IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

February 25, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

H. B. H. ENTERPRISES, INC.	)	KNOX COUNTY
	)	03A01-9608-CV-00253
Plaintiff-Appellant	)	
	)	
	)	
v.	)	HON. DALE C. WORKMAN,
	)	JUDGE
	)	
	)	
QUITMAN CATES and JOHN DOE PARTNERS, All d/b/a CATES MAINTENANCE	)	
	)	
	)	
Defendants-Appellees	)	AFFIRMED AND REMANDED

J. MYERS MORTON OF KNOXVILLE FOR APPELLANT

PAUL D. HOGAN, JR., OF KNOXVILLE FOR APPELLEES

OPINION

Goddard, P.J.

This is an appeal from a judgment entered by the Circuit Court of Knox County. The Plaintiff, H.B.H. Enterprises, Inc., sought damages under breach of contract and warranty theories arising from the sale of used laundry equipment by the

Defendant Quitman Cates.[1] The Defendant filed a counter-complaint seeking an award for the Plaintiff's failure to pay for the equipment that is the subject of this suit, as well as other equipment sold and services rendered.

A jury trial was held on November 30, 1995. At the conclusion of the Plaintiff's case in chief, the Court granted in camera the Defendant's motion for a directed verdict on the warranty issues. The Plaintiff's breach of contract claim and the Defendant's counter-claim proceeded to a conclusion before the jury, although the Trial Court did not inform the jury of the directed verdict or instruct them to disregard any testimony pertaining to warranties. The jury returned a $15,000 verdict in favor of the Defendant. The Plaintiff filed a motion for new trial, which the Trial Court subsequently denied.

The Plaintiff is a corporation which has been operating a dry cleaning and laundry business since 1989. In 1993 the Plaintiff's principal owner and president, Bart Howell, expanded the business by contracting to iron linen napkins and tablecloths for a restaurant supplier. The Plaintiff did not have the proper equipment to perform the new contract, so the Plaintiff sought to purchase equipment from several sources, including the Defendant. The Defendant informed Mr. Howell that he had two industrial ironers for sale, a rebuilt ironer for approximately $15,000, and

[1] It appears that Mr. Cates is the only party in this case, and operates individually rather than as a partnership.

a used and disassembled ironer for $1000, plus $4000 for delivery and set up. Although Mr. Howell knew that the latter ironer had been in a fire, he purchased the disassembled ironer.

The Defendant and his representatives installed the ironer at the Plaintiff's facility. The Plaintiff was responsible for connecting the plumbing and electricity to the ironer, but this work was not completed while the Defendant's representatives were installing the ironer. Although the ironer worked for approximately eight months, it did not work as well as the Plaintiff had expected and was subject to many problems which affected the quality and production rate of the ironer. However, the Plaintiff was able to use that ironer and another to perform the linen contract. The contract resulted in $92,181.93 in sales, $79,117.74 in expenses, and $13,064.19 in profit for the Plaintiff. After this period, the Plaintiff sold the ironer for $6500. The Plaintiff never paid the Defendant for the ironer.

Although the Trial Court directed a verdict against the warranty claims by the Plaintiff, the Court did not advise the jury that it had done so. The Trial Court's instructions permitted the jury to find for the Plaintiff if the jury found either a breach of contract or a breach of any warranty by the seller. The Trial Court also defined a calculation for assessing damages if either a breach of contract or warranty were found. Additionally, the Trial Court instructed the jury about exclusion

of implied and express warranties, including an "as is" instruction:

> The buyer and seller may agree that there be no expressed warranties relating to the goods, or they may agree that only certain warranties shall apply, and all others excluded.
>
> If such an agreement has been made, there can be no expressed warranty contract[2] to its terms. Unless the circumstances indicate otherwise, all implied warranties are excluded by an expression like "as is", or "without faults", or other language which in common understanding calls to a buyer's attention the exclusion of warranties, and makes it plain that there are no implied warranties.

However, the Trial Court did not define for the jury the meaning of implied or express warranties.

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[2] The transcript shows that the word "contract" was used in the charge. However, it appears most likely, in accordance with the Civil Pattern Jury Instruction 10.36, the word "contrary" was used. In any event, the Plaintiff raises no issue relative to this particular charge.

The Plaintiff presents the following issue on appeal:

> Did the Court commit error in directing a verdict dismissing plaintiff's warranty claims which clearly affected the judgment in this case.

In addition to the directed verdict issue, the Defendant presented the following issue on appeal:

> The trial court did not err by instructing the jury as to disclaimers of warranties because evidence supporting such instruction exists in the record. Alternatively, if the trial court erred in instructing the jury as to disclaimers of warranties, such error was harmless.

The Plaintiff's warranty claims included breach of express warranties, implied warranty of merchantability, and implied warranty of fitness for a particular purpose. Because we reach this case on the Plaintiff's appeal from a directed verdict, we must take the strongest legitimate view of the evidence in favor of the Plaintiff. This Court must uphold the decision of the Trial Court only if reasonable minds could not differ. Eaton v. McLain, 891 S.W.2d 587 (Tenn. 1994).

The Plaintiff's argument is essentially two fold. First, the Plaintiff asserts that the directed verdict itself was in error. Second, although not formally raised, the Plaintiff argues that the Trial Court's "as is" instruction was in error since no evidence existed showing that the ironer was sold "as is."

Express warranties involve affirmations of fact or descriptions by the seller assuring the buyer that the goods in question will meet or conform to certain standards or specifications. The Plaintiff contends that the Defendant expressly warrantied the ironer to Mr. Howell after Mr. Howell told the Defendant he would be using the ironer to process polyester napkins for a third-party contract.

A breach of an express warranty by description under T.C.A. 47-2-313(1)(b) can arise when a seller's incorrect description of the goods induces the buyer to purchase those goods. In re Jackson Television, Ltd., 121 B.R. 790 (Bankrtcy. E.D. Tenn. 1990). To assert a prima facie case that an express warranty existed and was breached, a plaintiff must demonstrate that the seller made an affirmation of fact which has a tendency to induce the buyer to purchase the goods, that the buyer was induced by the seller's acts, and that the affirmation of fact was false regardless of the seller's knowledge of the falsity or intention to create a warranty. See Standard Stevedoring Co. v. Jaffe, 42 Tenn. App. 378, 302 S.W.2d 829 (1956). Examples of express warranties include a seller representing that its okra seeds were of a particular variety when they were not, Agricultural Services. Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057 (6th Cir. 1977); a seller advertising that its crane could lift 15-20 tons when it was actually a 10-ton crane, Standard Stevedoring Co. v. Jaffe, supra; and a seller representing that a

car was new when in actuality it was used, Mashburn v. Thornton, 35 Tenn. App. 216, 244 S.W.2d 173 (1951).

However, "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." T.C.A. 47-2-313(2). Thus, "some statements or predictions cannot fairly be viewed as entering into the bargain." T.C.A. 47-2-313(2), at Comment 8. Courts are reluctant to find an express warranty where the buyer knew of the condition of the property before the purchase. In re Jackson Television, Ltd., supra. The Plaintiff relies on the following statements made by its president, Mr. Howell, during direct examination to establish the existence of an express warranty: "he convinced me that this four-roll would do the visa;[3] because it wasn't cotton napkins, and it would be real easy for this to do it. So I bought it."

This general statement is the type addressed by Section 47-2-313(2) and does not rise to the level of an express warranty. The Plaintiff has the burden of establishing that the statement was false. However, the Plaintiff is unable to meet this burden since the Plaintiff took possession of and used the ironer for nearly eight months to generate $92,000 worth of sales. Assuming that the Defendant did warrant that the ironer would be functional, the fact that the ironer was operational defeats the Plaintiff's express warranty claim since the

[3] Visa is a polyester material.

Plaintiff would be unable to demonstrate that the Defendant's affirmation of fact was false. Furthermore, the fact that the Plaintiff was well aware of the condition of the ironer before purchasing the ironer militates against any reliance by the Plaintiff on the Defendant's affirmations of fact. Because the Plaintiff was unable after presenting its case to establish the elements necessary to maintain a prima facie case for a breach of an express warranty, the Trial Court did not err in granting the Defendant's motion for a directed verdict on this issue.

The Plaintiff also asserts that the Trial Court erred by directing a verdict against its claims for breach of the implied warranties of merchantability and fitness for a particular purpose under T.C.A. 47-2-314 and 47-2-315. However, for second-hand goods, liability under the implied warranty of merchantability is limited. T.C.A. 47-2-314, Comment 3. Additionally, Section 47-2-316(3)(b) provides for exclusion of implied warranties where the buyer has inspected the products or refused to do so and the defects should have been apparent upon such an examination. Comment 8 to the Official Text of Section 47-2-316 states:

> "Examination" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty.

. . . .

> . . . A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in his field ought to observe . . . .

Tennessee courts have held that implied warranties do not exist where "defects in the same are known to the buyer, or he has knowledge of facts sufficient to put him on inquiry or to charge him with notice. No such warranty will be implied where the seller states enough to put one of ordinary intelligence on notice." Cardwell v. Hackett, 579 S.W.2d 186 (Tenn.App.1978). This is not a case where the seller withheld the damaged condition of the goods being sold to the buyer. To the contrary, the Plaintiff's President, Mr. Howell, acknowledges that he was so informed. Because the Defendant stated enough about the condition of the ironer to put an ordinary person, especially a professional in the laundry business, on notice, no implied warranty could have existed. Therefore, the Trial Court was not in error to direct a verdict on the issue of implied warranties.

In conclusion, we note that the Plaintiff had a full plenary hearing before a jury as to its breach of contract claim and as to the counter-claim against it by Mr. Cates. Because he prevailed in neither, we conclude that even if the Trial Court was in error, as asserted by the Plaintiff, the error was harmless as contemplated by Rule 36 of the Tennessee Rules of Appellate Procedure.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against the Plaintiff, H.B.H. Enterprises, Inc., and its surety.

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Houston M. Goddard, P.J.

Concur:

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Charles D. Susano, Jr., J.

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Clifford E. Sanders, Sp.J.