BAR NEWS ITEM*

The Franklin County Bar Association is celebrating its centennial with opportunities for members to give back to the community

Among the events planned for the FCBA centennial are:

- Red Cross Bloodmobile visits at St. Marks Catholic Church, Greencastle, Wednesday, May 5, noon to 6 p.m. and the American Legion, Waynesboro, Thursday, May 6, noon to 6 p.m.
- Volunteer service at the Salvation Army Soup Kitchen, Chambersburg, on Saturday, May 22. Six volunteers are needed for each of two shifts: 8:30 to 11:00 a.m. and 11 to 1:30 p.m. Service also may be scheduled for Saturday, May 8, depending on the number of volunteers available.
- Tree plantings in boroughs throughout Franklin County
- Donation of books to the Franklin County Library System
- Additional pro bono work

Members also will celebrate the organization's 100th anniversary during the Spring Gala, dated for Friday, May 14, at the Waynesboro Country Club and the public ceremony on Friday May 21, at the Franklin County Courthouse.

Call Kim Shank at Legal Services, 264-5354, for details on the additional pro bono work. To register for the Bloodmobile visits or the Salvation Army Soup Kitchen, contact Bonnie Martin, executive director, at 888-237-9948 or fcba@cvn.net.

*From Press Release of Bonnie Martin, Executive Director of Franklin County Bar Association (FCBA), April 5, 1999.

MERLE S. ELLIOTT, ET AL., T/D/B/A SEKCO REALTY, Plaintiffs vs.. GAF BUILDING MATERIALS CORPORATION, Defendant, C.P. Franklin County Branch, Civil Action-Law, No. A.D. 1996 - 84

Elliott v. GAF

Summary judgment granted; breach of implied and express warranties; statute of limitations under Uniform Commercial Code, 13 Pa.C.S.A. section 2725.

1) An action for breach of any contract for the sale of goods must be commenced within four years after the cause of action has accrued. Uniform Commercial Code, 13 Pa.C.S.A. section 2725(a).

2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach; a breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered. Uniform Commercial Code, 13 Pa.C.S.A. section 2725(b).

3) A cause of action for breach of implied warranty accrues upon tender of delivery of the goods; a claimant must bring suit under such claims no later than four years after such delivery.

4) An implied warranty, by nature, cannot "explicitly extend to future performance" of the goods.

5) Where shingles were delivered and accepted in September of 1986 and the plaintiff did not file suit for breach of warranty by September 1990, but waited until March of 1996, the action is untimely.

6) Where the express terms of an express warranty specifically preclude the plaintiff from recovering labor costs to replace defective shingles, the warranty cannot be held to explicitly extend to future performance of the goods.

David C. Cleaver, Esquire, Counsel for Plaintiffs
Paul Loh, Esquire, Counsel for Defendant

OPINION AND ORDER OF COURT

HERMAN. J., March 15, 1999.

INTRODUCTION

Before the court is the defendant's motion for summary judgment to the plaintiff's complaint. The plaintiff seeks damages for breach of

express warranty and implied warranties under a contract whereby the defendant installed roofing shingles on the plaintiff's building. Argument was held and counsel submitted briefs. This matter is ready for decision.[1]

BACKGROUND

The parties entered into a contract under which the defendant installed shingles onto the roof of the plaintiff's building. The work was done on or about September 1986. Some of the shingles leaked in 1990 and the defendant supplied four new shingles as required by the contract. The labor to replace the new shingles was performed by a contractor hired by the plaintiff. After continuing to experience water leakage, the plaintiffs asked its contractor to inspect the soundness of the roof. On August 31, 1992, the contractor determined the shingles were defective and the entire roof needed replacing.

The plaintiff submitted a warranty claim to the defendant in October of 1992. Consistent with the warranty, the defendant offered to replace the shingles on a prorated basis but refused to pay for the labor costs to install them. (Exhibit C attached to the motion for summary judgment). The plaintiff rejected the offer. The defendant offered to replace all the shingles with an upgraded product. The

[1]The plaintiff withdrew Counts I and II which alleged negligence and strict liability. The defendant withdrew a motion for non pros filed concurrently with the motion for summary judgment.

Summary judgment is governed by Pa.R.C.P. 1035.2 which provides:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Ertel v. Patriot-News Co., 674 A.2d 1038 (Pa. 1996).

plaintiff rejected that offer as well. The plaintiff then hired a contractor to repair the entire roof at a labor cost of $13,642.78.

The plaintiff contends the defendant breached the contract's express warranty and the implied warranties of merchantability and fitness for a particular purpose by failing to reimburse the plaintiff for the labor costs necessitated by the shingles' failure. The defendant maintains the implied warranty claims are barred by the statute of limitations and the express warranty claim is barred both by the statute of limitations and the express terms of the warranty.

The Limited Warranty provides in relevant part as follows:

> 1. WARRANTY. GAF warrants to the original owner...that Shingles will remain free from manufacturing defects for the warranty period [25 years] and that wind-resistant Shingles will resist wind damage for five years from completion of the installation date. During the first year of the warranty period...Shingles containing manufacturing defects or Shingles damaged by wind will be replaced with an equivalent amount of Shingles, provided, however, that GAF's maximum liability will not exceed the original purchase price of the Shingles. GAF, whenever possible, will replace Shingles with Shingles of the same color and design...During the remaining warranty period [i.e., beyond five years from installation], GAF will adjust valid claims for Shingles containing manufacturing defects by an amount determined by decreasing annually GAF's maximum liability...by the original purchase price of the Shingles divided by the remaining warranty period, less any costs incurred by GAF for replacement during any previous year...
>
> 2. LIMITATIONS ON COVERAGE. GAF will not be liable for, and this Warranty does not apply to labor costs incurred for the application of the Shingles, tear-off, metal work, flashing or other related work...
>
> 4. SOLE WARRANTY. THIS WARRANTY IS EXCLUSIVE AND REPLACES ALL OTHER WARRANTIES...IN NO EVENT WILL GAF BE LIABLE FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES OF ANY KIND...

(Exhibit "A" of the complaint).

DISCUSSION

Under 13 Pa.C.S.A. section 2725, the Uniform Commercial Code, breach of warranty claims must be brought within four years from the date the cause of action accrues:

Statute of limitation in contracts for sale:

(a) General rule.--An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued...

(b) Accrual of cause of action.--A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.

The shingles were originally installed on or about September 1986. The plaintiff's first claim under the warranty was made in October of 1992 which the defendant honored by sending the plaintiff four replacement shingles. The plaintiff's claim to replace the entire roof was made in October of 1992 following their contractor's assessment on August 31, 1992 that all the shingles had failed. The complaint was filed on March 7, 1996. Citing section 2725(b), the defendant argues the plaintiff's warranty claims should have been brought by September of 1990, four years from the shingles' delivery. The plaintiff counters that the statute of limitations did not accrue until August 31, 1992 when they first learned the entire roof needed replacing.

I. The implied warranties of merchantability and fitness for a particular purpose

A cause of action for breach of implied warranty accrues upon tender of delivery of the goods and therefore a claimant must bring suit no later than four years after such delivery under section 2725. *Nationwide Insurance Co. v. General Motors Corp.*, 625 A.2d 1172 (Pa. 1993). "[T]he great weight of authority takes the position that an implied warranty, by nature, cannot 'explicitly' extend to future performance [of the goods]." *Id.* at 1178. The purpose of the tender of delivery rule is to encourage commerce by ensuring that sellers do not remain potentially liable for their goods beyond what the drafters of the UCC determined is a reasonable commercial record keeping

period. The rule allows sellers to bring closure to their business records on a given transaction. *Patton v. Mack Trucks, Inc.*, 519 A.2d 959 (Pa.Super. 1986).

The plaintiff, relying primarily on *Cucchi v. Rollins Protective Services,* 574 A.2d 565 (Pa. 1990) (plurality opinion), maintains that the implied warranty claim accrued when they discovered that the entire roof needed replacing, and not at the time the shingles were first delivered. That case involved the long-term lease of an alarm system which malfunctioned eleven years after installation. In reasoning that a long-term lease differs from the sale of goods, the court held that the cause of action for breach of warranty did not accrue until the plaintiff discovered the breach. The key fact was that the defendant still owned the system and had a continuing duty under the warranty to regularly service and maintain it. A party who retains title to a product and has an ongoing duty to furnish service for the duration of a lease may not take advantage of the tender of delivery rule.

The plaintiff's reliance on *Cucchi* to circumvent the tender of delivery rule is misplaced. The case at bar involves the sale of goods, not a lease, and is governed by the court's approach in *Nationwide*. The breach of implied warranty claim accrued in September of 1986 when the shingles were delivered and accepted, giving the plaintiff until September of 1990 to make that claim. The complaint filed in March of 1996 was untimely and will be dismissed.[2]

II. Express warranty

The *Nationwide* court also addressed the application of section 2725 to breach of express warranty claims. Where, by its express terms, an express warranty explicitly extends to future performance of the goods, the cause of action for breach of that warranty accrues on the date when the breach is or should have been discovered. *Id.* Even if the plaintiff's express warranty claim survives the defense of statute of limitations, however, that claim nevertheless is not viable

[2]The plaintiff also argues that the Limited Warranty is inherently defective because it contains no specific and conspicuous disclaimer of either the implied warranty of merchantability or the implied warranty of fitness for a particular purpose. Section 2316(b). Because we have already found that the plaintiff's implied warranty claim cannot pass the statute of limitations threshold, we need not consider this argument.

because the express terms of the Limited Warranty itself specifically bar the plaintiff from recovering labor costs to replace the shingles.

Paragraph 2(a) of the warranty clearly states the defendant is not liable for "labor costs incurred in the application of the Shingles, tear-off, metal work, flashing or other related work..." The plaintiff contends the defendant is responsible under the warranty for replacing all the shingles. The defendant does not dispute it was required to replace the shingles and the defendant did in fact provide four replacement shingles on or about October 1990 as the plaintiff requested. After the plaintiff requested that the defendant replace the entire roof, the defendant offered to supply the entire roof with upgraded shingles. The only request the defendant refused was that it reimburse the plaintiff for the cost of the labor to install the new shingles.

A close examination of the warranty reveals no obligation on the defendant's part to pay, either in advance or by reimbursement, for the costs which the plaintiff incurred when it hired a contractor to install new roofing. In fact, the express terms of the warranty specify otherwise. The defendant is therefore entitled to summary judgment as to the express warranty claim on this basis.[3]

ORDER OF COURT

NOW, this 15th day of March, 1999, the defendant's motion for summary judgment as to the plaintiff's claims of breach of express and implied warranties is hereby GRANTED and the plaintiff's claims are hereby DISMISSED with prejudice.

[3]Another reason the defendant argues the suit is untimely is that the plaintiff knew "several years" before October of 1992 the roof had been leaking but did not commence this action until March of 1996. (Exhibit "D" of the motion for summary judgment). This pertains to the issue of untimeliness, which we have already determined is irrelevant because the express warranty simply does not cover labor costs to install the replacement shingles.