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United States Court of Appeals
Tenth Circuit

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ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VAN ITALLIE COMPANY, INC., Plaintiff-Appellee, Cross-Appellant, vs. TRI-MAX CORPORATION, Defendant-on-Counterclaim, Third Party Plaintiff- Appellant, Cross-Appellee, vs. GENERAL ELECTRIC COMPANY, INC., Third Party Defendant- Appellee.	No. 88-2192 No. 88-2214 No. 88-2245 No. 88-2744 No. 88-2776 (D.C. No. Civ-85-2270-P) (W.D. Okla.)

ORDER AND JUDGMENT*

Before BALDOCK and EBEL, Circuit Judges, and SAM,** District Judge.***

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** Honorable David Sam, United States District Judge for the District of Utah, sitting by designation.

*** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause therefore is ordered submitted without oral argument.

Van Itallie Company is a distributor of Stratapax™ drill blanks, polycrystalline diamond-faced cutters manufactured by General Electric Company. Tri-Max Corporation produces and markets drill bits for use in the oil and gas industry. Between 1979 and 1983, Van Itallie, on behalf of General Electric, supplied Tri-Max under an open account with Stratapax™ drill blanks which Tri-Max incorporated into its drill bits. Accompanying each delivery to Tri-Max was a General Electric invoice/packing slip which contained the following warranty:

> WARRANTY
> Seller warrants that each product to be delivered hereunder will be of the kind designated or specified and no other warranty, except of title, shall be implied. . . . If any product delivered hereunder fails to conform to the specifications or to be the kind designated prior to the date which is 60 days from the date of shipment or prior to the date of use or resale of the product by Buyer, whichever date sooner occurs, and if Buyer shall notify Seller thereof immediately, Seller shall thereupon, at its option, either (1) correct the defect or defects by repairing or, at its option, by making replacement material available at Buyer's plant or (2) refund the purchase price. The liability of Seller (except as to title) arising out of the supplying of said product or its use, whether on warranties, contract, negligence, or otherwise, shall not in any case exceed the liability as herein provided and, upon expiration of the applicable warranty period specified herein, all such liability shall terminate. The foregoing shall constitute the sole and exclusive remedy of Buyer and the sole and exclusive liability of Seller. THE WARRANTIES STATED IN THIS PARAGRAPH ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES (EXCEPT OF TITLE) WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE. . . .

In September 1985, Van Itallie instituted this diversity action pursuant to 28 U.S.C. § 1332 against Tri-Max seeking payment of $61,221 allegedly due on twelve drill blank shipments during 1983. Tri-Max joined General Electric as a party to the action and claimed breach of warranty and product liability against Van Itallie and General Electric. According to Tri-Max, fifty-four of its drill bits failed in service because of defective Stratapax™ drill blanks, resulting in a $1.8 million loss to the business.

At the close of Tri-Max's case, the district court directed a verdict under Fed. R. Civ. P. 50(a) in favor of Van Itallie and General Electric on Tri-Max's product liability claim. The court concluded that Tri-Max as a matter of law had failed to prove that the fifty-four drill blanks were unreasonably dangerous or the cause of any loss to Tri-Max. At the close of all the evidence, the district court submitted special interrogatories to the jury. The jury returned a verdict against Van Itallie on its open account claim and in favor of Tri-Max on its breach of warranty claim. The jury found that the warranty contained on the invoice/packing slip was a part of the agreement between the parties, but that the limited remedy failed of its essential purpose. The jury assessed damages of $140,000 and $420,000 against Van Itallie and General Electric respectively. Subsequently, the district court granted judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b) to Van Itallie and General Electric on the warranty claim. The court held as a matter of law that the warranty's language was conspicuous and its limited remedy had not failed of its essential purpose.[1] The district court, however, denied Van Itallie's motion for judgment on the open account, holding that the evidence was sufficient to support the jury's finding in favor of Tri-Max.

These consolidated appeals from the district court's rulings ensued.[2] Our jurisdiction arises under 28 U.S.C. § 1291. Applying Oklahoma substantive law,[3] we affirm in part and reverse

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1 At the conclusion of Tri-Max's case, Van Itallie and General Electric moved for a directed verdict on the warranty claim as well as the product liability claim. The district court took the motion on the warranty claim under advisement and indicated that the jury would act in an advisory capacity on that issue. The court's actions in this regard were technically incorrect. Fed. R. Civ. P. 39(c) specifically authorizes a district court, in its discretion, to impanel an advisory jury in any case "not triable of right by a jury." Thus, where an action is triable as of right to a jury, as this action was, the district court is powerless to impanel an advisory jury. See McKinney v. Gannett Co., Inc., 817 F.2d 659, 673 (10th Cir. 1987). We therefore construe the district court's grant of a directed verdict in favor the Van Itallie and General Electric on the warranty claim after submitting that claim to the jury, as a judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b).

2 A motion for a directed verdict and a motion for judgment notwithstanding the verdict are governed by the same standard. Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 899 F.2d 951, ___ (10th Cir. 1990). In determining the propriety of either motion, we must view the evidence in a light most favorable to the nonmoving party; we may not pass upon the witnesses' credibility or substitute our judgment for that of the jury. Id. at ___. Yet a scintilla of evidence will not withstand either motion. Dixon v. City of Lawton, 898 F.2d 1443, ____ (10th Cir. 1990). Instead, the evidence must be sufficient to create an issue for the jury; where reasonable minds could differ as to the import of the evidence, the motions should be denied. Banghart v. Hollywood Gen. P'ship, ___ F.2d ___ ___ (10th Cir. 1990).

3 Because Van Itallie commenced this diversity action in the Oklahoma federal district court, we must apply the substantive law that an Oklahoma state court would apply, including its choice of law rules. Because all parties agree that Oklahoma substantive law applies to this action, we shall proceed accordingly without further analysis. See Missouri Pac. R.R. Co. v. Kansas Gas & Elec. Co., 862 F.2d 796, 798 n.1 (10th Cir. 1988). Although (footnote continued on next page)

in part the judgment of the district court.

I.

Product Liability

The district court properly directed a verdict for Van Itallie and General Electric on Tri-Max's product liability claim. In Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974), the Oklahoma Supreme Court adopted the Restatement (Second) of Torts § 402A (1965) and set forth the elements necessary to sustain a product liability claim in Oklahoma. Among other things, the plaintiff "must prove that the defect made the article unreasonably dangerous" and "that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough." Id. at 1363.

The trial record does not support Tri-Max's assertion that the fifty-four specified drill blanks were the cause of any redressable injury in tort. The most Tri-Max proved was a "mere possibility." While Tri-Max throughout the trial vigorously attacked the quality of the Stratapax™ drill blank generally, such evidence was insufficient to sustain a finding that the fifty-four blanks were the proximate cause of any loss to Tri-Max. Similarly, the evidence was insufficient to permit a reasonable jury to find that the drill blanks were unreasonably dangerous.

(footnote continued from previous page)
entitled to some deference, we ultimately review de novo the district court's interpretation of state law. Midamerica Fed. Sav. and Loan Ass'n v. Shearson/American Exp. Inc., 886 F.2d 1249, 1253 (10th Cir. 1989).

At most, any defect in the blanks caused Tri-Max purely economic loss. A strong argument can be made that the risk that a product may not perform as expected does not per se make the product unreasonably dangerous within the meaning of § 402A.[4]

II.

Warranty

The district court also properly granted Van Itallie and General Electric judgment on Tri-Max's breach of warranty claim notwithstanding the jury's verdict to the contrary. The Uniform Commercial Code, adopted in Oklahoma, provides for both the exclusion of warranties and limitation of remedies in the commercial setting:

> (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. . . .

Okla. Stat. Ann. tit. 12A, § 2-316(2) (West Supp. 1990).

> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods

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[4] This point leads to a more fundamental issue regarding Tri-Max's product liability claim: Whether Oklahoma law recognizes a cause of action in tort where a defective product purchased in a commercial transaction malfunctions causing purely economic loss? See East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858 (1986); Laurens Elec. Coop, Inc. v. Altec Indus., Inc., 889 F.2d 1323 (4th Cir. 1989). The Oklahoma Supreme Court has not yet spoken on this issue, and because we do not sit to declare the common law of Oklahoma, we decline to express an opinion on the issue.

and repayment of the price or to repair and replacement of non-conforming goods or parts; and
(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

Id. § 2-719. To avoid the affect of these provisions as encompassed within the warranty contained on the invoice/packing slip, Tri-Max asserts that (1) the warranty was not part of any agreement with General Electric, (2) the exclusion of warranties was not conspicuous and (3) the limitation of remedies failed of its essential purpose.

In Patty Precision Prod. Co. v. Brown & Sharpe Manuf. Co., 846 F.2d 1247, 1254 (10th Cir. 1988), we held that under Oklahoma law, General Electric's disclaimer on certain goods to an initial purchaser did not bind a subsequent purchaser where the disclaimer was never communicated to the subsequent purchaser. Unlike the facts in Patty Precision, the evidence in this case revealed that Tri-Max was placed on notice of the limited warranty via the invoice/packing slip which accompanied each shipment of drill blanks to Tri-Max. Whether officials at Tri-Max ever actually read the warranty and were aware of its terms is irrelevant. See id. at 1257-58 (Logan, J., concurring in part) (where benefits of warranty pass without regard to privity, so should detriments of disclaimer, especially in cases between commercial entities involving only economic loss). Tri-Max acknowledged at trial that the issue of whether the warranty was a part of its agreement with

General Electric was a question of fact. The jury's finding that the warranty ran from General Electric to Tri-Max was supported by the evidence and will not be disturbed.

Tri-Max's argument that the exclusion of warranties was not conspicuous in contravention of § 2-316(2) is likewise unpersuasive. Conspicuous is defined in Okla. Stat. Ann. tit. 12A, § 1-201(10) (West 1963):

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. . . . Whether a term or clause is "conspicuous" or not is for decision by the court.

Interpreting § 1-201(10), Oklahoma courts have described conspicuous as that which reasonably may be expected to come to the attention of the buyer. The location of the disclaimer in the contract, its type face and size, the variation in printing, the length of the contract and the sophistication of the buyer are all factors to be considered, although none alone are determinative. P.E.A.C.E. Corp. v. Oklahoma Natural Gas Co., 568 P.2d 1273, 1277-78 (Okla. 1977); Collins Radio Co. v. Bell, 623 P.2d 1039, 1049-51 (Okla. App. 1980).

In this case, the front of the invoice/packing slip contained the following language in capital letters: "THIS TRANSACTION IS SUBJECT TO THE TERMS AND CONDITIONS ON THE FACE AND REVERSE SIDE HEREOF . . . ." On the back of the slip were the "STANDARD CONDITIONS OF SALE" including the warranty previously set forth. The exclusion of warranties was printed in black capital letters and was the only language so printed aside from the headings. While the print was small, it was amply spaced and easily read. These factors, coupled with the fact that Tri-Max was a sophisticated business in need of no special protection, lead us to agree with the district court that the exclusion of warranties was conspicuous.

Lastly, Tri-Max asserts that the limited remedy of repair, replacement or refund failed of its essential purpose so as to make alternative remedies available to it under § 2-719(2). The Oklahoma Supreme Court has stated that a remedy fails of its essential purpose "[w]here the seller is afforded a reasonable opportunity to correct the defect and fails timely to respond or is repeatedly unsuccessful in the efforts to meet the warranty-imposed obligation." Osburn v. Bendix Home Sys., Inc., 613 P.2d 445, 449-450 (Okla. 1980). In the commercial setting, a remedy fails of its essential purpose only where the seller has refused to make repairs or cannot repair the product. Reigel Power Corp. v. Voith Hydro, 888 F.2d 1043, 1046 (4th Cir. 1989). See also, J. White & R. Summers, Uniform Commercial Code 602 (3d ed. 1988) (situations rarely occur where remedy fails of its essential purpose).

This is not a case where the limited remedy failed of its essential purpose. The evidence was uncontradicted that General Electric had no notice of Tri-Max's warranty claim until Van Itallie instituted this suit against Tri-Max. Before a remedy contained in a written warranty may fail of its essential purpose, the seller must be given the opportunity to attempt to fulfill its obligations under the warranty. In this case, Tri-Max never even asked General Electric or Van Itallie to repair or replace the fifty-four drill blanks at issue. Tri-Max's evidence that it had rejected approximately 12% of all Stratapax™ drill blanks and that General Electric had granted credit to Tri-Max on only 5% of all drill blanks did not allow Tri-Max to assume that General Electric would do nothing to remedy the alleged defect in the fifty-four drill blanks. Tri-Max simply did not give General Electric or Van Itallie any opportunity to correct the problem.

III.

Open Account

Having held that the district court correctly denied Tri-Max relief on its product liability and warranty claims, we now ask whether the evidence was sufficient to sustain the jury's finding against Van Itallie on the open account. In Oklahoma, acceptance of goods occurs when a buyer fails to make an effective rejection after an opportunity to inspect the goods. CMI Corp. v. Leemar Steel Co, Inc., 733 F.2d 1410, 1414 (10th Cir. 1984). Rejection of goods occurs when a buyer seasonably notifies the seller of rejection within a reasonable time after delivery. Okla. Stat. Ann. tit. 12A, § 2-602 (West 1963). A failure to reject goods results in their acceptance. Id. § 2-607. A buyer is entitled to revoke acceptance within a reasonable time only if it has accepted the goods on the assumption that any non-conformity would be cured or its acceptance was induced by the difficulty of discovery or the seller's assurances. Id. § 2-608.

Our review of the record indicates that Tri-Max neither effectively rejected the drill blanks or revoked their acceptance. Although somewhat unclear from the state of the record, it is certain that Van Itallie delivered the fifty-four drill blanks to Tri-Max sometime before January 1984. Tri-Max did not complain of any problem with those blanks until at least September 1985. After a lapse of twenty-one months, Tri-Max attempted to reject the blanks or in the alternative, revoke their acceptance. This delay was unreasonable as a matter of law. The jury's finding to the contrary cannot stand. Because Tri-Max accepted the drill blanks, Van Itallie is entitled to recover on the open account.

Accordingly, the judgment of the district court is AFFIRMED IN PART and REVERSED IN PART. The award of attorney's fees and costs against Van Itallie on its open account claim is VACATED and this cause REMANDED for further consideration of fees and costs consistent with this opinion.

Entered for the Court

Bobby R. Baldock
Circuit Judge