Affirmed and Opinion filed October 11, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00895-CV

DOUG SHOWS, Appellant

V.

MAN ENGINES & COMPONENTS, INC. AND MAN NUTZFAHRZEUGE AKTIENGESELLSCHAFT, Appellees

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 2006-38352

O P I N I O N

The owner of a yacht sued the manufacturer of the yacht's engines and the manufacturer's subsidiary, asserting various claims for damages allegedly suffered as a result of major engine failure. The jury rendered a verdict in favor of the vessel's owner on his claim for breach of the implied warranty of merchantability. On appeal, the vessel owner asserts that the trial court erred in (1) granting a take-nothing judgment against him, notwithstanding the jury's verdict, and (2) denying the vessel owner's motion for judgment nihil dicit against the manufacturer. We affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant/appellee Man Nutzfahrzeuge Aktiengesellschaft (hereinafter, "Man Germany"), a German company named as a defendant below, manufactured engines that were installed in a fifty-foot yacht ("Vessel"). The model year of the Vessel is 1988. The engines in question were installed on the Vessel in 2000. In September 2002, plaintiff/appellant Doug Shows purchased this Vessel knowing that the Vessel and its engines were not new but used. Shows was the Vessel's third owner since these engines were installed and commissioned.

In June 2004, the Vessel allegedly suffered a major engine failure, allegedly due to a defective valve that caused major damage to the starboard engine. The following summer, in June 2005, the Vessel suffered a second major engine failure, allegedly due to a defective valve, which allegedly damaged the starboard engine beyond repair, such that the engine had to be replaced.

The following year, in June 2006, Shows filed this suit against Man Germany and defendant/appellee Man Engines & Components, Inc. (hereinafter, "Man Engines"), eventually asserting claims for negligence, violations of the Texas Deceptive Trade Practices Act ("DTPA"), breach of express and implied warranties, and intentional and negligent misrepresentation. Man Germany filed a special appearance, but did not file an answer subject to that special appearance. Before trial, the trial court denied Man Germany's special appearance. Without having filed an answer, Man Germany appeared at trial through its counsel and corporate representative. Shows did not seek a judgment nihil dicit against Man Germany based on its failure to answer until after he rested his case in chief at trial. The trial court denied Shows's request for a judgment nihil dicit.

At trial, the jury was charged on claims for breach of express warranties, breach of implied warranties, and DTPA violations. The jury found liability only on the claim for breach of the implied warranty of merchantability. The only damages the jury awarded resulting from this breach was "the cost to replace the engine(s) in 2005," which the jury found was $89,967. Shows moved for entry of judgment.

Man Germany and Man Engines (hereinafter collectively, the "Man Parties") filed a motion for judgment notwithstanding the verdict, arguing as follows:

(1) The claim for breach of the implied warranty of merchantability under section 2.314 of the Texas Business and Commerce Code fails as a matter of law because an essential element is missing, namely privity of contract between Shows and the Man Parties.

(2) It is undisputed that Shows was the third owner of the engines at issue and that he purchased the Vessel used. As a matter of law, there is no implied warranty of merchantability because Shows bought the Vessel knowing the Vessel and its engines were used.

(3) Because the engines were delivered to the original buyer in October 2000, Shows had to sue for breach of the implied warranty of merchantability no later than October 2004. The Man Parties asserted that this is not a limitations issue but rather an issue regarding the expiration of the implied warranty.

(4) By means of the document contained in Defendant's exhibit 1, the first purchaser of the engines effectively disclaimed the implied warranty of merchantability as a matter of law and therefore Shows cannot recover for breach of the implied warranty of merchantability.

(5) There is no evidence that the damages awarded by the jury are reasonable and necessary repair costs, as required by Texas law.

The trial court granted the Man Parties' motion for judgment notwithstanding the verdict (hereinafter, "JNOV Motion") and rendered a take-nothing judgment against Shows. In its written order, the trial court stated that it was granting the JNOV Motion based upon grounds (1), (2), and (4), above. As to ground (3), the trial court stated that it found this argument to be a limitations argument and concluded that because the Man Parties did not plead limitations, this argument provided no basis for relief. The trial court did not expressly address the fifth argument.

In two appellate issues, Shows asserts the trial court erred in granting the JNOV Motion and in refusing to grant his motion for judgment nihil dicit.

II. ISSUES AND ANALYSIS

A. As a matter of law, does an implied warranty of merchantability exist when the Vessel owner bought the Vessel knowing the Vessel and its engines were used?

Under his first issue, Shows asserts that the trial court erred in concluding that there is no implied warranty of merchantability when a buyer purchases goods knowing that they are used. Shows has not cited, and research has not revealed, any Texas case holding that an implied warranty of merchantability arises when a buyer purchases goods knowing that they are used. In *Nobility Homes v. Shivers*, the Supreme Court of Texas held that "a manufacturer can be responsible, without regard to privity, for the economic loss which results from his breach of the Uniform Commercial Code's implied warranty of merchantability." 557 S.W.2d 77, 81 (Tex. 1977). When the high court decided *Nobility Homes*, no Texas court had held that an implied warranty of merchantability under the Uniform Commercial Code arises when a buyer purchases goods knowing that they are used, and the *Nobility Homes* court did not so hold. *See id*. at 81–83.

Shows relies upon the Supreme Court of Texas's opinion in *Gupta v. Ritter Homes, Inc*. *See* 646 S.W.2d 168, 168–69 (Tex. 1983), *overruled on other grounds by Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 649–50 (Tex. 1996). In that case, the high court held that the warranty of habitability and good workmanship implied in the contract between a homebuilder and the original purchaser is automatically assigned to a subsequent purchaser, who may sue the homebuilder for breach of this warranty. *See id*. The *Gupta* court did not address whether there was an implied warranty of merchantability under the Uniform Commercial Code, nor did the *Gupta* court state that such a warranty arises when a buyer purchases goods knowing that they are used. *See id*. In any event, Chapter 2 of the Texas Business and Commerce Code, Texas's version of article 2 of the Uniform Commercial Code, does not apply to the construction and sale of a house. *See* Tex. Bus. & Comm. Code Ann. § 2.102 (West 2009); *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982), *overruled on other grounds by*, *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987). An implied warranty of merchantability under the Uniform Commercial Code does not arise when a buyer

purchases a house in a real estate transaction like that involved in the *Gupta* case. *See G-W-L, Inc.*, 643 S.W.2d at 394. Therefore, the *Gupta* case is not on point.

Shows also cites *PPG Industries, Inc. v. JMB/Houston Centers Partners Limited Partnership*, a case in which the Supreme Court of Texas held that (1) DTPA claims generally cannot be assigned by an aggrieved consumer to someone else, (2) one express-warranty claim was barred as a matter of law, and (3) the trial court erred in not submitting another express-warranty claim to the jury. *See* 146 S.W.3d 79, 88–92, 98, 100 (Tex. 2004). In analyzing the first issue, the high court noted that the *Nobility Homes* court had "held a downstream purchaser of a mobile home could bring implied warranty claims directly against a remote manufacturer, even though there was no privity of contract between them." *Id.* at 88. The *PPG Industries* court did not address whether there was an implied warranty of merchantability under the Uniform Commercial Code and did not state that such a warranty arises when a buyer purchases goods knowing that they are used. *See id.* at 82–83, 88–89. The *PPG Industries* case is not on point.

Shows has not cited, and research has not revealed, any Supreme Court of Texas case addressing this issue. But, this court has held that an implied warranty of merchantability under the Uniform Commercial Code does not arise when a buyer purchases goods knowing that they are used. *See Bren-Tex Tractor Co. v. Massey Ferguson, Inc.*, 97 S.W.3d 155, 159, n.8 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Chaq Oil Co. v. Garnder Machine Corp.*, 500 S.W.2d 877, 878 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ). Other Texas courts of appeals have held likewise. *See Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889, 891 (Tex. App.—El Paso 1983, no writ); *Bunting v. Fodor*, 586 S.W.2d 144, 145–46 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *Valley Datsun v. Martinez*, 578 S.W.2d 485, 489 (Tex. Civ. App.—Corpus Christi 1979, no writ). Absent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or an intervening and material change in the statutory law, this court is bound by the prior holding of another panel of this court. *See Chase Home Finance, L.L.C. v. Cal Western Reconveyance Corp.*, 309 S.W.3d 619, 630 (Tex. App.—Houston [14th Dist.] 2010, no

pet.). We have not found a decision from a higher court or this court sitting en banc that is on point and contrary to these prior panel decisions, and research has revealed no intervening and material change in the statutory law that would affect these prior panel decisions. Therefore, we are bound by this court's prior precedent, under which an implied warranty of merchantability under the Uniform Commercial Code does not arise when a buyer purchases goods knowing that they are used. *See Bren-Tex Tractor Co.*, 97 S.W.3d at 159, n.8; *Chaq Oil Co.*, 500 S.W.2d at 878.

At trial, Shows testified that he had owned a forty-six-foot boat before he bought the Vessel but that he did not consider installing new engines on this boat because "it would cost too much." Instead, Shows testified as follows: (1) the Vessel "was a 1988"; (2) Man engines had been installed on the Vessel in 2000; (3) Shows bought the Vessel in September 2002, knowing that the Vessel was a used boat and that the Man engines had been installed in the boat in 2000; and (4) Shows had "a pattern and a history of being willing to purchase used boats knowing [there were] used engines in them." Shows introduced into evidence documents showing that the engines in question were manufactured in 1999 and commissioned in October 2000. In his appellate brief, Shows asserts that the engines were commissioned in October 2000, less than two years before Shows purchased the Vessel. Shows introduced into evidence a "prepurchase survey" prepared by a marine surveyor for Shows in August 2002. The survey reflects that the model year of the engines is 1999 and that the engines have been used. A document entitled "Certification of Acceptance of Vessel" was admitted into evidence. Shows signed that document on September 3, 2002. Under the unambiguous language of the certification Shows agrees that the Vessel "is sold as a used vessel." Because the evidence proves as a matter of law that Shows bought the Vessel knowing that the Vessel and its engines were used, the implied warranty of merchantability does not apply. *See Bren-Tex Tractor Co.*, 97 S.W.3d at 159, n.8; *Chaq Oil Co.*, 500 S.W.2d at 878.

Shows asserts that the Man Parties waived their argument there that there is no implied warranty of merchantability by failing to plead this defense or to seek a jury question on this issue. As to this assertion, Shows has not provided any argument,

analysis, or citations to the record or legal authority. Even construing Shows's appellate brief liberally, we cannot conclude that he has briefed this argument adequately. *See* Tex. R. App. P. 38.1(i); *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 337 (Tex. App.— Houston [14th Dist.] 2005, no pet.). Based upon this inadequate briefing, Shows has waived review of this argument.[1] *See San Saba Energy, L.P.*, 171 S.W.3d at 337.

For the reasons stated above, we conclude that Shows's first issue lacks merit, and we overrule it. The trial court did not err in granting the JNOV Motion.[2]

B. Did the trial court err in denying the Vessel owner's motion for judgment nihil dicit based on a defendant's appearance in the case without filing an answer?

In his second issue, Shows argues that the trial court erred in denying his motion for judgment nihil dicit based upon Man Germany's failure to file an answer. As noted, Man Germany filed a special appearance but did not file an answer subject to that special appearance. Before trial, the trial court denied Man Germany's special appearance. But Man Germany still did not file an answer before trial commenced. Man Germany appeared at trial through its counsel and its corporate representative. Though Shows was entitled to seek a judgment nihil dicit against Man Germany based on its failure to answer, Shows did not do so until after he rested his case in chief at trial. At that time, Man Germany had not filed an answer. The trial court denied Shows's request for a judgment nihil dicit and concluded that Shows waived his right to this relief by proceeding to trial.

Though Shows would have been entitled to seek a judgment nihil dicit before trial, he did not do so and instead proceeded to trial against Man Germany. Thus, the trial court did not err by concluding that Shows waived any right to a judgment nihil dicit. *See Stoner v. Thompson*, 578 S. W.2d 679, 682 (Tex. 1979) (stating that, though there is a difference between default judgments and judgments nihil dicit, the same rules generally apply to both); *Estate of Grimes v. Dorchester Gas Producing Co.*, 707 S.W.2d 196, 204

[1] In any event, this argument lacks merit. This matter is not an affirmative defense, and there was no genuine issue of fact in this regard to submit to the jury.

[2] We need not and do not address (1) whether any of the other grounds asserted in the JNOV Motion has merit, or (2) the Man Parties' cross-point.

(Tex. App.—Amarillo 1986, writ ref'd n.r.e.) (holding that plaintiffs waived their right to a default judgment or interlocutory judgment against non-answering defendants by proceeding to trial); *Foster v. L.M.S. Development Co.*, 346 S.W.2d 387, 397 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) (concluding that even if defendant who participated at trial had failed to file an answer, plaintiffs waived their right to a default judgment by proceeding to trial). Accordingly, we overrule Show's second issue.

III. CONCLUSION

Under binding precedent from this court, the implied warranty of merchantability does not apply in the case under review because the evidence proves as a matter of law that Shows bought the Vessel knowing that the Vessel and its engines were used. Therefore, the trial court did not err in granting the JNOV Motion. Nor did the trial court err in concluding that Shows waived any right he had to a judgment nihil dicit against Man Germany by proceeding to trial without first seeking such a judgment. Having overruled Shows's two appellate issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Chief Justice Hedges and Justices Frost, and Christopher.