STATE OF MICHIGAN

COURT OF APPEALS

JOHN FRENCH JR.,	UNPUBLISHED November 29, 2016
Plaintiff-Appellee,	
v	No. 328963 Sanilac Circuit Court
BEN'S SUPERCENTER INC.,	LC No. 14-035666-CK
Defendant-Appellant.	

Before: M. J. KELLY, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

In this action concerning the sale of a defective outdoor wood furnace, defendant Ben's Supercenter Inc. appeals as of right from the circuit court's order entering judgment in favor of plaintiff John French Jr. and awarding him a total of $37,546.74 for his damages, pre-judgment interest, costs, and attorney fees. The trial court entered the order following a bench trial on damages and after having granted summary disposition as to plaintiff concerning liability. For reasons set forth in this opinion, we affirm.

I. FACTS

On May 21, 2011, after meeting with defendant's salesman, Todd Kaatz, and having a fairly lengthy discussion with him regarding purchasing an outdoor wood furnace for his home, plaintiff purchased a Portage & Main Outdoor Water Furnace Optimizer 250 Wood Gasification Unit (Optimizer 250) from defendant, at a cost of exactly $12,000.00.[1] Defendant delivered the furnace to plaintiff's property and plaintiff installed it. Sometime around Christmas of 2011, after plaintiff had been using the furnace for about three weeks, he began to have trouble with its performance and contacted Kaatz for help. Kaatz and another employee, Alan Strouser, came to plaintiff's property and inspected the furnace, but they were unable to determine why the furnace was operating inefficiently. Nevertheless, despite the furnace's ongoing efficiency issues, plaintiff used it to heat his house throughout the 2011-2012 winter.

[1] The Optimizer 250 is manufactured in Canada by the Canadian company Piney Manufacturing Ltd. and distributed in the United States by Heat Smart Plus, which is also a Canadian company.

In the spring of 2012, after the 2011-2012 heating season, plaintiff and Kaatz met to discuss the continuing problems with the furnace, and Kaatz suggested that they phone Boyd King, who Kaatz knew had also purchased the same furnace and experienced similar problems. King explained that he contacted the manufacturer after experiencing similar inefficiencies, that the manufacturer sent him a kit to retrofit the furnace's air box, and that retrofitting the air box resolved these problems. Kaatz thereafter obtained a retrofit kit from the manufacturer and dropped it off at plaintiff's house in October of 2012.[2] The "kit" was a box of parts with no instructions. Plaintiff contacted Kaatz about the lack of instructions, and Kaatz contacted the manufacturer to get more information.[3] Plaintiff was apparently unable to properly install the retrofit kit and continued to have problems with the furnace during the 2012-2013 heating season.

Sometime before August of 2013, Kaatz discovered that the box of parts he had left with Kaatz was not a complete air box kit. On August 2, 2013, Kaatz e-mailed the manufacturer and asked for a retrofit air box kit and everything needed for a "field install." Over the next two months, Kaatz continued to e-mail the manufacturer and inquire as to when the kit would be received.[4] On October 31, 2013, Kaatz received what he believed to be the correct retrofit kit; however, because the kit did not contain any markings or instructions, he e-mailed the manufacturer for clarification. Kaatz was still attempting to get clarification or instructions from the manufacturer approximately three months later, sending an e-mail to the manufacturer on January 30, 2014 with such a request. According to Kaatz, although he was given a name of a person in Maine who could walk him through the installation, he never received any instructions from the manufacturer or verification that he had the correct kit.

By late January 2014, plaintiff retained a lawyer who, on February 3, 2014, advised Kaatz and Jim Zyrowski (the owner of defendant Ben's Supercenter), by e-mail, that plaintiff wanted either a full refund or a new Optimizer 250. The e-mail also detailed all the problems that still existed with the furnace. Kaatz stated that he could not recall the content of his discussion with Zyrowski regarding the e-mail and did not know if there was ever any response to this e-mail.

Plaintiff filed the instant suit on May 28, 2014, alleging: (1) breach of express warranty under Michigan's Uniform Commercial Code (UCC), MCL 440.2101, *et seq.*; (2) breach of implied warranty of merchantability under the UCC; (3) breach of implied warranty of fitness for

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[2] In a deposition, Kaatz acknowledged that around this time plaintiff asked him for a complete refund. Kaatz stated that, despite being a manager, he did not have authority to issue a refund for such an expensive purchase, and that he was unsure whether he had discussed a refund with the owner, Jim Zyrowski, who would have had such authority, "as the parts hadn't [yet] been replaced on [the furnace]."

[3] It is unclear from the record whether any additional information was received.

[4] Kaatz acknowledge that on October 21, 2013, plaintiff wrote him an e-mail, stating "I would like to ask you one last time for a complete refund." Kaatz did not recall if he ever responded to the e-mail or discussed the situation with the owner.

a particular purpose under the UCC; (4) revocation of acceptance; (5) violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; and (6) breach of implied warranty under the Magnuson-Moss Warranty Act (Magnuson-Moss), 15 USC 2301, *et seq*.

Following discovery, on February 11, 2015, plaintiff moved for summary disposition on all six claims pursuant to MCR 2.116(C)(10). Defendant responded and following a hearing, the court granted plaintiff summary disposition on all claims except for the breach of express warranty claim. It determined that questions of fact remained regarding the amount of damages.

On July 14, 2015, a bench trial was held to determine the amount of plaintiff's damages. At the conclusion, the court awarded plaintiff $12,000.00 related to the furnace and denied plaintiff's claim that he was entitled to additional damages related to the excess wood he had to use in the furnace. The court also awarded plaintiff $357.44 for pre-judgment interest and $25,189.30 for attorney fees and costs, for a total award of $37,546.74. This appeal ensued.

II. SUMMARY DISPOSITION

Defendant first argues that the circuit court erred when it granted summary disposition in favor of plaintiff.

We review de novo a circuit court's ruling on a motion for summary disposition. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009). Pursuant to MCR 2.116(C)(10), a party may be entitled to summary disposition if there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. All documentary evidence submitted by the parties is considered in the light most favorable to the nonmoving party. *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2013).

As noted above, the five claims that the circuit court granted plaintiff summary disposition on included: (1) UCC breach of implied warranty of merchantability, (2) UCC breach of implied warranty of fitness for particular purpose, (3) revocation of acceptance; (4) violation of the MCPA, and (5) breach of implied warranty under Magnuson-Moss. We will discuss each in turn.[5]

A. IMPLIED WARRANTY OF MERCHANTABILITY

MCL 440.2314 sets forth the criteria for the implied warranty of merchantability in relevant part as follows:

[5] Defendant argues on appeal that the court erred in granting plaintiff summary disposition on the UCC breach of express warranty claim. However, this argument is without merit because the circuit court never granted plaintiff summary disposition on that claim. Instead, at the bench trial to determine damages, plaintiff indicated that he abandoned the express warranty claim.

(1) Unless excluded or modified (section 2316), 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. []

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

* * *

(c) *are fit for the ordinary purposes for which such goods are used*; and

(3) Unless excluded or modified (section 2316) other implied warranties may arise from course of dealing or usage of trade. [Emphasis added.]

MCL 440.2316 sets forth the criteria by which the implied warranty of merchantability may be excluded or modified, in pertinent part, as follows:

(2) [] [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, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

Used in this context, the term "conspicuous" is defined as follows:

"Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include any of the following:

(i) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to surrounding text of the same or lesser size.

(ii) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

In this case, there is no question that the implied warranty of merchantability was included in the contract for the sale of the furnace. First, defendant admitted that it was a merchant with respect to the furnace. Second, contrary to defendant's argument, defendant did not disclaim the warranty of merchantability. Defendant cites to the warranty set forth in the

manufacturer's handbook to support that the warranty was disclaimed. Defendant does not cite specific language in the handbook; however, in the handbook, the manufacturer included a single-spaced regular font one-page warranty generally setting forth the terms of a four-year warranty warranting against defects "in material or workmanship." The manufacturer specifically stated that it did not "assume any liability of any nature for unsatisfactory performance caused by improper installation or operation; any costs for labor for removal and reinstallation." The manufacturer specifically included the following language:

> No other warranty is expressed or implied.
>
> * * *
>
> Piney Manufacturing Ltd. specifically disavows any other representation, warranty or liability related to the condition or use of the product.

As noted above, to disclaim an implied warranty of merchantability, the "language must mention merchantability and in the case of a writing must be conspicuous. . . ." MCL 440.2316(2). Whether a writing is "conspicuous" "is a decision for the court." MCL 440.1201(j). Here, there is nothing in the handbook warranty specifically mentioning "merchantability" and there were no disclaimers that were set forth in a "conspicuous" manner. MCL 440.2316(2). Nowhere in the document does it "mention merchantability" or contain any "conspicuous" language disclaiming that warranty, as required under MCL 440.2316(2). See MCL 440.1201(j) (defining "conspicuous"). As to defendant's argument that plaintiff's "admission that he read and understood the warranty is alone sufficient to create a question of fact" as to whether the warranty was disclaimed, we reject that argument because it conflicts with the statutory requirements set forth in MCL 440.2316(2). Accordingly, defendant has not shown that the circuit court erred in granting plaintiff summary disposition on his implied warranty of merchantability claim. [6]

B. IMPLIED WARRANTY OF FITNESS

MCL 440.2315 sets forth the criteria for the implied warranty of fitness for a particular purpose, as follows:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

The first comment for MCL 440.2315 (fitness for a particular purpose) states, as follows:

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[6] Defendant only argues that it disclaimed the implied warranty of merchantability and that it was therefore not part of the contract for the sale of the furnace. Defendant does not argue in the alternative that it was never in breach of this warranty.

> Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller. [MCL 440.2315, comment 1.]

In its brief on appeal, defendant concedes that it "knew of [plaintiff's] particular purpose for the outdoor boiler." After making this concession, defendant's only argument on this issue is that plaintiff failed to present evidence that Kaatz was aware that plaintiff was relying on him to furnish suitable goods. Assuming that defendant's concession regarding the existence of a particular purpose is credited, defendant's argument concerning Kaatz's "awareness" lacks merit. As comment 1 to MCL 440.2315 indicates, the seller does not need to have "actual knowledge" of the particular purpose, nor does the seller need to have actual knowledge that the buyer is relying on the seller's skill and judgment to select or furnish suitable goods. All that is required is that the "circumstances are such that the seller *has reason* to realize the purpose intended or that the reliance exists." MCL 440.2315, comment 1 (emphasis added).

Here, we agree with the trial court that there is no genuine issue of fact concerning whether the circumstances were such that Kaatz had reason to realize that reliance existed. Plaintiff's deposition testimony establishing his actual reliance on Kaatz is overwhelming. Kaatz's deposition testimony is equivocal at best. We note that Kaatz was the employee responsible for actually deciding to sell Portage & Main brand furnaces at the store, and the particular model that plaintiff purchased was so new that it was the first one that Kaatz had sold. Kaatz has also acknowledged that he was so highly involved in the sale that he took plaintiff out to lunch as part of the sales process. And, although we agree that Kaatz's opinion that plaintiff was sharp and had a good understanding of what he wanted has some relevance to this issue, we do not think it sufficient to provide a basis on which reasonable minds could disagree, given everything stated above. Under these circumstances, Kaatz had every reason to realize that plaintiff was relying on him.

Defendant also argues that it disclaimed the implied warranty of fitness. In contrast with the implied warranty of merchantability, which requires that "the language must mention merchantability" in the disclaimer, there is no such requirement with the implied warranty of fitness for a particular purpose. MCL 440.2316(2). Rather, "[l]anguage to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'" *Id*. However, similar to the implied warranty of merchantability, in order to disclaim the implied warranty of fitness for a particular purpose, the disclaimer must "be by a writing and conspicuous." *Id*.

Here, the warranty page in the user manual states, at the conclusion of the warranty, that "No other warranty is expressed or implied" and that it "disavows any other representations, warranty or liability related to the condition or use of the product." Although the *language* of this disclaimer appears sufficient to exclude the implied warranty of fitness for a particular purpose pursuant to the language requirement in MCL 440.2316(2), it is presented in such a way that it does not meet the statute's "conspicuous" requirement, because it is in a font no larger

than the fonts appearing on the rest of the page, not set off from the surrounding text, and not in all capital letters, bold, or a different color ink. MCL 440.1201(j). Accordingly, defendant has not shown that the circuit court erred in granting plaintiff summary disposition on his implied warranty of fitness for a particular purpose claim.[7]

C. REVOCATION OF ACCEPTANCE

Revocation of acceptance of goods is governed by MCL 440.2608, which states, as follows:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
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> > (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
> >
> > (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
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> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

"Whether a reasonable time has elapsed is generally a question for the trier of fact." *Bev Smith, Inc v Atwell*, 301 Mich App 670, 681; 836 NW2d 872 (2013). "If reasonable minds could not differ, however, the question of what constitutes a reasonable time should be decided on summary disposition as a matter of law." *Id*. at 682.

Defendant does not dispute that plaintiff can satisfy the substantive requirements that must be established in order to revoke acceptance, which are found in MCL 440.2608(1). Defendant's complaint is with the procedural requirements for an effective revocation, which are found in MCL 440.2608(2). Defendant's argument is that summary disposition on plaintiff's revocation of acceptance claim was improper because there was a genuine issue of material fact regarding whether plaintiff provided timely notice of revocation.

As to whether plaintiff's revocation of acceptance occurred within a "reasonable time" under MCL 440.2608(2), the UCC provides that "[w]hether a time for taking an action required by this act is reasonable depends on the nature, purpose, and circumstances of the action." MCL 440.1205(1). Regarding circumstances, this Court has held that "[t]he seller's attempts to repair

[7] Defendant only argues that the implied warranty of fitness for a particular purpose was not part of the contract because of the disclaimer and the other circumstances of contracting. Defendant never argues in the alternative that it did not breach this warranty.

are . . . a factor in determining whether the buyer notified the seller of revocation within a 'reasonable time' after discovering the defect." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 106; 593 NW2d 595 (1999).

Here, we conclude the circuit court did not err in deciding this issue in plaintiff's favor as a matter of law because reasonable minds could not disagree that plaintiff's revocation of acceptance occurred within a reasonable time. The undisputed evidence showed that plaintiff began to have problems with the furnace after he used it for about three weeks. He immediately contacted defendant and reported the problems and sought to have defendant cure the defects. Defendant agreed to fix the furnace, but, despite what appears to be a good-faith effort on defendant's part, was unable to actually do so despite repeated repair attempts over the next two years. It is clear that plaintiff relied on defendant's representation that the defects would be cured as the multiple attempts he made at revocation over this time period were forestalled by defendant's assurances that the furnace would be repaired. There is no evidence that plaintiff was unjustified in relying on these assurances that the furnace would be fixed.

Given plaintiff's reliance on defendant's representations that the defect would be cured, as well as plaintiff's efforts to have defendant cure the defect before revocation, we find no merit in defendant's argument that it was unreasonable for plaintiff to wait 10 months after discovering the defect before his first attempt at revoking his acceptance. Because we conclude that reasonable minds could not disagree that plaintiff's revocation of acceptance occurred within a reasonable time, the circuit court did not err in granting plaintiff summary disposition on his revocation of acceptance claim.

D. VIOLATION OF THE MCPA

In *Mikos v Chrysler Corp*, 158 Mich App 781, 783; 404 NW2d 783 (1987), this Court held that "[a] breach of an implied warranty of merchantability is a violation of the [MCPA]." The Court reasoned that, although implied by law as part of a contract for sale of goods, "[f]rom the consumer's standpoint, [an implied warranty] is just as much a promised benefit as if the merchant itself made the promise." *Id*. at 784. This Court concluded that breach of an implied warranty constitutes a "failure to provide the promised benefits" under MCL 445.903(1)(y), which is actionable under the MCPA. *Id*. at 784-785.

On appeal, defendant argues that the circuit court erred in granting plaintiff summary disposition on the MCPA claim because there were genuine issues of material fact regarding the existence and breach of the implied warranties under the UCC. However, given the determination above that there were no genuine issues of material fact regarding plaintiff's breach of implied warranty claims, and that plaintiff was entitled to summary disposition on those claims, defendant's argument is without merit. Accordingly, defendant has not shown that the circuit court erred in granting plaintiff summary disposition on the MCPA claim. Further, the circuit court did not err in granting plaintiff summary disposition on the MCPA claim, as a defendant's breach of the implied warranty of merchantability is also a violation of the MCPA. *Mikos*, 158 Mich App at 783.

E. MAGNUSON-MOSS

Magnuson-Moss provides a cause of action for a consumer against a supplier or warrantor who breaches an implied warranty:

> [A] consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief. [15 USC 2310(d)(1).]

On appeal, defendant's argument is that the circuit court erred in granting plaintiff summary disposition on the Magnuson-Moss claim because there were genuine issues of material fact regarding the existence and breach of the implied warranties. Again, given the determination above that there were no genuine issues of material fact regarding plaintiff's implied warranty claims, and that plaintiff was entitled to summary disposition on those claims, defendant's argument is without merit.

III. DAMAGES

Defendant argues that the circuit court's award of damages is clearly erroneous and that the circuit court abused its discretion when it excluded evidence during the bench trial on damages. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). In addition, an error of law necessarily constitutes an abuse of discretion. *In re Waters Drain Drainage Dist,* 296 Mich App 214, 220; 818 NW2d 478 (2012). "This Court reviews the trial court's determination of damages following a bench trial for clear error." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id*. at 512.

A. EXCLUSION OF EVIDENCE

At the bench trial, defendant attempted to introduce evidence that plaintiff should have done something different during the prolonged period when defendant was attempting to repair the furnace (use the manufacturer warranty, return the furnace to the manufacture or distributor, hire an independent company to examine the furnace), and that plaintiff's failure to take this action was a failure to mitigate damages. The court held that "all this business about who did what when has all been . . . considered and taken into account in the motion for summary disposition," noting that had the court thought that plaintiff had done something wrong, or had not done something right, it would not have granted summary disposition. The court noted that within the first year plaintiff attempted to give the furnace back, hence plaintiff attempted to cure the problem immediately. The court held that any attempt to blame plaintiff for carrying this thing on so long and therefore causing the value of the furnace to go down is inadmissible. However, the court also held that defendant "can show some depreciation in value that's not related to fault, that I would allow."

On appeal, it appears that defendant argues that plaintiff failed to mitigate his damages "when he failed to avail himself of the manufacturer's warranty." However, as the trial court noted, this argument overlooks the fact that plaintiff attempted to return the furnace to defendant for a refund on at least four occasions and defendant either did not respond or instead attempted to repair the furnace. Thus, the court considered defendant's mitigation argument by noting that plaintiff attempted to return the furnace to defendant. Furthermore, the court instructed that defendant could introduce evidence to show depreciation. In short, defendant has failed to show that the court made evidentiary errors during the bench trial.

B. AWARD OF DAMAGES

Defendant objects that the circuit court awarded the full $12,000 contract price to plaintiff when "[t]here was no evidence to suggest that the outdoor boiler was worthless as [plaintiff] had used it for three heating seasons." Defendant's argument is without merit because it overlooks the fact that the court could award damages pursuant to plaintiff's revocation of acceptance claim and did not have to calculate damages using the breach of warranty damages formula.

The remedies available to a buyer who revokes acceptance are identified in MCL 440.2711, which states, in pertinent part:

> (1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (section 2612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
>
> > (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
> >
> > (b) recover damages for nondelivery as provided in this article (section 2713).

Under MCL 440.2711(1), plaintiff was entitled to recover "so much of the price as has been paid." In this case, plaintiff had paid the full contract price of $12,000 and was therefore entitled to damages in that amount, which is the exact amount the circuit court awarded. Accordingly, the circuit court's award of damages was not clearly erroneous.

Affirmed. Plaintiff having prevailed in full, may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Stephen L. Borrello