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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JERRY BRENISER and GALE)
THURBER,)
)
 Plaintiffs,)
)
 v.)
)
 WESTERN RECREATIONAL VEHICLES,)
 INC., a foreign corporation,)
)
 Defendant.)
_____)

No. CV-07-1418-HU

FINDINGS OF FACT &
CONCLUSIONS OF LAW

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HUBEL, Magistrate Judge:

Plaintiffs Jerry Breniser and Gale Thurber bring this action against defendant Western Recreational Vehicles, Inc., regarding an allegedly defective fifth-wheel trailer plaintiffs purchased in August 2005. Plaintiffs bring a single breach of warranty claim under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 - 2312 (MMWA).

Both parties have consented to entry of final judgment by a

1 - FINDINGS OF FACT & CONCLUSIONS OF LAW

1 Magistrate Judge in accordance with Federal Rule of Civil Procedure
2 73 and 28 U.S.C. § 636(c).

3 The case was tried to the Court on March 17, 2009. Plaintiffs
4 appeared through their counsel. Defendant, which was initially
5 represented by counsel in this case, did not make an appearance
6 because it presently has no counsel and thus, it may not appear in
7 this Court. Local Rule 83.9(b) ("Unless otherwise specifically
8 provided by law or Court order, a corporation may appear or act
9 only through an attorney.").

10 These are my Findings of Fact and Conclusions of Law. Fed. R.
11 Civ. P. 52(a).

12 FINDINGS OF FACT

13 On or about August 26, 2005, plaintiffs purchased a 2006
14 Alpenlite Portofino fifth-wheel trailer from Highway Trailer Sales
15 in Salem, Oregon. Pltfs' Exh. 1. The Alpenlite was manufactured
16 by Western Recreational Vehicles, Inc., a Washington corporation
17 (WRV). Plaintiffs planned to live in the trailer full-time while
18 traveling for Breniser's work as an aircraft mechanic.

19 At the time of the sale, a representative of Highway Trailer
20 Sales advised plaintiffs that the trailer was covered by WRV's
21 warranty, and that plaintiffs could bring the fifth-wheel to
22 Highway Trailer Sales for any and all repairs. See Pltfs' Exh. 2
23 (warranty).

24 WRV warranted that the fifth-wheel would be free of
25 substantial defects in material and workmanship attributable to
26 WRV, for one year from the date of purchase. Id. A substantial
27 defect is defined as the failure of a part or system to perform
28 substantially within the design or manufacturing specifications for

1 that part or system, and which substantially limits the usage of
2 the good. Id. The warranty also expressly provides for a pro-rata
3 five-year limited warranty covering the "structural integrity" of
4 the unit, meaning fixed, or stationary components including the
5 front, side, and back walls, ceiling, and undercarriage. Id.

6 Not long after the August 2006 purchase, plaintiffs began
7 discovering numerous defects and damage to the fifth-wheel. The
8 defects included a leaking roof and slider seals, a leaking
9 refrigerator, faulty shower, faulty moulding, faulty vents,
10 defective microwave, defective furnace, defective electronics,
11 damaged or defective slider, de-lamination at trailer-side fifth-
12 wheel support, and defective wheels. See Pltfs' Exh. 3 (service
13 records from Highway Trailer Sales in October 2005, November 2005,
14 January 2006, reflecting numerous problems). In addition, as a
15 result of one or more of the defects, the fifth-wheel has sustained
16 water damage, mold, and damage to wiring and circuitry. Pltfs'
17 Exh. 9 (photographs showing mold on walls and carpet).

18 Initially, plaintiffs brought the fifth-wheel to Highway
19 Trailer Sales for service under the WRV warranty. Id. (service
20 records show warranty work performed by Highway Trailer Sales). At
21 some point, Highway Trailer Sales was unable to remedy or repair
22 all of the defects and plaintiffs contacted WRV directly. WRV told
23 Breniser that he could continue to bring the trailer to Highway
24 Trailer Sales for warranty work, or could bring it directly to
25 WRV's service center in Yakima, Washington. See Pltfs' Exh. 4 at
26 p. 8 (December 29, 2005 email from WRV Customer Service
27 Representative Gary Ford indicating plaintiffs could schedule a
28 thorough inspection of the fifth-wheel at WRV's Factory Service

1 Center in Yakima, Washington).

2 In early February 2006, plaintiffs brought the fifth-wheel to
3 WRV's service center in Yakima. Pltfs' Exh. 4 at p. 11.
4 Nonetheless, on March 1, 2006, plaintiffs emailed WRV to express
5 continued dissatisfaction with the fifth-wheel and to ask for a
6 rescission of the transaction, with a total refund to plaintiffs.
7 Id. at p. 18.

8 The parties continued discussions about the ongoing problems,
9 including leaks and mold. E.g., Id. at p. 21. In 2007,
10 plaintiffs, through their attorney, again requested that WRV
11 repurchase the fifth-wheel and refund plaintiffs' out-of-pocket
12 losses. WRV refused to rescind the sale and refund plaintiffs'
13 out-of-pocket losses. The defects have continued, and plaintiffs
14 continue to experience leaking and mold growth in the fifth-wheel.
15 Plaintiffs have lived in the fifth-wheel since they bought it, and
16 continue to do so as of the time of trial.

17 On December 15, 2006, WRV sold its assets to Delaware
18 corporation Western Recreational Vehicles, Inc. (WRV-Delaware).
19 Pltfs' Exh. 10. Some liabilities were assumed under the Asset
20 Purchase Agreement between the two companies. Id.

21 CONCLUSIONS OF LAW

22 Plaintiffs' claim arises under the Magnuson-Moss Warranty Act,
23 15 U.S.C. §§ 2301-2312 (MMWA); (Dec. 12, 2008 Op. at pp. 5-7).

24 The warranty issued by the manufacturer of the fifth-wheel
25 trailer, WRV, was a limited warranty under the MMWA; (Dec. 12, 2008
26 Op. at pp. 7-9).

27 The binding arbitration provision in the limited warranty is
28 unenforceable and thus, plaintiffs' failure to follow the dispute

1 resolution provision in the warranty does not bar their claim;
2 (Dec. 12, 2008 Op. at pp. 9-11).

3 Defendant in this case, WRV-Delaware, assumed the liability of
4 this warranty under its Asset Purchase Agreement with WRV; (Dec.
5 12, 2008 Op. at pp. 15; Jan. 14, 2009 Op. at pp. 2-4).

6 Under the MMWA, state law provides the remedy for breach of a
7 limited warranty; (Dec. 12, 2008 Op. at pp. 15; Jan. 14, 2009 Op.
8 at pp. 4-7).

9 The appropriate state law remedy in this case is found at
10 Oregon Revised Statute § (O.R.S.) 72.8100, which allows a consumer
11 to sue the manufacture for breach of warranty when the manufacturer
12 maintains, or causes to be maintained, in the state sufficient
13 service and repair facilities to carry out the terms of the
14 warranty. The evidence shows that plaintiffs were instructed to
15 take the fifth-wheel to Highway Trailer Sales for warranty-related
16 repairs, and that plaintiffs did so, making Highway Trailer Sales
17 an authorized agent of the manufacturer WRV for purposes of O.R.S.
18 72.8100. Clark v. Ford Motor Co., 46 Or. App. 521, 529, 612 P.2d
19 316, 320 (1980) ("the dealer was the [manufacturer's] agent at
20 least for purposes of warranty work").

21 The statute provides that if the manufacturer is unable to
22 service or repair the good in compliance with the applicable
23 warranty, the manufacturer shall either replace the good or
24 reimburse the buyer in an amount equal to the purchase price paid
25 by the buyer, less a reasonable charge for the beneficial use by
26 the buyer, and damage, if any, to the good. O.R.S. 72.8100(4).

27 Plaintiffs timely notified the dealer and the manufacturer of
28 the defects that were covered under the warranty. WRV has failed

1 to service or repair the fifth-wheel in compliance with the limited
2 warranty. The defects in the fifth-wheel are substantial defects
3 as defined in the warranty, and occurred within one year of the
4 purchase date.

5 It is defendant's burden of proof to establish a "reasonable
6 charge for beneficial use" by plaintiffs. Clark, 46 Or. App. at
7 530, 612 P.2d at 320 ("If Ford is to set off the beneficial use
8 value of the vehicle to plaintiff, the burden is on it to show what
9 that value is.").

10 Although defendant, when represented by counsel, raised
11 several affirmative defenses in its Answer, it failed to re-assert
12 any affirmative defenses in the pretrial order, precluding its
13 ability to rely on any such affirmative defenses at trial. DP
14 Aviation v. Smiths Indus. Aerospace & Defense Sys. Ltd., 268 F.3d
15 829, 842 n.8 (9th Cir. 2001) ("a pretrial order generally
16 supersedes the pleadings, and the parties are bound by its
17 contents.") (internal quotation and brackets omitted).

18 Even if the affirmative defenses raised in the Answer are
19 considered, no evidence or argument was offered at trial in support
20 of any of these defenses. Notably, defendant failed to raise the
21 issue of an offset for beneficial use in its Answer. It also
22 failed to provide any evidence of the value of plaintiff's
23 beneficial use, if any. Defendant has been on notice since this
24 Court's December 12, 2008 Opinion on plaintiff's first summary
25 judgment motion, that Oregon consumer statutes supplied the
26 appropriate remedy for plaintiffs' MMWA claim. And, defendant has
27 been on notice since plaintiff's supplemental motion for summary
28 judgment was filed on January 2, 2009, that O.R.S. 72.8100, was the

1 particular statute that plaintiffs relied on.

2 The record suggests that plaintiffs' ability to live in the
3 fifth-wheel might have some value, but, because of defendant's
4 failure of proof, there is no evidence of what that value might be.
5 Additionally, the record supports finding that the value is
6 negligible given the multiple defects, the continued leaking, and
7 the incessant mold growth.

8 The purchase price of the fifth-wheel was \$85,333.69. Pltfs'
9 Exh. 1. Under O.R.S. 72.8100(4), plaintiffs are entitled to
10 judgment in that amount. I reject plaintiffs' argument that they
11 are entitled to a judgment of \$88,765.53 because, as the record
12 shows, this includes interest paid on the loan they used to finance
13 part of the purchase price. The statute allows plaintiff to
14 recover the purchase price which is the price paid by the buyer to
15 the seller. There is no support for the purchase price to include
16 monies attributable to finance charges and interest paid to someone
17 other than the seller.

18 The statute also provides that when the purchase price is
19 refunded, the buyer is to return the defective good to the
20 warrantor free and clear of liens and encumbrances. O.R.S.
21 72.8100. Here, while returning the fifth-wheel to Highway Trailer
22 Sales is sufficient, Clark, 46 Or. App. at 529, 612 P.2d at 320
23 ("Because the dealer was designated as [the manufacturer's] agent
24 for warranty work, we conclude that the return of the vehicle to
25 the dealer was a return to [the manufacturer] within the meaning of
26 the statute"), given the burdens already placed on plaintiffs, it
27 is more reasonable to order that plaintiffs make the fifth-wheel
28 available to defendant and require defendant to retrieve it.

1 Because of defendant's purported insolvency, the Judgment in
2 this case will require plaintiffs to make the fifth-wheel trailer
3 available to defendant within thirty days of recovering the monies
4 owed by defendant, whether that be by defendant's voluntary
5 payment, or from defendant involuntary through other means.

6 Plaintiffs seek prejudgment interest in the pretrial order.
7 Because state law provides the remedy for this federal cause of
8 action, I award plaintiffs prejudgment interest at the rate of 9%
9 per annum, beginning with the date of sale of the fifth-wheel,
10 under O.R.S. 82.010, since this result contemplates a rescission of
11 the contract.

12 Although plaintiffs sought attorney's fees in their Complaint,
13 I make no award of attorneys' fees because they failed to assert an
14 attorney's fee claim in the pretrial order.

15 CONCLUSION

16 Judgment is awarded to plaintiff in the amount of \$85,333.69.
17 Prejudgment interest is awarded, beginning with the date of sale of
18 August 26, 2005, at a rate of 9% per annum. Post-judgment interest
19 at that rate is also awarded. Within thirty days of payment by
20 defendant of the money owed, with interest, plaintiffs shall vacate
21 the fifth-wheel trailer, tell defendant where the fifth-wheel
22 trailer is located, and make it available to defendant wherever it

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1 is then located. Defendant then has thirty days to retrieve the
2 fifth-wheel trailer from that location. If defendant does not do
3 so, disposal of the fifth-wheel trailer is at plaintiffs'
4 discretion.

5 IT IS SO ORDERED.

6 Dated this 17th day of March, 2009.

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9 /s/ Dennis James Hubel
10 Dennis James Hubel
United States Magistrate Judge
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