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NO. COA08-408

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

WELLIVER MCGUIRE, INC.,

Plaintiff,

v.

MEMBERS INTERIOR CONSTRUCTION, INC.,

Defendant and Third Party
Plaintiff,

v.

HUGHES SUPPLY, INC., THE HOME DEPOT, INC., AND UNITED STATES FIDELITY AND GUARANTY CO.,

Third Party Defendants,

Mecklenburg County
No. 06 CVS 6517

Court of Appeals

Slip Opinion

HUGHES SUPPLY, INC.,

Additional Third Party
Plaintiff,

v.

TAMKO BUILDING PRODUCTS, INC.
f/k/a TAMKO ROOFING PRODUCTS, INC.,

Additional Third Party
Defendant.

Appeal by defendant Members Interior Construction, Inc., from judgment entered 5 February 2008 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 September 2008.

Eisele, Ashburn, Greene & Chapman, P.A., by Douglas G. Eisele, for defendant and third party plaintiff-appellant.

Poyner & Spruill, L.L.P., by Thomas L. Ogburn, III, for third party defendant-appellee.

ELMORE, Judge.

I. Background

On 13 June 2000, Welliver McGuire, Inc. (Welliver), entered into a contract with the University of North Carolina at Charlotte (UNCC) to build a science and technology building (UNCC Project). Pease Associates (Pease) created the architectural plans for the multi-story brick building, which included specifications for a sheet rubberized air barrier (SRAB) to be affixed to gypsum sheathing between the metal studs and the brick exterior. The purpose of the SRAB was to prevent moisture from entering the building.

Welliver entered into a subcontract with Members Interior Construction, Inc. (plaintiff),[1] on 29 January 2003 wherein plaintiff agreed to install, *inter alia*, the SRAB specified for the UNCC Project. Plaintiff agreed to perform its duties in accordance with the terms of Welliver's contract with UNCC, which specified that "[a]ll related accessories [for the SRAB] . . . shall be as recommended by or of the same manufacturer as the barrier material used[] [such as] Perm-A-Barrier by W. R. Grace & Company [W. R.

[1] We denominate Members Interior Construction, Inc., as plaintiff and Hughes Supply, Inc., as defendant for the sake of clarity, even though the parties assume different titles with respect to the overall cause of action not raised in this appeal.

Grace]; Duramem 714 Dyna-Barrier by Pecora Corporation [Pecora], or equal." On 30 January 2003, plaintiff submitted literature to Pease in order to gain approval for an alternate SRAB manufactured by Tamko Roofing Products, Inc. (Tamko). Pease informed plaintiff that it took "no exception" to the substitution the same day.

Before plaintiff became part of the UNCC project, Murray Fater, a sales representative for Hughes Supply, Inc. (defendant), reviewed Pease's project specifications. Using that information, Mr. Fater compiled market packages of specific materials for prospective contractors on the UNCC Project. Mr. Fater then contacted plaintiff to offer a price quote for the SRAB manufactured by W.R. Grace, and defendant provided the quote on 17 October 2002. Michael Weber, plaintiff's project manager, estimator, and vice president at the time, responded by asking whether defendant could supply the Tamko SRAB instead, because the Tamko SRAB was more cost efficient than the SRAB's manufactured by W. R. Grace and Pecora. Mr. Fater responded by obtaining information and pricing for the required Tamko materials, and provided plaintiff with a price quote on 20 November 2002. Prior to Mr. Weber's inquiry, defendant had not sold any products manufactured by Tamko.

Plaintiff and defendant's business relationship predated the SRAB price quotes by several months. In July 2002, plaintiff signed a written "Credit Application/Billing Instruction and Continuing Personal Guaranty" (Credit Agreement) with defendant for

an unrelated construction project at East Lincoln High School. The Credit Agreement's terms and conditions stated in part:

> All sales made by Seller [defendant] are subject to the Terms and Conditions of Sale[.]
>
> * * *
>
> Goods not manufactured by Seller are warranted and guaranteed only to the extent and in the manner warranted and guaranteed to Purchaser by the original manufacturer of such goods.
>
> ALL OTHER WARRANTIES ARE EXCLUDED, WHETHER EXPRESS OR IMPLIED BY OPERATION OF LAW OR OTHERWISE INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

(Capitalization in original).

On 29 April 2003, plaintiff placed its first order for the Tamko SRAB with defendant. The goods arrived on the job site on 7 May 2003, and Members received an invoice from defendant for the order on 12 May 2003. The goods supplied to the job site were accompanied by delivery tickets containing the same disclaimer within its terms and conditions; the invoice also contained identical disclaimer language. Plaintiff paid defendant after receiving the invoice, and subsequent orders were placed by plaintiff for the Tamko SRAB on 3 October and 22 October 2003.

Plaintiff began installing the Tamko SRAB on 7 May 2003, and defects surfaced shortly thereafter. The seams of the installed Tamko SRAB developed wrinkles and gaps, which prompted Pease to halt installation on or after 30 July 2003. On 21 August 2003, Welliver ordered the removal of the gypsum sheathing, the Tamko SRAB, and other components affected by the defects such that only

the metal studs remained. The gypsum sheathing was then replaced by another sheathing material, and on 4 December 2003, the SRAB manufactured by W.R. Grace was installed on the project.

On 29 March 2006, Welliver filed a breach of contract claim against plaintiff. On 28 April 2006, plaintiff filed an answer with a counterclaim against Welliver and third-party complaint against defendant, The Home Depot, and United States Fidelity and Guaranty Company. Plaintiff's complaint against defendant alleged breaches of: (1) express warranty, (2) implied warranty of merchantability, and (3) implied warranty of fitness for a particular purpose. On 17 July 2006, defendant filed an answer to plaintiff's complaint, and asserted that: (1) no express warranty was made to plaintiff and (2) all implied warranties were disclaimed per the terms and conditions of the Credit Agreement. Defendant filed an amended answer on 26 June 2007.

Defendant filed a motion for summary judgment on 22 June 2007 and an amended motion for summary judgment on 6 August 2007. On 29 January 2008, defendant's motion was granted by the Honorable Timothy L. Patti as to all of plaintiff's claims. From the trial court's order granting defendant's motion, plaintiff appeals.

II. Summary Judgment

In reviewing an order granting summary judgment, we examine the record to determine "whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Taylor v. Coats*, 180 N.C. App. 210, 212, 636 S.E.2d 581, 583 (2006); N.C. Gen. Stat. § 1A-1, Rule 56(c)

(2007). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). "[E]vidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

A.

As a preliminary matter, we note that the trial court's order granting partial summary judgment does not dispose of "the entire controversy between all parties," and is therefore interlocutory. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999). However, an interlocutory appeal may be heard if "a substantial right of the appellant" is affected. *Plummer v. Kearney*, 108 N.C. App. 310, 313, 423 S.E.2d 526, 529 (1992); *see* N.C. Gen. Stat. § 7A-27 (2007).

The North Carolina Supreme Court has stated that "the right to avoid the possibility of two trials on the same issues can be such a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982) (quotations and citation omitted). Where the same factual issues may possibly be litigated twice, this Court "has created a two-part test to show that a substantial right is affected, requiring a party to show (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exist[s]." *Camp v. Leonard*, 133 N.C. App. 554, 558, 515 S.E.2d 909, 912 (1999) (quotations and citation omitted).

The overlap of factual issues in this case poses the possibility of inconsistent verdicts: Members' defenses to Welliver's pending claims parallel its claims against Hughes based on the same alleged representations. If Members were required to wait until a final judgment was entered to appeal the summary judgment order and then prevailed as to that order, then Members could potentially be "prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989). Accordingly, we conclude that this appeal is properly before this Court. *See Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 566 S.E.2d 818 (2002) (substantial right affected when summary judgment granted to third-party defendant where third-party defendant's representations presented common factual issues in plaintiff's claim against defendant and defendant's claim against third-party defendant).

B.

Plaintiff first argues that the record is sufficient to support a finding that defendant expressly warranted the Tamko SRAB to conform to the specifications for the UNCC project. We disagree.

Under the Uniform Commercial Code (UCC), a seller may create an express warranty through "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[.]" N.C. Gen. Stat. § 25-2-313(1)(a) (2007).

To support a finding of an express warranty under this section, plaintiff cites portions of Mr. Weber's deposition, which provide in relevant part:

> Q. Was there anything that Mr. Fater told you that made up part of your decision to purchase the Tamko product?
>
> A. The fact that [defendant] was going to sell the product would have given me some assurance that the product would perform. I would not think [defendant] would have put their name on it if it wouldn't.
>
> Q. Did he expressly say anything?
>
> A. No, I don't remember that expression.
>
> Q. [Y]ou don't believe a company like [defendant] would deliberately sell a product that wouldn't work?
>
> A. [T]hat's what I believe, yes[] sir.
>
> Q. Mr. Fater didn't expressly say anything to you?
>
> A. Not that I can remember.

While defendant's willingness to order and supply Tamko materials might have been part of plaintiff's motivation to purchase the Tamko SRAB from defendant, this fact alone falls short of satisfying the cornerstone element for the creation of an express warranty under the UCC. In particular, this fact is not substantial evidence that defendant made a promise or factual affirmation with regard to the Tamko SRAB upon which plaintiff relied. *See Westover Products, Inc. v. Gateway Roofing, Inc.*, 94 N.C. App. 63, 72, 380 S.E.2d 369, 375 (1989) (defining "critical

inquiry" as whether buyer relied upon seller's statements). Accordingly, this assignment of error is overruled.[2]

C.

Plaintiff next argues that the record is sufficient to support findings that defendant breached the implied warranties of merchantability and fitness for a particular purpose. We disagree.

"Unless excluded or modified . . ., a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." N.C. Gen. Stat. § 25-2-314(1) (2007). A warranty that goods will be fit for a particular purpose is implied in a contract for the sale of such goods where: (1) the "seller at the time of contracting has reason to know any particular purpose for which the goods are required[,]" and (2) "the buyer is relying on the seller's skill or judgment to select or furnish suitable goods[.]" N.C. Gen. Stat. § 25-2-315 (2007). "[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous[.]" N.C. Gen. Stat. § 25-2-316(2) (2007). Exclusions of the implied warranty of fitness for a particular purpose must also be in writing and conspicuous. *Id.*

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[2] Plaintiff additionally offers evidence of conversations defendant conducted with representatives at Tamko. To the extent defendant might have discussed plaintiff's installation of the SRAB with Tamko, these discussions were not conducted with plaintiff, and plaintiff does not present evidence demonstrating that the content of these exchanges formed the basis of its bargain with defendant. Thus, this evidence is also insufficient to show that defendant made an express warranty to plaintiff under the UCC.

The disclaimer in the parties' written Credit Agreement states:

> ALL OTHER WARRANTIES ARE EXCLUDED, WHETHER EXPRESS OR IMPLIED BY OPERATION OF LAW OR OTHERWISE INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

(Capitalization in original.)

This disclaimer mentions merchantability and fitness for a particular purpose. Since plaintiff does not dispute that this writing is conspicuous, the disclaimer satisfies the requirements for excluding the implied warranties of merchantability and fitness for a particular purpose under N.C.G.S. § 25-2-316(2). Thus, our only task is to determine whether the disclaimer applies to plaintiff's purchases of the Tamko SRAB.

Plaintiff first claims that it never intended the Credit Agreement to apply to transactions with defendant beyond the completion of its work at East Lincoln High School in 2002.

We have long adhered to the rule that "[t]he duty to read an instrument[,] or to have it read before signing it, is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity." *Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963) (citation and quotations omitted).

In this case, the Credit Agreement unequivocally states that "*[a]ll sales* made by [defendant] are subject to the Terms and Conditions of Sale[.]" (Emphasis added.) As a result, plaintiff's

ex post facto assertion that no meeting of the minds existed regarding the Credit Agreement's duration is invalid, because plaintiff was under an affirmative duty to inspect the contract before agreeing to its terms and conditions. *See, e.g.*, *Massey v. Duke Univ.*, 130 N.C. App. 461, 503 S.E.2d 155 (1998).

We therefore conclude that the Credit Agreement applied to plaintiff's purchases of the Tamko SRAB in accordance with its stated terms, and that defendant properly excluded the implied warranties of merchantability and fitness for a particular purpose.

Plaintiff also contends that defendant invalidated the Credit Agreement by making representations that invoked the implied warranties of merchantability and fitness for a particular purpose.

The implied warranties of merchantability and fitness for a particular purpose may be implied in a contract by law unless properly excluded or modified by agreement. *See* N.C.G.S. §§ 25-2-314 to -316 (2007). In this case, the Credit Agreement precludes the inclusion of the implied warranties in issue. As a result, even assuming representations by defendant could be construed to support an implied warranty, the Credit Agreement bars the implied warranties of merchantability and fitness for a particular purpose from becoming part of the contract.

Accordingly, the record shows that defendant effectively disclaimed the implied warranties of merchantability and fitness for a particular purpose through the parties' Credit Agreement, and we conclude that no genuine issue of material fact exists with

respect to plaintiff's claims under these warranties. This assignment of error is overruled.[3]

D.

Plaintiff lastly argues that defendant is bound by representations made by Tamko employees because Tamko employees were acting as agents of defendant. We disagree.

Two elements must be shown to establish a principal-agent relationship: "(1) [a]uthority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Colony Associates v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637, 300 S.E.2d 37, 39 (1983) (quotations and citation omitted).

In its brief, plaintiff declines to cite even one instance in the record to support its agency theory. Instead, it generally reiterates its contention that defendant made "representations about the Tamko SRAB" and claims further that defendant referred plaintiff to Tamko "both for [the] initial description of the Tamko SRAB and later for instructions on the proper application of the Tamko product."

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[3] Our conclusion as to the validity of the Credit Agreement's disclaimer of implied warranties obviates our need to address plaintiff's further argument that the implied warranty disclaimers in the invoices are unenforceable. Moreover, because summary judgment was proper as to plaintiff's claims for breaches of express and implied warranties, we decline to address plaintiff's remaining arguments as to: (1) whether the limitation of buyer's remedy contained in the Credit Agreement fails of its essential purpose, or (2) whether defendant's defenses based on the North Carolina Products Liability Act are without merit.

Even assuming these general averments are true, they do not establish that defendant had either authority or control over Tamko's employees. This assignment of error is overruled.

III. Conclusion

Based on the foregoing reasons, we affirm the trial court's order granting defendant summary judgment.

Affirmed.

Judges HUNTER and GEER concur.

Report per Rule 30(e).