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STATE OF MICHIGAN

COURT OF APPEALS

PALMA JEAN RAMIREZ,

Plaintiff-Appellant,

v

CHARTER NATIONAL BANK,

Defendant/Counter-Plaintiff-Appellee,

and

DOWN RIVER MOTOR SALES,

Defendant-Appellee.

July 1, 1992

No. 134053

UNPUBLISHED

Before: Fitzgerald, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order dismissing her claims against defendants based on no genuine issue of material fact. MCR 2.116(C)(10). She also appeals the judgment entered in favor of defendant Charter National Bank on its counterclaim. We reverse in part.

In December, 1987, plaintiff purchased a used 1981 Mercury Marquis from defendant Down River Motor Sales (dealership). The sticker on the window contained the disclaimer language, "as is-no warranty." However, plaintiff also purchased an extended service contract at the time she bought the automobile. The automobile purchase was financed through defendant Charter National Bank.

Within a short period of time, the automobile developed serious mechanical problems. The dealership refused to authorize repairs. Apparently plaintiff did not follow the procedure outlined in the service contract. In April 1988, she stopped making payments.

Plaintiff filed suit against the dealership, bank and Extended Service Program, Inc., the administrator of the service contract. She claimed a breach of the sales contract, express warranties and the implied warranty of merchantability and violation of the Michigan Consumer Protection Act. MCL 445.901 et seq.; MSA 19.416 et seq. The bank was included on the basis that it is subject to all claims and defenses of the buyer arising out of the transaction. MCL 492.114a(b); MSA 23.628(14a)(b). The trial court granted ESPI's motion for summary disposition on the basis that plaintiff had failed to comply with the procedure in the service contract.

The dealership and the bank moved for summary disposition claiming that there were no express warranties and the "as is" language excluded any implied warranties. MCL 440.2316(3)(a); MSA 19.2316(3)(a). Plaintiff responded that the federal Magnuson-Moss Warranty Act prevented the dealership from disclaiming the implied warranty. The act prohibits a supplier from disclaiming any implied warranty to a consumer if, at the time of sale or 90 days thereafter, the supplier enters into a service contract with the consumer. 15 USC 2308(a). The trial court held that the dealership was not a party to the service contract, dismissed the plaintiff's claims, and entered judgment for the bank on its counterclaim for the balance owing on the purchase agreement.

On appeal, plaintiff argues that the court erred in dismissing its implied warranty claim because under, the unambiguous language of the contract, the dealership was a party. She also argues that the court erred in dismissing her claim based on the MCPA because a disclaimer defense is not applicable to that claim.

Defendants argue that the dealership was not a party to the contract. In the alternative they suggest that summary disposition was still proper as plaintiff did not comply with the terms of the service contract.

Where the language of a contract is unambiguous, its construction is a question of law for the trial court. Wilson v Home Owners Mutual Ins Co, 148 Mich App 485, 490; 384 NW2d 807 (1986). The language of the contract is to be construed against the drafter of the contract. Petovello v Murray, 139 Mich App 639, 642; 362 NW2d 857 (1984).

In this case it is clear from the language of the contract that plaintiff and the dealership, not ESPI, were the parties to the service contract. The contract was signed by the plaintiff and the dealership's representative. Underneath the signatures is the phrase "This contract must be signed by both parties." There are references to the "issuing dealer" throughout the contract. There is also a statement that ESPI is the administrator of the contract on behalf of the dealer and their liability extends to the dealer under a separate agreement. The trial court erred as a matter of law in finding that the dealership was not a party to the contract. Thus, under § 2308 of the Magnuson-Moss Act, the dealership's disclaimer of the implied warranty of merchantability would be invalid. Defendants' contention that plaintiff did not follow the proper procedure in the service contract is irrelevant. This claim is based on breach of an implied warranty, not breach of the service contract. The trial court erred in dismissing the breach of implied warranty claim.

The court also erred in dismissing the claim based on violation of the Michigan Consumer Protection Act. A breach of an implied warranty of merchantability is a violation of the act. Mikos v Chrysler Corp, 158 Mich App 781, 782-783; 404 NW2d 783 (1987). Since the implied warranty claim is still viable, so is the claim based on the MCPA.

We reverse the part of the order granting summary disposition of the claims based on breach of an implied warranty and violation of the MCPA. We also reverse the judgment in favor of Charter National Bank on its counterclaim. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Janet T. Neff