

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001241-MR

C. KAY SHANNON and
READMOND PRINTING, INC.

APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE KELLEY ASBURY, JUDGE
ACTION NO. 98-CI-00627

DON HALL CHEVROLET-OLDSMOBILE, INC.

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, EMBERTON, and SCHRODER, Judges.

SCHRODER, JUDGE: This is an appeal by C. Kay Shannon from an order of the Boyd Circuit Court granting summary judgment to the appellee, Don Hall Chevrolet-Oldsmobile, Inc., (Don Hall).

On August 30, 1997, Shannon purchased a 1995 Chevrolet Tahoe from Don Hall. In exchange for the Tahoe, Shannon traded in her 1994 GMC Yukon and paid an additional \$6,500.00. The Buyer's Order provides that Don Hall allowed Shannon \$17,400.00 on the Yukon, resulting in a total purchase price of \$23,900.00 for the Tahoe.

During the closing of the sales transaction, Shannon executed a "Vehicle Verification Certificate." In executing the certificate, Shannon warranted that her Yukon had never been designated as a salvage vehicle, a rebuilt vehicle, or a water-damaged vehicle. The certificate provided that upon breach of this warranty, Shannon agreed to "pay the difference in value resulting from the breach" or that Don Hall could "elect to rescind the acceptance" of the vehicle.

Subsequent to the sales transaction, Shannon provided the title for the Yukon to Don Hall. On September 13, 1997, Don Hall sold the Yukon to Cheryl Johnson. At some point after the sale to Johnson, it was discovered that the Yukon was a rebuilt vehicle, and that this status was branded on the vehicle's title. Don Hall thereafter repurchased the Yukon from Johnson and, in so doing, incurred a sales tax of \$530.00.

Thereafter Don Hall sought to rescind its acceptance of the Yukon. Shannon resisted, and on June 24, 1998, Don Hall filed suit in Boyd Circuit Court against Shannon for breach of warranty, alleging that Shannon misrepresented the actual state of the Yukon and either intentionally or negligently deceived Don Hall from ascertaining the actual value of the vehicle.

On July 8, 1998, Shannon filed her Answer to the complaint denying any intentional and/or negligent misrepresentation, and pleading the affirmative defenses of contributory negligence, estoppel, waiver, the doctrine of laches, and failure to mitigate damages. On February 9, 1999, Don Hall filed a motion for summary judgment. On May 5, 1999,

the trial court granted Don Hall's motion for summary judgment. The judgment awarded Don Hall damages of \$17,930.00 plus interest. This appeal followed.

In order to qualify for summary judgment, the movant must "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. On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used when, as matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant." Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

The "Vehicle Verification Certificate" executed by Shannon in conjunction with her trade-in of her Yukon stated in relevant part as follows:

As a material part of the transaction, the undersigned warrants and represents as to the subject vehicle, intending by such warranties and representations that the dealership rely upon same in establishing a trade-in or purchase value that:

1. The vehicle has never been designated as a "Salvage Vehicle" or "Rebuilt Vehicle", "Water Damaged" or any such designation of

similar nature by any state regulatory agency.

. . . .

If any of the warranties or representations above are incorrect, the undersigned agrees to pay the difference in value resulting from the breach to the dealership forthwith, or the dealership may elect to rescind the acceptance or purchase of the vehicle at the option of the dealership.

First, Shannon contends that Don Hall was not entitled to revoke its acceptance of the Yukon and rescind the purchase agreement because of various provisions of the Uniform Commercial Code (UCC). See KRS Chapter 355. We disagree. The Vehicle Verification Certificate contains Shannon's explicit warranty that the Yukon was not a rebuilt vehicle. The Yukon, in fact, was a rebuilt vehicle. The certificate further provided that upon Shannon's breach of the warranty "the dealership may elect to rescind the acceptance or purchase of the vehicle at the option of the dealership." KRS 355.1-102(3) permits the parties to vary the effect of provisions of the UCC. A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky. App., 998 S.W.2d 505, 510 (1999). To the extent that the explicit warranty contract language varies from any UCC provision, the variation is clearly expressed by the contract, and we are not persuaded that the UCC provisions cited by Shannon inhibit Don Hall's ability to enforce Shannon's warranty.

Next, Shannon contends that Don Hall did not exercise its right to revoke acceptance within a reasonable time. The transaction between Don Hall and Shannon occurred on August 30, 1997. The record does not disclose exactly when Don Hall

discovered that the Yukon was a rebuilt vehicle and sought to rescind the contract; however, in conjunction with its motion for summary judgment, Don Hall filed a letter from Shannon's trial counsel addressed to Don Hall's trial counsel dated November 20, 1997. The first sentence of that letter states, "As you may or may not be aware, Don Hall Chevrolet is attempting to rescind the sales contract it has with my client, Kay Shannon, pertaining to the sale of a 1995 Chevrolet Tahoe." It is evident that Don Hall sought to rescind the sale no later than twelve weeks from the date of the original transaction.

The certificate is silent as to the issue of how long Don Hall was to have, following a breach of warranty, to seek redress under the warranty. Shannon contends that the UCC "reasonable time" provisions of KRS 355.2-608 apply. Certainly a "reasonable time" provision is an implicit term to be implied to Don Hall's right to rescind and, normally, what constitutes a reasonable time is one of fact for the jury. Chaplin v. Bessire & Company, Ky., 361 S.W.2d 293, 294-295 (1962); Chernick v. Casares, Ky. App., 759 S.W.2d 832 (1988). However, we are not persuaded that a genuine issue of material fact exists as to whether Don Hall sought to rescind its acceptance of the Yukon within a reasonable time. The facts may be so overwhelming as to render the timeliness question a matter of law. Chernick at 834. No later than twelve weeks following the August 30, 1997, transaction, Don Hall sought to rescind. Drawing all inferences in the light most favorable to Shannon, this was manifestly a reasonable time period for Don Hall to seek to rescind its

acceptance of the Yukon. We discern no chance that Shannon would prevail at trial under the theory that Don Hall did not seek to rescind within a reasonable time.

Next, citing KRS 355.2-608(2), Shannon contends that Don Hall did not revoke its acceptance before a substantial change in the condition of the Yukon occurred. It is uncontested that the Yukon was vandalized and damaged while in the possession of Don Hall. However, the May 5, 1999, order addressing summary judgment provided that "Any damage which has occurred [to the Yukon] during Don Hall's possession of the vehicle shall be repaired and/or remedied by Don Hall Chevrolet." Moreover, the trial court's August 27, 1999, order granting Don Hall's motion to auction the Yukon states, "the Court not[es] that [Don Hall] has complied with the Court's Order of Judgment entered on May 5, 1999 by repairing the damage to the vehicle[.]" In summary, the record discloses that the issues relating to the vandalism damage have been resolved, and this issue cannot defeat summary judgment.

Next, citing KRS 355.2-603(1), Shannon contends that Don Hall did not make a reasonable effort to mitigate damages. Shannon alleges that Don Hall failed to make a good faith effort to attempt to sell the Yukon following its discovery of the breach of warranty. Under the circumstances of this case, we disagree that Don Hall was under a duty, at the same time it was seeking to rescind its acceptance of the Yukon, to attempt to sell the Yukon. It was Don Hall's objective to return the Yukon to Shannon in conjunction with its recission of its acceptance of

the Yukon. Efforts to sell the vehicle to a third party would have been contrary to this objective. Moreover, we are not convinced that the Yukon was a good which "threaten[ed] to decline in value speedily" such that KRS 355.2-603(1) would apply.

Next, Shannon contends that the trial court incorrectly determined breach of warranty damages. Again relying on the UCC, Shannon, citing KRS 355.2-714, contends that the proper measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. However, this ignores the fact that the Vehicle Verification Certificate specifically provided that "the dealership may elect to rescind the acceptance or purchase of the vehicle at the option of the dealership."

The summary judgment awarded Don Hall a judgment of \$17,930.00. Shannon was granted a \$17,400.00 trade-in allowance on her Yukon and Don Hall incurred a \$530.00 sales tax expense on the aborted sale of the Yukon to Johnson. The judgment awarded to Don Hall is the sum of these two amounts, and appears to be a proper judgment, in conjunction with Don Hall's return of the Yukon to Shannon, to make Don Hall whole.

There are no genuine issues of material fact, and, under the facts, based upon the express warranty given by Shannon in the Vehicle Verification Certificate, Don Hall was entitled to summary judgment. The judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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