Affirmed and Opinion Filed August 4, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00779-CV

CAS, LTD, Appellant
V.
TM AVIATION PARTNERS, LP, TM AVIATION ENTERPRISES, LLC, AND TIMOTHY THOMPSON, Appellees

On Appeal from the County Court at Law No. 4
Collin County, Texas
Trial Court Cause No. 004-01101-2014

MEMORANDUM OPINION

Before Justices Bridges, Lang, and O'Neill[1]
Opinion by Justice Bridges

Appellant CAS, Ltd. purchased aviation floats from appellees TM Aviation Partners, LP, TM Aviation Enterprises, LLC, and Timothy Thompson. Appellant later filed suit against appellees for breach of contract, breach of warranty, fraud, and violations of the DTPA. After a bench trial, the trial court entered a take nothing judgment in favor of appellees.

CAS raises six issues on appeal. In its first four issues, CAS argues it proved its DTPA and contract claims as a matter of law, or in the alternative, the trial court's failure to find in its favor is against the great weight and preponderance of the evidence. In its fifth issue, CAS argues the trial court considered defenses that are not applicable to a DTPA cause of action.

[1] The Hon. Michael J. O'Neill, Justice, Retired, sitting by assignment.

Lastly, CAS contends the trial court misapplied the law regarding an "as is" contract clause in the bill of sale. We affirm the trial court's judgment.

Background

Timothy Thompson is the owner of TF Aviation Partners, LP and managing partner of both TF Aviation Partners, LP and TM Aviation Enterprises, LLC.[2] He has extensive experience in the aviation business and has sold over 150 planes.

On May 7, 2009, Thompson purchased a pair of 1976 Wipaire model 3730 amphibious airplane floats[3] from Glen Ernst for $45,000. Thompson had a long-standing relationship with Ernst and considered Ernst to have a good reputation within the aviation industry. Because of Thompson's many years of business dealings with Ernst, Thompson did not personally inspect the floats prior to purchasing them; however, Ernst took pictures of the floats and sent them to Thompson. Thompson saw the pictures, but purchased the floats "sight unseen."

Despite purchasing the floats from Ernst, Ernst continued to store the floats for Thompson in Oregon. Thompson admitted he never personally saw the floats during the years he owned them, and his original plans for using the floats changed. Thompson decided to sell the floats four years later. Thompson placed an ad in the Trade-A-Plane publication on April 1, 2013. The ad listed the purchase price as $35,000 and described the floats as "Wip 3730's, 20 hrs. TT, like new."

In October 2013, Gregory Coy, the president of CAS, a business that buys and sells aircraft, began looking for a set of floats for a Cessna 185 for an overseas client. Like Thompson, Coy had years of experience in the aviation industry, including holding multiple pilot

[2] TM Aviation Enterprises, LLC is the general partner of TM Aviation Partners, LP.

[3] The floats were described as "pontoons that are designed to go on aircraft," generally smaller aircraft like a Cessna 185 or Cessna 206A.

licenses and licenses allowing him to work on and inspect planes. He had also purchased over 350 planes throughout the years.

Coy contacted Thompson about the floats. According to Coy, Thompson reiterated the floats were like new and had twenty hours of total float time on the water. "Total time" referred to the time of operation or engine hours of operation. Coy emphasized this time is important because it determines the value of the products and condition of the parts. He knew the floats were manufactured in the 1970s and admitted it was unusual to find a set of floats that old with only twenty hours of time on them, but he said "it does happen within the industry."

Thompson and Coy talked several times on the phone prior to sale. Thompson also provided Coy the 2009 pictures of the floats from Ernst. Although Coy requested additional pictures, Coy did not have any more to provide. Thompson advised Coy he had never personally seen the floats and encouraged Coy to inspect them.

During the time Coy and Thompson were discussing the floats, another person named Mr. Smith contacted Thompson about purchasing them. Thompson contacted Coy and gave the impression that if Coy did not purchase the floats quickly, he would sell them to Smith.[4] Coy then drafted a contract and wire transferred $34,000 to Thompson. The contract, executed on October 18, 2013, stated the following in its entirety:

> We offer to purchase the following aircraft floats:
>
> 1976 Wipair[e] Model 3730 amphibious floats serial numbers 37157 and 37158 together with the fittings, pump and electrical equipment for instillation on a Cessna 185 with 20 hrs total time as further described in the Trade a Plane advertisement.
>
> The agreed price is $34,000.00. (Thirty Four Thousand and 00/100) Floats are sold "As is, where is" in Bend Oregon, without warranties expressed or implied. Purchaser is responsible for

[4] Smith ultimately opted not to purchase the floats and told Thompson the floats were "pretty clean, but not clean enough" for him.

> determining the airworthiness of the floats upon transfer of ownership.
>
> Consummation of the sale shall be on or before October 27 by payment of the purchase price by wire transfer. The Seller agrees to continue to store the floats in the disassembled condition for an additional period of up to 45 days.

Coy, as president of CAS, signed the contract as "Purchaser," and Thompson, on behalf of TM Aviation Enterprises, signed as "Sellers." Thompson testified his intent was to sell the floats "as is" and not provide any warranties. Coy admitted the only due diligence he engaged in was reviewing the photographs and Trade-A-Plane ad.

After entering into the contract, Coy tried contacting Ernst to coordinate picking up the floats, but he had trouble reaching him. When Coy finally talked with Ernst, Coy learned only one float had been removed and disassembled, despite Thompson's alleged representations that both floats were disassembled.

In November, Coy hired a truck driver to drive to Oregon and transport the floats to Vermont, where Coy lived. When the truck driver arrived, she had to wait for disassembly of the second float, and Coy paid an additional $1,865 to Ernst for the labor.

After seeing the floats, Coy described them as being in very poor condition, lots of corrosion, badly stored, and more than twenty hours of total time on them. He did not think they were "like new," as described in the ad. Coy apprised his client of the situation and then took over three hundred photos documenting the condition of the floats.

On December 16, 2013, Coy sent an email to Thompson asking him to "[D]o the right thing and refund" the money because, "We bought the floats based on your advertisement and on the pictures that were supplied by you. They clearly do not match the advertisement." Thompson refused. Coy sent a demand letter on January 15, 2014 and later filed suit for DTPA

violations, breach of contract, breach of warranty, and fraud. Thompson tried to contact Ernst after Coy filed the lawsuit, but Ernst never responded. Ernst died before trial.

At the time of trial, the floats were still stored in a hangar in Vermont. Coy testified he tried to mitigate his damages by advertising the floats and although he had received some interest, no one had made an offer. At the conclusion of the bench trial, the trial court entered a take nothing judgment in favor of appellees TM Aviation Partners, LP, TM Aviation Enterprises, LLC, and Thompson. The trial court also entered findings of fact and conclusions of law supporting the judgment and denied CAS's motion for new trial. This appeal followed.

Application of "As Is" Clause

Because CAS's sixth issue is dispositive of the appeal, we address it first. CAS contends the trial court misapplied the law regarding an "as is" contract clause in the bill of sale. Relying on *Prudential Insurance Co. of Am. v. Jefferson Associates, Ltd.*, 896 S.W.2d 156 (Tex. 1995), TM Aviation and Thompson argue the "as is" language controls.

In *Prudential*, the Texas Supreme Court determined whether a buyer who agrees, freely and without fraudulent inducement, to purchase commercial real estate "as is" can recover damages from the seller when the property later is discovered not to be in as good a condition as the buyer believed when he inspected the property before sale. *Id.* at 159. Although CAS did not inspect the floats prior to entering into the bill of sale containing the "as is" clause, the supreme court's analysis of such clauses is applicable to the present facts.

A valid "as is" agreement, prevents a buyer from holding a seller liable if the thing sold turns out to be worth less than the price paid because "it is impossible for the buyer's injury on account of this disparity to have been caused by the seller." *Id.* at 161. The sole cause of the buyer's injury in such circumstances, by his own admission, is the buyer himself. *Id.* He has

agreed to take the full risk of determining the value of the purchase, "to which he is not obligated to do." *Id.*

The supreme court acknowledged that by its holding, it was not suggesting all "as is" clauses have a determinative effect in every circumstance. *Id.* at 162. A buyer is not bound by an agreement to purchase something "as is" that he is induced to make because of fraudulent representation or concealment of information by the seller. *Id.* "A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase 'as is,' and then disavow the assurance which procured the 'as is' agreement." *Id.*

The court further noted the nature of the transaction and the totality of the circumstances surrounding the agreement must be considered. *Id.* "Where the 'as is' clause is an important part of the basis of the bargain, not an incidental or 'boiler-plate' provision, and is entered into by parties of relatively equal bargaining position, a buyer's affirmation and agreement that he is not relying on representations by the seller should be given effect." *Id.*

The relevant contract provision at issue states, "Floats are sold 'As is, where is' in Bend Oregon, without warranties expressed or implied. Purchaser is responsible for determining the airworthiness of the floats upon transfer of ownership." Considering the totality of the circumstances, the record indicates the following pertinent facts. It is undisputed CAS drafted the bill of sale, which included the "as is" clause. Both parties are sophisticated businessmen with years of experience in buying and selling within the aviation industry. The "as is" clause is not boilerplate language hidden within a lengthy document, but rather is set forth in the few short paragraphs comprising the one page document. Thompson made it clear he had not seen the floats and encouraged Coy to inspect them.[5] Coy knew the floats were thirty-five years old and

[5] CAS argues Thompson provided conflicting testimony about whether he told Coy to inspect the floats, but we view the evidence in the light favorable to appellees and there is more than a scintilla of evidence supporting this fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 827

agreed the floats were "fairly old." Coy also admitted he would not expect floats that old to be in pristine condition.

Accordingly, CAS's agreement to buy the floats "as is" should be given effect and precludes it from proving that TM Aviation or Thompson's conduct caused it harm. CAS agreed to make the bargain and to accept the risk that it may be wrong.

In reaching this conclusion, we reject CAS's arguments it was induced into purchasing the floats "as is" because "like new" is a material misrepresentation. A seller misrepresents the condition of goods when he makes a representation of material fact to the consumer that is false, even if the seller is unaware the representation is false. *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980). It is common knowledge and may always be assumed that any seller will express a favorable opinion concerning what he has to sell; and when he praises it in general terms, without specific content or reference to facts, buyers are expected to and do understand that they are not entitled to rely literally upon the words. *Cleveland Mack Sales, Inc. v. Foshee*, No. 14-00-00059-CV, 2001 WL 1013393, at *5 (Tex. App.—Houston [14th Dist.] Sept. 6, 2001, pet. denied) (citing Restatement (Second) of Torts §§ 539 & 542 (1977)).

Courts consider three variables in their determination of whether a statement is puffing and therefore not actionable. *Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 839 (Tex. App.—Amarillo 1993, writ denied). First, the specificity of the statement must be analyzed. *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 462 (Tex. App.—Dallas 1990, writ denied). An imprecise or vague representation constitutes a mere opinion. *Id*. General statements must be examined in light of the particular fact situation. *Id*. at 464. Second, courts will compare the knowledge of the buyer and seller. *Id*. at 463. A final consideration is whether

(Tex. 2005) (reviewing court must credit favorable evidence if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not).

the representation pertains to a past or current event or condition, or to a future event or condition. *Id*. at 464.

We begin by considering the specificity of the statement. Although words like "excellent" and perfect" have been held to be "more general words of quality," the Texas Supreme Court has held these words indicate a high degree of quality that can be actionable misrepresentations rather than opinion or puffing because "[s]ometimes language only generally related to a product or its attributes will convey definite implications." *See Pennington*, 606 S.W.2d at 687.

CAS relies on *Pennington* to support its argument that Thompson's use of the phrase "like new" in the Trade-A-Plane ad induced it to enter into the bill of sale. *Pennington* is distinguishable. In that case, the seller of a used boat told a buyer that after some mechanical repairs, the boat and motor was in "excellent condition," "perfect condition," and "just like new." *Id*. at 685. The boat did not have these characteristics because unbeknownst to the seller or buyer, it still had a cracked gear housing. *Id*. at 687. While CAS argues "no rationale exists for treating this case differently" simply because the ad states "like new" rather than "just like new," we disagree. First, the holding in *Pennington* did not turn entirely on the seller's use of the words "just like new," but also included his use of "perfect" and "excellent" to describe the boat. Thompson did not use such additional superlatives to describe the condition of the floats. Further, the record does not indicate Thompson continued to emphasize the quality of the floats in additional conversations with Coy. *See, e.g., Milt Ferguson Motor Co. v. Zeretzke*, 827 S.W.2d 349, 355 (Tex. App.—San Antonio 1991, no writ) (concluding salesman's repeated statements of "how good the car was, and the quality of it" and that "it was a better car than the [one] they had," were substantial misrepresentations of material fact and not puffing). Instead, the record shows all parties knew the floats were over thirty years old, and Thompson

encouraged Coy to inspect the floats. Further, a December 4, 2013 email from Coy to Thompson after Coy "carefully examined the floats" stated "they do appear to be low time, with little or no damage history." And although we understand that "like new" and "just like new" are very similar, we cannot conclude the two phrases are a distinction without a difference. Webster's Third New International Dictionary defines "just" as "exactly, precisely." *See* [3]*Just*, WEBSTER'S THIRD NEW INT'L DICTIONARY (1981). Thus, when read in conjunction with "like new," a seller indicates a good is "exactly like new." However, "like new" has been defined as "in very good condition," which is not the same as "exactly like new." *See Like New*, Mirriam-Webster Online Dictionary, at http://www.Merriam-Webster.com/dictionary/like%20new (last visited August 1, 2016). Thus, we conclude after examining the statement in light of the record, "like new" is more of a vague representation constituting a mere opinion rather than a general phrase conveying definite implications. *Autohaus, Inc.*, 794 S.W.2d at 464; *Pennington*, 606 S.W.2d at 687.

We now turn to compare the knowledge of the buyer and seller. Unlike the buyer and seller in *Pennington*, in which the seller had never sold a boat and was not in the business of selling boats, the buyer and seller in this case are sophisticated businessmen with years of experience negotiating deals in the aviation industry. The record does not indicate that Thompson and TM Aviation had any superior knowledge of aircraft floats over Coy and CAS. As such, this is not a situation in which one sophisticated businessman preyed upon ignorance or had an unfair advantage over the unsophisticated or ignorant buyer. Thus, this factor does not support avoidance of the "as is" clause.

Lastly, we consider whether the representation pertained to a past or current event or condition, or to a future event or condition. In *Autohaus, Inc.*, the court determined a general statement concerning a future condition should be looked at differently than a statement

concerning a past or present condition. 794 S.W.2d at 464 (distinguishing *Pennington* because the statement about the boat referred to its present condition and the statement at issue in *Autohaus, Inc*. involved a car's future performance). Like the boat seller in *Pennington*, Thompson made a statement about the current condition of the floats. Accordingly, case law indicates this factor weighs in favor of avoidance of the "as is clause." However, considering the totality of the circumstances and the factors as a whole, none of CAS's arguments avail to avoid the "as is" agreement because of a material misrepresentation by Thompson. *See Prudential*, 896 S.W.2d at 163.

In reaching this conclusion, we also reject CAS's argument that the "as is" clause should not be enforced because it felt pressured to purchase the floats quickly because of another potential buyer. Nothing in the record indicates TM Aviation or Thompson gave CAS a strict deadline to purchase the floats before selling them to a third party. Rather, Thompson indicated CAS needed to hurry up and make a decision. Nothing in the record indicates TM Aviation required CAS to include the "as is" clause as a condition of sale. And although CAS complains the bill of sale contained no provision allowing it to back out of the transaction after it was executed or any right to terminate following inspection of the floats, CAS's argument disregards the fact it drafted the contract. Had such provisions been important to the transaction, CAS was free to include or negotiate such terms.

We are likewise unpersuaded by CAS's contention that the photographs provided to Coy demonstrate a fraudulent misrepresentation and concealment of information by Thompson and TM Aviation that should negate the "as is" clause because the photographs were over four years old and Thompson did not relay that information. Thompson admitted he provided the pictures to Coy to aid in selling the floats, but again, Thompson communicated to Coy he had never inspected the floats and the floats were over thirty years old. Thompson did not hinder Coy's

ability to inspect the floats prior to sale. *See, e.g.*, *Prudential*, 896 S.W.2d at 162 ("A seller cannot obstruct an inspection for defects in his property and still insist the buyer take it 'as is.'"). The record simply does not support the argument, as presented by appellants, that this is a situation where a seller is trying to have it both ways: "he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase 'as is,' and then disavow the assurance which procured the 'as is' agreement." *Id*. The record does not indicate Thompson used the pictures to assure Coy of the condition of the floats and then persuaded Coy to purchase the floats "as is." As stated above, such an argument disregards the undeniable fact CAS drafted the "as is" provision without any coercion from Thompson or TM Aviation.

Finally, CAS argues section 2.316(a) of the Texas Business and Commerce Code saves its DTPA claim because an "as is" clause that conflicts with an express warranty contained in the same document is inoperative. Section 2.316(a) provides:

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (Section 2.202) negation or limitation is inoperative to the extent that such construction is unreasonable.

TEX. BUS. & COMM. CODE ANN. § 2.316(a) (West 2009). CAS contends because the bill of sale contains the "as is" and "without warranties expressed or implied" language while also specifically incorporating the "like new description" and describing the floats as having twenty hours total time, disassembled, such language negates the express warranties and any other construction is unreasonable. We acknowledge that mere use of the words "as is" has never been held to automatically bar an action on an express warranty. *See Prudential*, 896 S.W.2d at 166 (Cornyn, J., concurring); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 110 (Tex. App.—Houston [14th Dist.] 2000, no pet.). However, in considering the nature of the transaction and the totality of the circumstances as explained above, we cannot conclude the

language in the bill of sale creates an unreasonable construction resulting in the express warranties becoming inoperative. *See Hou-Tex, Inc*., 26 S.W.3d at 110–11 (finding nothing in the nature of the transaction or totality of the circumstances to prevent applications of the disclaimers and "as is" clause).

Accordingly, the contract drafted by CAS leaves no doubt exactly what it agreed to. The sole cause of CAS's injury, by its own admission, is itself. It agreed to take the full risk of determining the value of the purchase. As such, CAS's contractual disavowal of reliance upon any representation by TM Aviation was an important part of the arm's-length transaction and is binding. We overrule CAS's sixth issue.

Because proof of causation is essential for recovery on both of CAS's DTPA and breach of contract claims and the "as is" clause negates the element of causation as to both, we need not address CAS's remaining issues in which it challenges the sufficiency of the evidence to support a take-nothing judgment on its claims or the trial court's alleged consideration of inapplicable defenses under the DTPA. TEX. R. APP. P. 47.1; *White v. Aguirre, Inc*., No. 05-00-00503-CV, 2002 WL 987930, at *3 (Tex. App.—Dallas May 15, 2002, no pet.) (an essential element of a breach of contract claim is causation); *Prudential*, 896 S.W.2d at 160–61 (an essential element of a DTPA claim is causation).

Conclusion

The judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CAS, LTD, Appellant

No. 05-15-00779-CV V.

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Opinion delivered by Justice Bridges.
Justices Lang and O'Neill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees TM AVIATION PARTNERS, LP, TM AVIATION ENTERPRISES, LLC, AND TIMOTHY THOMPSON recover their costs of this appeal from appellant CAS, LTD.

Judgment entered August 4, 2016.