

RECENT DEVELOPMENTS

DECEPTIVE TRADE PRACTICES AND WARRANTIES

USE OF “SUGGESTED RETAIL PRICE” MAY CONSTITUTE FRAUD

Kim v. Carter’s Inc., 598 F.3d 362 (7th Cir. 2010)

FACTS: Consumers Su Yeun Kim and Gina Polubinski (“Plaintiffs”) brought separate actions against children’s clothing retailer Carter’s Inc. (“Carter’s”), alleging breach of contract and violation of Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”). Carter’s marked articles of clothing with a “Suggested Price” and an advertised percent-off savings. Plaintiffs alleged that the suggested price was substantially higher than what Carter’s products actually sold for on a regular basis, so that the sales price would match those of the competitors’ regular pricing. The district court entered an order dismissing actions for failure to state a claim, and Plaintiffs appealed.

HOLDING: Affirmed.

REASONING: The court held that there was no breach of contract. Plaintiffs selected the clothing and offered to purchase it at the advertised price, regardless of that price’s relation to its actual value, at which point Carter’s accepted by taking Plaintiffs’ money in exchange for possession of the clothing. By charging this agreed price in exchange for ownership of the clothing, Carter’s gave Plaintiffs the benefit of their bargain. Plaintiffs claimed that Carter’s advertised sale at 30% off an inflated fictitious “Suggested Price” led them to believe that they were paying 30% less than what other consumers usually paid. The court disagreed. The parties intended to complete a sale in accordance with the plain terms of Carter’s advertising, the clothing at the price on the price tag.

The court held that Carter’s allegedly deceptive price comparisons “may violate the [ICFA].” The ICFA makes unlawful “[u]nfair methods of competition and unfair or deceptive acts or practices... in the conduct of any trade or commerce....” The court specified that while a deceptive practice violates the ICFA even if it doesn’t actually deceive or injure anyone, a private party must show actual damage in order to maintain an action under the ICFA. The court held that Plaintiffs sufficiently alleged an ICFA violation because comparison between actual and fictitious suggested retail prices is specifically identified in the ICFA. A showing of actual damage can be fulfilled if the seller’s deception deprived the plaintiff of the “benefit of her bargain” by causing her to pay “more than the actual value of the property.” Plaintiffs did not allege that the clothing was defective or worth less than what they actually paid. They also did not allege that, but for Carter’s deception, they could have shopped around and obtained a better price in the marketplace.

The court held that similar practices may constitute fraud, but that Plaintiffs got the benefit of their bargain and suffered no actual pecuniary harm. As such, the allegations failed to establish the actual damages element of the ICFA claim, so the court upheld the lower court’s dismissal.

WARRANTY DISCLAIMER IS EFFECTIVE TO WAIVE IMPLIED WARRANTIES

Dewayne Rogers Logging, Inc. v. Propac Indus., Ltd., 299 S.W.3d 374 (Tex. App.—Tyler 2009)

FACTS: In late 1998, Dewayne Rogers Logging, Inc. (“Rogers”) purchased a Propac delimeter attached to a John Deere Excavator (the “machine”) from East Texas Machinery. Rogers took the machine on demonstration for approximately one week before purchasing it. Deere and Propac gave Rogers a six-month warranty on the machine, but disclaimed all implied warranties. Two years later, the machine caught fire when no one was present and was destroyed. Rogers brought suit against Deere, Propac, and East Texas Machinery (collectively, “Appellees”). The causes of action alleged against Appellees included negligence, gross negligence, strict liability, violation of the Deceptive Trade Practices Act (“DTPA”), breaches of express and implied warranties, breach of contract, and fraud. Appellees filed both traditional and no evidence motions for summary judgment. After hearings on the motions, the trial court ultimately granted all of them and entered a final take nothing judgment in favor of Appellees. This appeal followed.

HOLDING: Affirmed.

REASONING: Rogers contended that the trial court erred in granting summary judgment in favor of Appellees on its implied warranty claims. In their no evidence motions, Appellees alleged that the customer purchase order disclaimed the implied warranties of merchantability and fitness for a particular purpose. Therefore, they contended, Rogers could not produce evidence of any implied warranties.

Under Texas law, unless excluded or modified, 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. To exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and in the case of writing, must be conspicuous. To exclude or modify any implied warranty of fitness, the exclusion must be by a writing and conspicuous.

The court noted that the customer purchase order signed by Rogers for the machine contained the following language in bold, all capital letters: “NO IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS IS MADE.” The court held that because the language mentioned merchantability, was in capital letters equal in size to the surrounding text, and was in con-

Because the language mentioned merchantability, was in capital letters equal in size to the surrounding text, and was in contrasting bold type, the disclaimer was conspicuous.

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trasting bold type, the disclaimer was conspicuous and, thus, was an effective disclaimer of the implied warranties of merchantability and fitness under Tex. Bus. & Com. Code Ann. § 2.316(b).

Rogers did not present any evidence regarding the existence of implied warranties. Rogers argued that the disclaimers were not effective because they were not communicated to it before the machine was delivered. However, the court held that the contract of sale was not completed until Rogers and East Texas Machinery signed the customer purchase order. The customer purchase order included the disclaimers of the implied warranties of merchantability and fitness. Thus, the court ruled, the disclaimers were communicated to Rogers before completion of the contract of sale. Because the disclaimers complied with the Texas Business and Commerce Code and were communicated before completion of the sale, the court ruled them effective. Therefore, the court held that the trial court did not err in granting Appellees' no evidence motions for summary judgment regarding Rogers' implied warranties claims.

DTPA AWARD OF ATTORNEY'S FEES REQUIRES AWARD OF ACTUAL DAMAGES

McDaniel v. Bennett, 295 S.W.3d 675 (Tex. App.—Amarillo 2008)

FACTS: Homeowners Benny and Mary Bennett brought action against roofing contractor Richard McDaniel for breach of contract, violation of Deceptive Trade Practices Act, breach of implied warranty, and fraud. Mrs. Bennett was the sole witness at the bench trial, at which McDaniel failed to appear. The district court entered default judgment in favor of the Bennetts for actual damages, exemplary damages, and attorney fees. McDaniel appealed.

HOLDING: Reversed and rendered.

REASONING: A post-answer default constitutes neither an

abandonment of the defendant's answer nor an implied confession of any issues joined by the defendant's answer. Judgment cannot be entered on the pleadings, rather, the plaintiff in such cases must offer evidence and prove its case. The only evidence in the record bearing on damages came from Mrs. Bennett's trial testimony. She referenced a repair estimate, but the repair estimate did not appear in the record.

A party seeking damages measured by the cost of repair must present competent evidence justifying a finding by the trier of fact that the repairs are necessary to restore the property to its former condition and that the cost of repairs is reasonable and fair. The court found that an estimate without the testimony of the person who created the estimate or other expert testimony is no evidence of the necessity of the repair or the reasonableness of the cost of the repair.

The court also held that the recovery of actual damages is a necessary predicate to recovery of exemplary damages and awards of attorney's fees. Since the Bennetts failed to present legally sufficient proof of actual damages, the court held that there was no basis for the trial court's award of exemplary damages or attorney's fees under the DTPA. The court reversed the trial court's judgment and rendered a take-nothing judgment.

The Texas Supreme Court subsequently overruled the majority holding. *Bennett v. McDaniel*, 295 S.W.3d 644 (Tex. 2009). They found no fault with the Court of Appeals' analysis, but while this case was still pending, *Dolgencorp v. Lerma*, 288 S.W.3d 922, 929 (Tex. 2009), altered the required disposition. The court, accordingly, reversed the take-nothing judgment and remanded the case to trial court.

The recovery of actual damages is a necessary predicate to recovery of exemplary damages and awards of attorney's fees.