of defendants PPG and Home Depot, dismissing all of the Severios' demands with prejudice. The March 29, 2021 judgment further decreed that PPG's third party claims were rendered moot by the trial court's judgment against the Severios, and therefore dismissed PPG's claims against Spier Drywall. The Severios appeal the March 29, 2021 judgment.

ASSIGNMENTS OF ERROR

The Severios urge the following assignments of error:

- (1) The trial court committed manifest error and was clearly wrong in its ruling that the Severios did not carry their burden of proving that the Glidden Duo Paint manufactured by PPG and sold by Home Depot was defective; and
- (2) The trial court committed manifest error and was clearly wrong by admitting into evidence the Technical Service Report Letter written by Michael W. Falb under the “business records” exception to the hearsay rule.

LAW AND DISCUSSION

Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold which renders the thing either absolutely useless or its use so

inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice. La. C.C. art. 2520; *Cazaubon v. Cycle Sport, LLC*, 2011-0289 (La. App. 1 Cir. 11/9/11), 79 So. 3d 1063, 1065. A defect is also redhibitory when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price. La. C.C. art. 2520. There are three factors which must be present to give rise to a redhibition action: (1) a sale; (2) a defect; and (3) the defect must be of such a nature as to render the object purchased so inconvenient or imperfect it gives rise to a presumption the buyer would not have bought it, had he known of that defect. *MGD Partners, LLC v. 5-Z Invs., Inc.*, 2012-1521 (La. App. 1 Cir. 6/2/14), 145 So. 3d 1053, 1058, writ granted, 2014-1426 (La. 11/7/14), 152 So. 3d 162.

In order to establish a prima facie case of redhibition, a purchaser must show that a non-apparent defect existed at the time of the sale. La. C.C. arts. 2520 and 2530; *Cazaubon*, 79 So. 3d at 1065. “Defect” as contemplated in La. C.C. art. 2520 means a physical imperfection or deformity or a lacking of the necessary components or level of quality. *Cazaubon*, 79 So. 3d at 1065. Apparent defects that the purchaser might have discovered by simple inspection are not redhibitory defects. La. C.C. art. 2521.

Once the purchaser establishes a prima facie case, the burden shifts to the seller to show that it can somehow escape liability. *Cazaubon*, 79 So. 3d at 1065. Whether or not a thing is defective is a factual determination to be made by the trier of fact, which determination will not be set aside on appeal absent manifest error. *Id.* at 1065-66.

At issue in this appeal is whether the Severios proved that the Glidden Duo Paint was defective. The evidence presented at the trial is as follows.

Mrs. Severio testified that in 2014, she and her husband were in the process of building a “future second home” for their retirement. She testified that they acted as their own contractor, and hired Spier Drywall to do the sheetrock and texture work in the home. Mrs. Severio testified that she did not notice anything wrong with the drywall job and had no complaints with the work performed by Spier Drywall. In June of 2014, after the sheetrock was complete, the Severios went to Home Depot to purchase paint for the interior of the home. They were interested in the Glidden Duo Paint because they were doing the painting themselves and would be able to skip the primer step, which would mean less time and work for them. According to Mrs. Severio, prior to painting, they wiped down the walls and vacuumed everything to clean the sheetrock dust. Mrs. Severio’s brother Rusty assisted her and her husband with painting the house. Mr. Severio and Rusty painted the ceiling and walls of the home, while Mrs. Severio painted the doors and trim. After they applied the second coat of the Glidden Duo Paint, Mrs. Severio noticed that it was not drying. According to Mrs. Severio, the Glidden Duo Paint was dry to the touch, but when she looked down the hallway, there were shadows, and “it just didn’t look right.” She contacted Home Depot and was given contact information for Ms. Knox, the territory manager for PPG. Ms. Knox met the Severios at the home and could see what Mrs. Severio was talking about with regard to the shadowing down the hallway. According to Mrs. Severio, Ms. Knox accompanied the Severios to Home Depot where, upon Ms. Knox’s recommendation, the Severios were given five gallons of “gripper” and a gallon of paint in the same color as the Glidden Duo Paint they had purchased for the home. The Severios applied the gripper and painted the hallway, but this did not fix the shadows. Ms. Knox returned to the Severio home, and this time took samples of the paint to send off for analysis. According to Mrs. Severio, Ms. Knox put tape on the walls, and the paint came off with the tape. The Severios ultimately hired SR

Enterprise to remove the paint from the entire home and repaint the interior. According to Mrs. Severio, the problem with the Glidden Duo Paint was that it did not dry properly, was sticky, and did not adhere to the wall or the trim and doors that were painted with it.

Mr. Severio confirmed Mrs. Severio's testimony regarding their purchase of the Glidden Duo Paint at Home Depot. In connection with his testimony, Mr. Severio was shown a copy of a label/sticker, and agreed it was the same sticker that was on the Glidden Duo Paint that the Severios purchased from Home Depot. The "Application" section of the label provided as follows:

Mix thoroughly before use. May be applied by brush, roller or airless spray. Standard roller application should be used for best results. No thinning required. For airless spray, use a .015"-.019" tip at 2000 psi, adjust pressure as needed. For best touch-up results with airless spray, backroll airless spray area and touch-up with a standard roller. Application by conventional spray is not recommended. Two coats are required for new and uncoated surfaces. An additional coat may be necessary for dramatic color changes, dark colors or over rough surfaces for optimal appearance and hide. Do not apply when the surface or air temperature is below 50°F (10°C). Provide good ventilation and warmth for normal drying.

Mr. Severio acknowledged that he did not read the "Application" section, rather, he "[j]ust kind of glanced over it." According to Mr. Severio, his experience with painting was "limited." Mr. Severio testified that he and Rusty used a paint sprayer, which Rusty had purchased when he painted his own house a year prior to painting the Severio home, to apply the Glidden Duo Paint to the walls of the Severio home. Mr. Severio did not know whether the paint sprayer they used was airless. Nor did he know the size of the tip or the psi. He was unable to say that the paint sprayer they used conformed to the guidelines contained in the "Application" section of the Glidden Duo Paint. After spraying the paint onto the walls, Mr. Severio and Rusty "backrolled," i.e., rolled the paint to make sure it was evenly applied. Mr. Severio agreed with his wife's testimony that the Glidden Duo Paint did not adhere. He testified that the Glidden Duo Paint "peeled off in whole

pieces....like a banana” from the walls, the trim, the door and baseboards.

Mr. Spier, Sr., owner of Spier Drywall, testified that his son, Warren Spier, Jr., did the sheetrock/drywall work at the Severio home. According to Mr. Spier, Sr., his son advised him that there was a problem with the paint coming off the walls of the Severio home. Mr. Spier, Sr., inspected the home, and concluded that the peeling had nothing to do with the drywall because the paint itself was peeling off the top of the texture. While Mr. Spier, Sr., acknowledged that he did not strictly follow all of the instructions regarding the sheetrock texture spray that he used in his business, he testified that he has substantially done texturing drywall the same way for 37 years and has never encountered such a problem.

Stephanie Roane Berthelot, owner of SR Enterprise, testified regarding the work she did at the Severio home. Ms. Berthelot testified that the Severios hired her to remove the paint from the walls, do any repairs caused by the paint removal, and repaint the walls with a different product. According to Ms. Berthelot, the paint “never cured, meaning that it stayed tacky.” Ms. Berthelot testified that she had to remove the existing paint before repainting because the first layer of paint was not sticking to the sheetrock as it should. According to Ms. Berthelot, when she peeled the paint from the sheetrock, a lot of the texture material adhered to the paint, and very little texture material remained on the sheetrock. Ms. Berthelot repainted the walls using a different brand of paint plus primer, which she applied using a brush and roller.

Ms. Knox testified that as of the time of trial, she had been a territory manager for PPG for almost 20 years. Part of her job as territory manager is investigating complaints. As part of her complaint investigation, Ms. Knox gathers information regarding the weather conditions at the time the painting was being done. According to Ms. Knox, the temperature and humidity can affect the way the paint dries. Ms. Knox testified that in July of 2014, she was notified that there

was “some type of streaking” occurring at the Severio home, and went to the home to investigate. At the time of her first visit, Ms. Knox noted that the home was brand-new construction, with no air-conditioning, and floor-to-ceiling windows that let in a lot of natural light. With regard to the “streaking,” Ms. Knox stated that it was what she would call “lap” marks, caused by overlapping the paint with a paint roller. Ms. Knox recommended that the Severios use a flat paint finish, which would hide the imperfections reflected by the natural light. The Severios did not want to use a flat paint, and preferred to use an eggshell finish. Therefore, Ms. Knox recommended that the Severios use a different Glidden paint with a slightly lower sheen level along with a gripper primer to prevent sheen breakthrough. Ms. Knox provided the Severios the paint and gripper primer free of charge with the understanding that the Severios were going to try them in the hallway to see if the problem resolved. According to Ms. Knox, at the time of her first visit in July of 2014, the Severios did not tell her that the paint was peeling. If they had, she would not have advised them to paint over anything, explaining that the adhesion has to come from the first coat, and putting anything else on top would not make it adhere.

Ms. Knox returned to the Severio home in August of 2014, within a couple of weeks of the initial visit. According to Ms. Knox, the Severios had called and advised her that they could still see lap marks. They also told her that the paint was not adhering to the walls. On Ms. Knox’s second visit, she used packing tape to remove paint samples to send to PPG’s technical services for analysis. When Ms. Knox pulled off the tape, “a tremendous amount of sheetrock dust” came off with the paint. Ms. Knox testified that the texture material was stuck to the paint, leaving the drywall behind. This caused Ms. Knox to question the prep work that the Severios had done before painting. According to Ms. Knox, the Severios told her they did not do any prep work. Ms. Knox only took samples from the walls

because the Severios did not tell her that paint was not adhering to the trim, doors, or ceiling. According to Ms. Knox, Mr. Severio told her that the paint was sticking “just fine” on the doors and trim.

In connection with her investigation, Ms. Knox recorded the batch codes of the Glidden Duo Paint that the Severios used. A batch code is a code given to an entire batch of paint, comprised of between 2,000 and 10,000 gallons. The batch codes allow PPG to track specific paint, and any associated complaints. According to Ms. Knox, the Severios used Glidden Duo Paint from three to four different batches. Other than the Severios’ complaint, Ms. Knox testified that there were no complaints of the Glidden Duo Paint failing to adhere for any of the batch codes associated with the Glidden Duo Paint used by the Severios.

Finally, Ms. Knox testified regarding a letter she received from PPG’s technical services following its evaluation of the paint samples she took from the Severio home. The letter was written by Mr. Falb, a technical services representative of PPG Architectural Coatings. It was admitted into evidence over the objections of counsel. In his letter, Mr. Falb concluded as follows:

The presence of texture material on the underside of the peeled samples provided is evidence that the texture material did not have good adhesion to the drywall surface. The subsequent heavy application of the [Glidden Duo Paint] product most likely contributed to this delamination. The reported condition of peeling was not due to a faulty PPG product.

The trial court concluded that the Severios failed to prove by a preponderance of the evidence that the Glidden Duo Paint was defective. On appeal, the Severios argue that the facts that the Glidden Duo Paint was still “tacky” when Ms. Berthelot removed it four months after it was painted on the wall, and that it peeled off of the wood trim and doors as well as the walls, prove by a preponderance of the evidence that the Glidden Duo Paint had a redhibitory defect. Initially, we note that Ms. Berthelot did not testify that the fact that the

Glidden Duo Paint “stayed tacky” was a defect attributable to the paint itself. Rather, she stated that the issue with the paint on the walls that required its removal was that the first layer of paint was not properly adhering to the sheetrock. She further testified that when she peeled the paint from the sheetrock, the texture material adhered to the paint, with only a minimal amount of texture remaining on the sheetrock. Ms. Knox’s testimony was consistent with that of Ms. Berthelot. According to Ms. Knox, the texture material stuck to the paint, leaving the drywall behind, causing her to question the prep work done by the Severios before painting. Mrs. Severio’s trial testimony that she wiped down the walls and vacuumed the sheetrock dust was contradicted by Ms. Knox’s testimony that in August 2014, the Severios told her they did not do any prep work.

Mr. Severio acknowledged that his painting experience was limited and that he did not read the instructions for applying the Glidden Duo Paint. He could not state that his application of the paint by spraying and “backrolling” conformed to the instructions contained on the Glidden Duo Paint label, which indicated that, “[s]tandard roller application should be used for best results.” In fact, Ms. Berthelot testified that she repainted the walls using a brush and roller. Moreover, the Severios’ testimony that the Glidden Duo Paint peeled off the wood trim and doors as well as the walls was contradicted by that of Ms. Knox. According to Ms. Knox, she did not take paint samples from the wood trim and doors because Mr. Severio told her the Glidden Duo Paint was sticking “just fine” to the doors and trim. Finally, Ms. Knox testified that while the Severios used Glidden Duo Paint from at least three to four different batches, no other complaints regarding the paint’s failure to adhere were received for any of those batch codes. Based upon the above evidence, we do not find the trial court’s conclusion that the Severios failed to prove a defect in the Glidden Duo Paint to be manifestly erroneous.

In their second assignment of error, the Severios contend that the trial court

erroneously admitted into evidence the technical services letter authored by Mr. Falb. The Severios acknowledge that La. C.E. art. 803(6) provides an exception to the hearsay rule for records of regularly conducted business activity. They argue, however, that the analysis and conclusions contained in the letter are expert conclusions and/or opinions given, without any showing of Mr. Falb's scientific, technical, or other specialized knowledge, skill, experience, training, or education to qualify him as an expert pursuant to La. C.E. art. 702(A). The Severios made a similar argument when they objected to the admission of the letter at trial. The trial court inquired as to whether Mr. Falb's analysis was "a scientific analysis." Counsel for defendants responded that the report was not a scientific analysis indicating that Mr. Falb only looked at the paint samples "under a microscope." The trial court overruled the objection to the letter and admitted it into evidence.

The trial court did not reference the letter in its reasons for judgment, and was aware of the limited extent of Mr. Falb's analysis. Thus, we are unaware what weight, if any, was given the report by the trial court. As noted above, there was ample evidence in the record without reference to the letter to support the trial court's conclusion. Accordingly, even if the letter was improperly admitted, we find that it was harmless error. *See Gohres v. Dryer*, 2009-0473 (La. App. 1 Cir. 11/18/09), 29 So. 3d 640, 644.

CONCLUSION

For the above and foregoing reasons, the March 29, 2021 judgment of the trial court is affirmed. Costs of this appeal are assessed to Dale and Donna Severio.

AFFIRMED.