STATE OF MICHIGAN

COURT OF APPEALS

KENNETH M. KELMAR,

Plaintiff-Appellant,

v

MID-MICHIGAN FREIGHTLINER, INC.,

Defendant-Appellee,

and

MERCEDES BENZ CREDIT CORP.,

Defendant/Counterplaintiff,

and

FREIGHTLINER FINANCIAL SERVICES DIVISION,

Defendant.

UNPUBLISHED
November 13, 2003

No. 235899
Saginaw Circuit Court
LC No. 99-029793-CP

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders striking plaintiff's jury demand, denying plaintiff leave to amend his pleadings, and granting summary disposition to defendant Mid-Michigan Freightliners, Inc.[1] We affirm.

[1] Defendant Freightliner Financial Services Division is not participating in this appeal, and we granted defendant Mercedes Benz Credit Corporation's motion for affirmance on November 16, 2001. Because Mid-Michigan Freightliner, Inc., is the only defendant participating in this appeal, our use of "defendant" in this opinion refers only to Mid-Michigan Freightliner.

Plaintiff purchased a 1995 Freightliner heavy truck from defendant in 1998 for commercial hauling purposes. Plaintiff insists that he received various assurances that certain services and warranties were included with the sale, but the retail installment contract and security agreement executed by the parties expressly disclaimed all warranties except those provided by the manufacturer. The contract further declared that it represented the full agreement of the parties, and conditioned the validity of any future contract modifications on their reduction to a signed writing. The manufacturer's warranty no longer applied because of the age and mileage of the truck. Plaintiff admits that he signed the contract without reading it.

The truck was plagued with mechanical difficulties from the start, and defendant attempted several repairs under color of warranty compliance. The repairs were generally unsuccessful, and in April 1999, the truck suffered total engine failure near Little Rock, Arkansas. When plaintiff sought warranty service on that occasion, defendant cited the contract's disclaimer and declared that the truck had no warranty. Plaintiff sought recovery under various theories, and the trial court granted defendant summary disposition on them all.

We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A summary disposition motion under MCR 2.116(C)(10) tests a claim's factual support. *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001). "The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Plaintiff asserts that he received various oral indications that certain warranties were part of the sale, and argues that such express warranties may not be disclaimed. We disagree with plaintiff's premise. When parties reduce their sales agreement to writing and the writing expresses the parties' intention that it represents "a final expression of their agreement," then evidence of prior oral agreements may not contradict the writing. MCL 440.2202. Here, plaintiff attempts to introduce parol evidence of warranties despite a conspicuous warranty disclaimer and integration clause in the written agreement. Because no evidence of defendant's warranty exists inside the written sales contract, plaintiff must avoid the written contract he signed before he may properly assert the oral warranty. MCL 440.2202, MCL 440.2316. Because plaintiff relied on the invincibility of his oral warranty, the trial court properly granted defendant summary disposition on plaintiff's breach of warranty claim.

The trial court also correctly dismissed plaintiff's revocation claim. A buyer "may revoke his acceptance of a . . . commercial unit whose non-conformities substantially impair its value to him" under enumerated circumstances. MCL 440.2608(1)(a). But the sales contract does not express any warranties regarding the truck, so even in its faulty state the truck conformed to the contract. MCR 440.2106(2). Without a non-conformity, the buyer may not properly revoke, and the trial court correctly granted defendant summary disposition on plaintiff's revocation claim.

The trial court also dismissed plaintiff's claim under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, on the grounds that plaintiff purchased the truck primarily for commercial purposes, rendering the act inapplicable. We agree with the trial court. We recently reiterated that "if an item is purchased primarily for business or commercial rather than personal purposes, the MCPA does not supply protection." *Zine v Chrysler Corp*, 236 Mich App

261, 273; 600 NW2d 384 (1999). Here, plaintiff purchased the truck as a commercial hauling vehicle and used it accordingly, so the trial court correctly granted defendant summary disposition on plaintiff's MCPA claim.

Plaintiff also argues that the trial court erred in dismissing his claim under the Motor Vehicle Service and Repair Act (MVSRA), MCL 257.1301 *et seq.* We disagree. "A facility that violates this act or who, in a course of dealing as set forth in this act or rules, engages in an unfair or deceptive method, act, or practice, is liable . . . to a person *who suffers damages or injury as a result* thereof . . . ." MCL 257.1336 (emphasis added). Plaintiff argues that defendant repeatedly attempted to repair the truck and never supplied him with invoices or other paperwork required by the act. But defendant submitted an uncontested affidavit that the truck's final breakdown was unrelated to defendant's repairs. Plaintiff argues that when he came in for repairs, defendant deceptively reassured him that the truck had a warranty. But plaintiff already signed the disclaiming sales contract, so defendant did not cause plaintiff any damage by giving him free repairs under color of an invalid warranty. Without evidence that defendant's repair procedures damaged plaintiff, the trial court correctly granted defendant summary disposition on this claim.

Plaintiff next argues that the trial court erroneously refused to grant him leave to amend his complaint to include a fraud claim. We disagree. We review for abuse of discretion a trial court's decision whether to allow amendment of the pleadings. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). But we also note that leave "shall be freely given when justice so requires." MCR 2.118(A)(2). Among other reasons, a trial court may deny leave if it finds that the amendment would sanction a party's undue delay or meet a futile end. *Weymers, supra* at 658.

Plaintiff must successfully assert fraud to avoid the contract, because the contract disclaims the parol warranty defendant's sales agent deceptively avowed according to plaintiff's version of events. But plaintiff originally relied exclusively on the strength of his revocation claim, oral warranty claim, and statutory claims and did not mention the tort of fraud until the parties completed eight months of discovery and motion practice, the entire mediation process, and one partial motion for summary disposition. When plaintiff mentioned fraud at a hearing, the trial court cautioned him that he must amend the complaint to include a fraud claim if he wished to assert the theory at trial. Plaintiff waited until another eight months passed and defendant filed another summary disposition motion before he formally requested leave to amend. At that point, trial loomed six weeks away. Under the terms of the trial court's scheduling order, plaintiff's request for an amendment came about a year after the amendment deadline passed.

A trial court may find undue delay, "when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." *Weymers, supra* 659-660. By merely raising the issue at the earlier hearing, plaintiff did not supply reasonable notice of his intent to rely on fraud at trial. On the contrary, by failing to amend his complaint as the trial court required, plaintiff indirectly suggested that he would not rely on the tort theory to avoid the contract. Because defendant sufficiently satisfies the factors in *Weymers*, the trial court

did not abuse its discretion when it denied plaintiff leave to amend the complaint to include fraud.

In light of our disposition of this case, we do not reach plaintiff's jury demand issue.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder