IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

PAUL KING and, KAREN KING, Plaintiffs, v. RON'S MOBILE HOMES SALES, INC., and PAWNEE HOMES, INC., Defendants.	))))))))))	C.A. No. 00-12-027

Submitted: June 17, 2008
Decided: July 23, 2009

Patrick E. Vanderslice, Esquire, Attorney for Plaintiffs.
H. Cubbage Brown, Jr., Esquire, Attorney for Ron's Mobile Homes Sales, Inc.
Pawnee Homes, Inc., Dissolved Entity

DECISION AFTER TRIAL

This action arises from the purchase by Plaintiffs Paul and Karen King of a manufactured home which they allege is defective and improperly installed. Plaintiffs sued both Ron's Mobile Homes, Inc., ("Ron's"), the seller and installer of the home, and Pawnee Homes, Inc. ("Pawnee"), the manufacturer of the home. Pawnee is now dissolved and non-existent, and so was not present or represented at trial. Plaintiffs claim Ron's is liable for failing to properly set up the home, or otherwise liable for the home's defects, and that Pawnee failed to construct the home in a workmanlike manner. Ron's cross-claimed against Pawnee contending that Pawnee is responsible for the problems and defects complained of by Plaintiffs. Pawnee cross-claimed against Ron's for indemnification. A two day trial was held on February 13, 2009 and June 17, 2009.

FACTS

On December 18, 1999, Plaintiffs entered into a Purchase Agreement with Ron's to purchase a custom built home manufactured by Pawnee. The order was placed by Ron's with Pawnee according to specifications requested by Plaintiffs. Purchase of the home was accompanied by a limited one-year warranty from Pawnee. The limited warranty was followed by an extended ten (10) year warranty. Once the home was completed, Pawnee, on February 25, 2000, transported the home from its manufacturing facility to Plaintiff's lot for installation. Permanent installation or set up of the home on Plaintiffs lot was performed by Ron's.

Upon inspection, Plaintiffs were dissatisfied with the home and made several complaints. In fact, Plaintiffs wrote a letter, dated April 10, 2000, and sent a fax, dated April 24, 2000, to Ron's that listed the items in the home which needed repair. In response, Ron's, on several different occasions, sent workers to perform repairs. However, Plaintiffs were not satisfied with the corrections. As a result, representatives from Ron's and Pawnee met at Plaintiffs home on June 19, 2000 to go over the issues Plaintiffs raised. At the conclusion of the meeting, the parties created a list of the necessary repairs. It was not refuted that all items on the list, with the exception of items pertaining to the marriage wall, were Pawnee's responsibility. While Ron Messick, owner of Ron's, and Terry Messick, a former employee of Pawnee, testified that Pawnee performed repairs on the home after the meeting, Mr. King, while unsure as to which

defendant performed which repairs, testified that both defendants completed repairs.

Nonetheless, Plaintiffs, still dissatisfied, contacted David N. Rutt, Esquire, who wrote a letter, dated August 16, 2000, to Ron's which requested that the repairs be completed within two weeks or Plaintiffs would hire an independent contractor. When repairs were not completed, Plaintiffs commenced this action on December 11, 2000[1], and hired John Copeland, on or about October 26, 2002, to perform repairs, which he completed on or about December 5, 2002. After Mr. Copeland completed the repairs, Plaintiffs moved into the home in May of 2003 after receiving a Certificate of Occupancy on May 29, 2003.[2]

DISCUSSION

Ron's Liability

This transaction involved the sale of goods (the manufactured home) and services rendered in setting up the home.[3] "When a mixed contract is presented, it is necessary for a court to review the factual circumstances surrounding the negotiation, formation and contemplated performance of the contract to determine whether the contract is predominantly or primarily a contract for the sale of goods. If so, the provisions of Article Two of the Uniform Commercial

[1] All action in this matter was stayed for several years by the bankruptcy filing of Pawnee's parent, Nanticoke Homes, Inc. The parties thereafter were granted 5 unopposed continuances of trial.

[2] While Plaintiffs waited more than three years after the home was delivered to apply for a Certificate of Occupancy, Plaintiffs failed to prove that the repairs would have prevented the house from meeting the minimum standards for receiving a Certificate of Occupancy.

[3] *See Brasby v. Morris*, 2007 WL 949485, at *3 n.6 (Del. Super. Mar. 29, 2007) (providing that modular homes are "goods" under the UCC until affixed to real property) (citing 67 Am.Jur.2d *Sales* § 62)). *See also Edwards v. Kent Rentals, Inc.*, 1989 WL 112512, at *5 (Del. Super. Sept. 20, 1989) (providing that a mobile home is a "good" under the UCC).

Code apply."[4] In this case, the facts establish that the installation or set up of the home was ancillary to the Purchase Agreement for the sale of the home, and therefore, the installation portion is not to be treated as standing separately from the sale of the mobile home. Thus, the Uniform Commercial Code applies.

Plaintiffs claim that Ron's breached an express warranty to properly set up the home and deliver the goods as expected. However, Ron's asserts it disclaimed any and all warranties on page two (2) of the Purchase Agreement entitled "ADDITIONAL TERMS AND CONDITIONS." Paragraph ten (10) thereof provides:

> "EXCLUSION OF WARRANTIES. I [Plaintiffs] UNDERSTAND THAT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ALL OTHER WARRANTIES EXPRESS OR IMPLIED ARE EXCLUDED BY YOU [Ron's] FROM THIS TRANSACTION AND SHALL NOT APPLY TO THE GOODS SOLD. I UNDERSTAND THAT YOU MAKE NO WARRANTIES WHATSOEVER REGARDING THE UNIT OR ANY APPLIANCE OR COMPONENT CONTAINED THEREIN, EXCEPT AS MAY BE REQUIRED UNDER APPLICABLE STATE LAW."

The Court concludes that this paragraph does disclaim the implied warranties of merchantability and fitness for a particular purpose as it not only mentions the word "merchantability," but is also conspicuous in bold print and clearly visible as all the letters in the paragraph are capitalized.[5] However, the Court finds that the testimony and evidence clearly establish that Ron's expressly agreed to properly set up, anchor, and block the home on an appropriate foundation so

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[4] *Neilson Bus. Equip. Ctr. v. Monteleone*, 524 A.2d 1172, 1174 (Del. 1987) (citing *Glover School and Office Equip. Co., Inc. v. Dave Hall, Inc.*, 372 A.2d 221, 223 (Del. Super. 1977)).

[5] According to 6 *Del. C.* § 2-316(2), "... to 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.' "

that it is level. Therefore, even if the disclaimer statement "could be found to constitute a disclaimer of warranty to install the home properly, such a disclaimer is inconsistent with the express warranty, and therefore, inoperative."[6]

While it is clear that Ron's provided an express warranty to Plaintiffs and that the home Plaintiffs took possession of after set up had many defects, Plaintiffs have failed to prove by a preponderance of the evidence that the alleged failure of Ron's to properly set up the home was the cause of the defects. In fact, Plaintiffs were unable to determine when the home was damaged, and, as a result, could not distinguish between which defects were caused by Ron's and which were caused by Pawnee. Moreover, Plaintiffs have not proven by a preponderance of the evidence that the problems observed by Mr. Copeland in 2002 existed immediately after the home had been set on the lot in 2000. The Court cannot ignore the fact that some of the defects observed may have been the result of normal settling. The Court finds credible the testimony of William Ward, the operations manager for Pawnee at the time, that most of the problems complained of by Plaintiffs could be remedied by leveling the home, which often must be done after installation. However, there was no evidence that this was attempted even though Plaintiff's witness Mr. Copeland testified that "it [was] like the house almost wasn't level on the foundation." Paragraph 21 of the Purchase Agreement plainly provides that "[s]ettling of [the] home is not a warranty item. If your home settles and needs relevelling, it will be on a cash,

[6] *Kent Rentals, Inc.*, 1989 WL 112512, at *7 (citing 6 *Del. C.* § 2-316(1); *Jensen v. Seigel Mobil Homes Group*, 668 P.2d 65, 72 (Idaho 1996)).

pay call basis." It is unclear from the evidence whether the repairs made by Plaintiffs were necessary or whether they could have been mitigated by proper leveling. Overall, Plaintiffs have failed to provide any evidence to substantiate their claim that Ron's breached its express warranty.

Notwithstanding the foregoing, the Court concludes that Plaintiffs did prove a breach of one of the contract terms by Ron's. To prevail on a breach of contract claim, a plaintiff must prove: (1) the existence of a contract, whether express or implied; (2) the breach of an obligation imposed by the contract; and (3) resultant damage to the plaintiff.[7] As part of the Purchase Agreement, Plaintiffs ordered and paid for two extra courses of foundation blocking at a price of $3,510.00. Plaintiff Mr. King's uncontroverted testimony was that he received only one additional course of foundation blocking. The Court concludes that Plaintiffs are entitled to damages for half the cost of the extra block, or $1,755.00.

Pawnee's Liability

Based on the evidence and testimony, the Court concludes that Plaintiffs have failed to prove by a preponderance of the evidence that Pawnee was responsible for the alleged deficiencies. In addition, the parties informed the Court that Pawnee is a dissolved entity, which obviously did not appear at trial. Any judgment against it would be a fiction. All claims against and by Pawnee therefore are dismissed.

[7] *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

Attorney's Fees

The general rule is that each party must bear his or her attorney's fees and expenses of litigation unless there is a "contractual or statutory basis for liability."[8] The prevailing party in this matter is entitled to attorney's fees under Paragraph 6 of the Purchase Agreement which provides that "[i]f you prevail in any legal action which you bring against me, or which I bring against you, concerning this contract, I agree to reimburse you for your reasonable attorney's fees, court costs and expenses which you incur in prosecuting or defending against that legal action." Although this attorney's fees clause is couched in one-sided language, the Court finds the contractual intent of the parties that the clause be mutually applicable, lest it be unconscionable.

Courts give great weight to contract clauses creating the right to payment of attorney's fees in subsequent litigation since the contracting parties had the opportunity to negotiate such provisions to allocate the costs of a breach of the contract.[9] In Delaware, both courts of law and equity "routinely enforce provisions of a contract allocating costs of legal actions arising from the breach of a contract."[10]

The *Delaware Lawyers Code of Professional Responsibility* DR-1.5 enumerates the factors to be considered in determining the reasonableness of a claim for attorney's fees:

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[8] *Safeway Stores v. Chamberlain Protective Services*, 451 A.2d 66, 68 (D.C. 1982). *See also Thomas v. Marta*, 1990 WL 35292 at *2 (Del. Super. Mar. 27, 1990); *Tri State Mall Assocs. v. A.A.R. Realty*, 298 A.2d 368, 373 (Del. Ch. 1972).
[9] *Knight v. Grinnage*, 1997 WL 633299 at *3 (Del. Ch. Oct. 7, 1997).
[10] *Id.*

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fees customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.[11]

These factors are applied by Delaware Courts in awarding attorney's fees.[12] In addition, the Court also may consider the ability of the losing party to pay attorney's fees.[13]

The Court need not conduct an in-depth analysis of the DR-1.5 factors, or consider fee affidavits, because it finds one of those factors overwhelmingly controlling in this case; the amount involved and the results obtained. Plaintiffs brought this action to obtain a judgment of at least $24,975.23 for claimed gross defects in the construction and installation of their home. All that was proven was an omitted extra course of foundation block worth $1,755.00. The result obtained was relatively *de minimus*; any attorney fee award in this case should be *de minimus* as well. While the Court acknowledges the good reputation of Plaintiffs' counsel within the community and assumes that any fee charged would be within the range of customary fees charged in the community, this case did not involve either complex or novel issues and, considering the duration of the litigation, any claim for attorney's fees would undoubtedly amount to far more than the damages Plaintiffs have been awarded. In consideration of the

[11] *Id.*
[12] *Husband S. v. Wife S.*, 294 A.2d 89, 93 (Del. 1972); *General Motors Corp. v. Cox*, 304 A.2d 57 (Del. 1973).
[13] *General Motors Corp. v. Cox*, 304 A.2d 57 (Del. 1973).

above, the Court awards nominal attorney's fees in the amount of one-third of the judgment, or $585.00.

CONCLUSION

For the foregoing reasons, judgment is rendered in favor of Plaintiffs and against Defendant Ron's in the amount of $1,755.00; plus reasonable attorney's fees in the amount of $585.00, plus post-judgment interest. Each party shall bear its own cost of suit.

IT IS SO ORDERED, this _____ day of July, 2009.

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Kenneth S. Clark, Jr., Judge