STATE OF MICHIGAN

COURT OF APPEALS

FIRE & ICE MECHANICAL, INC., Plaintiff,	UNPUBLISHED October 11, 2007
v	No. 269978 Bay Circuit Court LC No. 03-003873-CK
BIT MAT PRODUCTS OF MICHIGAN, Defendant/Third-Party Plaintiff-Appellant	
v	
VAPOR POWER INTERNATIONAL, Third-Party Defendant-Appellee.	

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Third-party plaintiff Bit Mat Products of Michigan (hereafter, "plaintiff") appeals as of right the trial court's judgment of no cause of action following a bench trial. We affirm.

Plaintiff is engaged in the business of producing and delivering asphalt as a "through-put" under a contract with British Petroleum (BP). Under its contract with BP, plaintiff is required to maintain and deliver the asphalt to BP's customers at a temperature not less than 300 degrees Fahrenheit.[1] Plaintiff also bids to supply asphalt to road construction jobs throughout the state. To maintain the asphalt in its storage tanks at the proper temperature, plaintiff purchased a thermal fluid heater from third-party defendant Vapor Power International (hereafter, "defendant")[2] in October 2001. The heater was installed in April 2002. It operated by circulating heated thermal fluid through pipes running through plaintiff's storage tanks to warm the tanks' contents. Plaintiff acknowledged that the heater "started fine" and "ran good"

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[1] Other products, such as emulsions and "superhot" asphalt are maintained at different temperatures.

[2] The original plaintiff settled its action against its named defendant, leaving only the third-party action for litigation at trial and in this appeal.

upon start-up. However, shortly thereafter, the heater experienced a leaking coil and two failed hydrovalves, necessitating four separate repairs in June and July 2002. Further, plaintiff's employees allegedly noted, and complained to defendant about, a loud vibration in the heater beginning at start-up, which plaintiff asserts could have been the cause of the breakdowns suffered by the heater. Still, plaintiff acknowledged that following the 2002 repairs, the heater operated effectively until May 2003, when it again began to leak oil from a damaged coil. This coil was replaced. Thereafter, the heater sustained damage when a coil retainer melted and, in July 2003, two additional coils were found to be leaking. At that point, plaintiff disconnected defendant's heater and began using a smaller heater it purchased as a "back-up" to defendant's heater.

Plaintiff attempted to revoke its acceptance of defendant's heater and sought to recover its purchase price and costs incurred in repairing the heater. However, the trial court concluded that plaintiff could not revoke its acceptance of the heater because its value had not been substantially impaired by the temporary breakdowns and because plaintiff's attempted revocation was not timely. Further, the trial court determined that defendant did not breach the implied warranties of fitness or merchantability for the heater relating to the leaking coils, because the coils were repaired and the heater kept plaintiff's asphalt liquefied as it was purchased to do.

I. Revocation

Plaintiff first argues that the trial court erred in holding that the heater's value was not substantially impaired by the repeated need for repairs to the heater and that plaintiff's attempted revocation was untimely. We disagree.

We review a trial court's factual findings for clear error and its application of the law to those facts de novo. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997).

MCL 440.2608 governs revocation of acceptance. It provides, in pertinent part, that:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity *substantially impairs* its value to him if he has accepted it
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> > (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
> >
> > (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
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> (2) Revocation of acceptance must occur *within a reasonable time* after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it. [Emphasis added.]

The trial court recited a list of problems that plaintiff experienced with the heater, but found that they did not substantially impair the value of the heater to plaintiff for purposes of the statute. We agree with plaintiff that the heater need not have been rendered totally inoperable for

an extended period of time in order for its value to have been "substantially impaired" under the statute. However, we conclude that the trial court did not clearly err in finding that the brief periods of inoperability occasioned by the repairs were not sufficient to establish a substantial impairment of the heater's value, where the heater otherwise operated effectively and without incident throughout the warranty period

Further, the statute requires that plaintiff revoke acceptance within a "reasonable time" after discovering the nonconformity. MCL 440.2608(2). The trial court found that plaintiff's attempt to revoke its acceptance was untimely, because plaintiff continued to use the heater until July 28, 2003 and did not notify defendant of its intent to revoke its acceptance until August 26, 2003, seventeen months after the heater was placed into service. Timeliness of revocation is a question of fact; whether a revocation is timely depends on the facts and circumstances of each case. *Uganski v Little Giant Crane & Shovel, Inc*, 35 Mich App 88, 108; 192 NW2d 580 (1971). This Court may not set aside a trial court's findings of fact unless clearly erroneous. MCR 2.613(C). A finding of fact is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Under the facts and circumstances of this case, especially considering the duration of plaintiff's use of the heater before attempting revocation, we are not left with a firm and definite conviction that the trial court mistakenly concluded that plaintiff's attempted revocation was untimely.

II. Essential Purpose of Defendant's Limited Warranty

Plaintiff next argues that the trial court erred in finding that defendant's limited warranty did not fail as to its essential purpose as it related to the heater's coils. We disagree. The sales agreement entered into between plaintiff and defendant for the heater set forth the following limited warranty:

> Vapor Power warrants products of its manufacture to be free of defects in material and workmanship if properly installed, cared for, and operated under normal conditions, with competent supervision, and in accordance with Vapor Power installation, operating and maintenance instructions. Vapor Power's only obligation under this warranty is to repair or replace at its factory such Vapor Power products which shall, within one year after startup, or 18 months after shipping date (whichever comes first) of the product, be returned by the original buyer to Vapor Power factory, after receipt of written approval from Vapor Power . . . and which upon examination shall appear to Vapor Power's satisfaction to have been defective in material and workmanship. Correction of such defects by repair or replacement shall constitute fulfillment of all obligations to Representative or buyer . . . . Vapor Power assumes no liability for labor and or any other expenses incurred by anyone without Vapor Power's express written consent. . . .
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> This warranty supersedes and is in lieu of all other warranties, express or implied . . . .

Under the Uniform Commercial Code, a purchaser is limited to the terms of the seller's written warranty unless the warranty fails of its essential purpose. MCL 440.2719. This Court has explained that "a warranty fails of its essential purpose where unanticipated circumstances preclude the seller from providing the buyer with the remedy to which the parties agree, in which

event the buyer is entitled to seek remedies under the standard UCC warranty provisions." *Severn v Sperry Corp,* 212 Mich App 406, 413-414; 538 NW2d 50 (1995). See also, *Computer Network, Inc v AM General Corp*, 265 Mich App 309. 314-315; 696 NW2d 49 (2005) ("a warranty fails of its essential purpose where unanticipated circumstances preclude the seller from providing the buyer with the remedy to which the parties agreed, under the standard UCC warranty provisions.").

The trial court cited evidence from defense witnesses indicating that plaintiff's treatment of the heater may have played a role in causing the failures of the coils. Defendant's expert testified that "the likely cause of the coil leaks were hot spots or other problems that arose from water contamination of the heating oil," and that the oil probably became contaminated when the expansion tank was left open, or when "oil [that was] brought into the system as new asphalt storage tanks were brought online was not properly dealt with." The trial court also noted defendant's various "concerns," including that plaintiff bypassed warning devices on the heater compromising its performance, and that upon inspection of the heater during a repair, rubber foam insulation and tape were found inside the combustion chamber, and cottonwood seeds were found in the blower and chamber, which might have interfered with the heater's operation. Thus, the record suggests that the limited warranty may not have applied because of plaintiff's failure to properly care for and operate the heater under normal circumstances.

In any event plaintiff conceded, via its general manager, that it contacted defendant regarding warranty repairs on only one occasion and that on that occasion, defendant replaced the leaking coil without charge, pursuant to the limited warranty. Defendant also replaced the two failed hydrovalves without charge during the warranty period. Under this Court's decisions in *Computer Network, supra*, and *Severn, supra,* a limited warranty fails only when "unanticipated circumstances" preclude the seller from providing the agreed-upon remedy to the buyer. There is no indication in the record that unanticipated circumstances prevented defendant from providing plaintiff with the agreed-upon remedy set forth in the limited warranty. Rather, the record indicates that, when presented with a claim under the warranty, defendant "did exactly what it had contracted to do, and [hence, plaintiff] was not left without any remedy at all." *Price Bros Co v Charles J Rogers Constr Co*, 104 Mich App 369, 374-375; 304 NW2d 584 (1981). Therefore, we conclude that the trial court properly found that the limited warranty did not fail as to its essential purpose as it related to the heater's coils.

III. Implied Warranty of Merchantability

Plaintiff also argues that the trial court erred in holding that the implied warranty of merchantability was not breached when the heater repeatedly broke down and its problems remained unremedied. We disagree.

The implied warranty of merchantability is governed by MCL 440.2314, which provides, in pertinent part, that:

> (1) 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. . . .
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> (2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

To prove that a seller has breached the implied warranty of merchantability, the buyer must show that the goods were defective when they left the possession of the manufacturer or seller. *Computer Network, supra* at 316. "'[A] defect is established by proof that a product is not reasonably fit for its intended, anticipated or reasonably foreseeable use. Merchantable is not a synonym for perfect[, rather, t]he warranty of merchantability is that goods are of average quality in the industry.'" *Id*. at 316-317, quoting *Guaranteed Constr Co v Gold Bond Products*, 153 Mich App 385, 392-393; 395 NW2d 332 (1986). In *Computer Network*, this Court held that the fact that a vehicle needed service on seventeen separate occasions within a short time was "circumstantial evidence that the vehicle was defective and not reasonably fit for its intended use" when it left the manufacturer. *Id.* at 317.

Here however, there were only four service calls during the warranty period. Further, there was evidence of other possible causes of the heater's issues, and that others not within defendant's control had access to, and modified, the heater. There was no direct evidence that the heater was defective when it left defendant's possession. As the trial court noted, generally, the heater operated effectively to keep plaintiff's asphalt liquefied and ready for delivery throughout the warranty period. Plaintiff presented no evidence that the vibration about which it complained was causally related in any way to the leaking coils or other malfunctions of the heater. In the absence of such evidence, the mere presence of a vibration, which may or may not have been unusual for this heater, was not sufficient to establish that the heater was not reasonably fit for its intended, anticipated or reasonably foreseeable use. *Id.* Consequently, the trial court did not err in concluding that defendant did not breach the implied warranty of merchantability.

We affirm.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens