

STATE OF MAINE
Cumberland, ss.

BUSINESS AND CONSUMER COURT

ARUNDEL VALLEY, LLC)
)
 Plaintiff)
)
 v.)
)
 BRANCH RIVER PLASTICS, INC.)
)
 Defendant)

Docket No. BCD-CV-13-15

RULING AFTER REMAND ON DISCLAIMER OF IMPLIED WARRANTIES

On Defendant Branch River Plastics, Inc.’s appeal of this court’s July 13, 2015 Judgment in this case, the Supreme Judicial Court of Maine, sitting as the Law Court, has vacated the Judgment as to Plaintiff Arundel Valley, LLC’s breach of implied warranty claims. The Law Court has remanded the case for this court to rule on “whether Branch River’s purported disclaimer of implied warranties was effective.” *Arundel Valley, LLC v. Branch River Plastics, Inc.*, 2016 ME 175, ¶ 1, 151 A.3d 938.

The Law Court has framed the issue to be addressed on remand as follows:

If the court rules, based on the evidence presented at trial, that Branch River made no legally operative disclaimer of implied warranties, the court must re-enter judgment on the jury’s verdict in Arundel Valley’s favor. If, on the other hand, the court rules that Branch River did disclaim the implied warranties of merchantability and fitness for a particular purpose – by way of an express warranty or otherwise – it must enter a judgment in Branch River’s favor on the two implied warranty counts.

Id. ¶ 15, 151 A.3d at ____.

After the Law Court mandate issued, this court established a schedule for the parties to brief the issue, with Branch River filing initially, Plaintiff Arundel Valley, LLC [“Arundel Valley”] responding, and Branch River filing a reply. Oral argument was held March 9, 2017,

and the record on remand was held open for further filings until March 13, 2017, at which point this court took the matter under advisement.¹

A. Threshold Issues Regarding Scope of Remand

Through the briefing process, it became apparent that each party is asking this court to decide issues that are beyond the scope of the Law Court's remand.

Arundel Valley asserts that this court should find and conclude that Branch River waived the defense of disclaimer of implied warranties in the course of the trial. *See* Arundel Valley, LLC's Post-Remand Brief at 2-3, *citing* Trial Transcript ("TT") 5:111-12, 5:118.² For its part, Branch River asserts that, in addition to the disclaimer of implied warranties issue, this court should decide that what Branch River claims is an independent limitation on damages is enforceable against Arundel Valley. *See* Post-Remand Reply Brief of Defendant Branch River Plastics, Inc. at 17 ("[E]ven if Branch River never disclaimed its implied warranties (which it did) Arundel Valley cannot avoid the consequences of the damages limitation.")³

In this court's view, neither Arundel Valley's waiver issue nor Branch River's limitation of damages issue is before this court on remand. As noted above, the Law Court has framed the sole issue on remand as being whether, "based on the evidence at trial," Branch River "did disclaim the implied warranties of merchantability and fitness for a particular purpose— by way of an express warranty or otherwise."

¹ Arundel Valley's late filing March 16, 2017 is not considered for purposes of this decision.

² This and similar citations are to volumes and pages of the trial transcript. Each volume corresponds to a trial day, so volume 5 covers the fifth trial day.

³ Branch River's limitation of damages argument is based on a provision in the document that Branch River's president, Robert Mayo, identified as the warranty that applied to Branch River's roof SIPs. *See* Def. Ex. 21; TT 5:30-31.

On its face, the answer to that question lies in the evidence presented at trial. Arundel Valley's contention that Branch River has waived its defense of disclaimer of implied warranties by failing to present evidence is thus outside the scope of the remand.

Similarly, Branch River's argument that this court should consider the effectiveness of the purported limitation on damages is outside the scope of the remand. A contractual limitation on damages is different from a contractual disclaimer of implied warranties and presents different issues of law and fact. The Law Court's remand identifies a single issue for this court to address, which is whether Branch River effectively disclaimed implied warranties.

Accordingly, the court declines to consider either Arundel Valley's waiver argument or Branch River's limitation of damages argument. Instead, the court turns to the issues of fact and law that are encompassed within the ultimate question of whether, based on the evidence at trial, Branch River effectively disclaimed the implied warranties of merchantability and fitness for particular purpose with respect to the structural roof panels it provided to Arundel Valley's project.

B. Findings and Conclusions Regarding Disclaimer of Implied Warranties

Based on the entire record, this court hereby adopts the following findings of fact and conclusions of law, which supersede any and all prior statements or rulings on the same matters, however designated.⁴ All affirmative findings are based on a preponderance of the evidence unless otherwise indicated.

1. In 2011, Arundel Valley hired a construction company, Peachey Builders, to serve as general contractor and "provide construction administration and management services" and all

⁴ Branch River's post-remand brief argues that the court has already decided the disclaimer issue in favor of Branch River, based on statements made by the court at trial, after the close of the evidence. *See* Post-Remand Brief of Defendant Branch River Plastics, Inc., at 1-2, 6-7, *citing* TT 6:7-10. To the extent the court's comments constituted rulings, they were explicitly designated as "tentative." TT 6:9. *See* M.R. Civ. 54(b)(1) (decisions, however designated, are subject to revision at any time prior to entry of judgment).

“labor, materials, equipment and services necessary” to construct a butter manufacturing facility for Arundel Valley. Plaintiff’s Trial Exhibit (“Pl. Ex.”) 1; TT 1:171. Arundel Valley owns the facility; Kate’s Butter, Inc., formerly a plaintiff in this case, leases the facility from Arundel Valley. TT: 1:166; Pl. Ex. 1. (The construction project is referred to hereinafter as “the Kate’s Butter project”).

2. During the planning phase for the Kate’s Butter project, Peachey Builders and the project architect recommended that the walls and roof of the facility be constructed using structural insulated panels, also known as SIPs. TT 1:176-77. Peachey Builders worked with a third party vendor, House & Sun, to purchase the SIPs. TT 1:179. House & Sun is a company that specializes in the sale of SIPs that it historically has obtained from either of two SIP manufacturers, one of which being Branch River. TT 2:90, 2:93. House & Sun had purchased SIPs from Branch River approximately seventy times in the eight to ten years prior to trial. TT 2:91, 2:94, 2:119.

3. The arrangement was that House & Sun would purchase the wall and roof SIPs from Branch River, and then re-sell them to Peachey Builders through a separate transaction, subject to House & Sun’s own pricing. TT 2:134. At the request of Peachey Builders “to price out some [SIPs] on the project,” House & Sun reached out to Branch River to prepare a bid for the Kate’s Butter project. TT 1:98-99.

4. Branch River is a manufacturer of SIPS for residential and commercial projects. Some of Branch River’s SIPS are marketed as Air-Flo SIPS and others are marketed as R-Control SIPS. TT 1:50-54. “Air-Flo” is Branch River’s own brand name, but R-Control is a designation that identifies the SIP as “code-compliant,” meaning that it is recognized to meet certain standards of manufacturing and performance established and monitored by AFM Corporation [“AFM”], the code compliance service that owns the R-Control designation. TT

1:50. The term “code-compliant” as applied to a product means that the product complies with the applicable building code. *See* TT 1:51.

5. R-Control is a registered trademark of AFM. AFM licenses facilities that manufacture SIPs to market products under the R-Control brand. Said licensed facilities must adhere to consistent standards to ensure high quality products. R-Control SIPs are manufactured under carefully controlled conditions and are certified as *per se* code compliant. Branch River has a license to manufacture and sell R-Control products. *See* TT 1:52-54, 3:259-60.

6. Branch River’s Air-Flo SIPs are designed and manufactured differently than its R-Control SIPs: the Air-Flo SIPs have channels cut into the foam core, whereas R-Control SIPs have a solid foam core. TT 1:52-54. As a result of the difference, the products perform differently. *Id.* Also, Branch River’s Air-Flo SIPs are not certified by any independent service, such as AFM, as being “code-compliant.” TT 1:52, 1:55.

7. Branch River proposed to provide R-Control SIPs for the walls of the Kate’s Butter facility, and to provide Air-Flo SIPs for the roof of the facility. Pl. Ex. 11, 13. Both proposals contained a critical error—they described the Branch River roof SIPs as R-Control. *Id.* Moreover, the twelve invoices that Branch River submitted to House & Sun for payment of the SIPs also incorrectly identified the Branch River roof SIPs as being R-Control. *See* Pl. Ex. 28.

8. In fact, while Branch River’s wall SIPs are indeed R-Control, Branch River’s Air-Flo roof SIPs are not R-Control. TT 1:52.

9. Based on Branch River’s repeated mischaracterization of its roof SIPs as being R-Control, Kel House, the owner of House & Sun, was under the mistaken understanding that the Branch River roof SIPs were R-Control. *See* TT 2:101, 2:107, 2:112. It was not until June 2012, well after the Branch River SIPs had been installed at the Kate’s Butter project, that

Branch River told Mr. House that the Branch River roof SIPS were not, in fact, R-Control. Pl. Ex. 37, TT 2:113-14.

10. Based on Mr. House's mistaken understanding, House & Sun submitted a budget estimate to Peachey Builders that mischaracterized the roof SIPS as being R-Control. P. Ex. 15. In December 2011 House & Sun submitted to Peachey Builders Change Order #1 that also mischaracterized the roof SIPS that House & Sun would be supplying as R-Control. Pl. Ex. 36.

11. Based on House & Sun's characterization of the Branch River roof SIPS, Peachey and Arundel Valley were led to believe that the Branch River roof SIPS were R-Control. TT 1:196-97, 2:145-46, -154; *see* Pl. Ex. 20.

12. Pursuant to Peachey Builder's contract with Arundel Valley, Peachey Builders provided its own material warranty to Arundel Valley and was to "assign to [Arundel Valley] all warranties received by Contractor on all materials and equipment included in the Work." Pl. Ex. 1, § 5.5.3.

13. In the course of the dealings in 2011-12 among Branch River, House & Sun, Peachey Builders and Arundel Valley, references were made to the warranty or warranties applicable to Branch River's wall and roof SIPS. The budget estimates that House & Sun provided Peachey Builders for the roof and wall SIPS made reference to "a 20 year factory warranty." Pl. Ex. 12, 18. On November 5, 2011, Branch River's representative provided House & Sun with a formal proposal for the Kate's Butter project that referenced Branch River's "Standard Panel Warranty." Pl. Ex. 21. On December 14, 2011, Peachey Builders sent House & Sun a signed second "Change Order" for the purchase of SIPS, which referenced a "20 year factory warranty." Pl. Ex. 22. On January 17, 2012, Branch River provided its final proposal to sell SIPS to House & Sun, making reference to a "Standard Panel Warranty" for \$201,330.00. Pl. Ex. 25.

14. Kel House on behalf of House & Sun accepted the Branch River proposal as of January 23, 2012.

15. The Branch River roof SIPS were delivered to the Kate's Butter project site between the end of February and the beginning of April 2012 and were installed by Peachey Builders during the April-June 2012 period. *See* Pl. Ex. 28 (Branch River invoices reflecting shipping dates). During March or April 2012, Branch River's sales manager, Kevin Arcand, visited the site and gave instruction to Peachey Builders on installation of the roof SIPS. TT 16-18.

16. Later in the spring or early summer of 2012, after the roof SIPS had been installed, Mr. Arcand again visited the site and determined that the installers had not used SIP tape as specified. TT 4:18-19.

17. At that point, in May and June 2012, two major issues arose.

18. One issue had to do with the discovery that Branch River's roof SIPS were not in fact R-Control. As noted above, prior to June 2012, House & Sun, Peachey Builders and Arundel Valley all had been led by Branch River's erroneous descriptions to believe that Branch River's roof SIPS were R-Control. The discovery that the Branch River roof SIPS were not R-Control raised issues about whether the structure would meet building code requirements, and eventually led Arundel Valley to direct that they be removed and replaced.

19. The other issue had to do with the effect of the improper installation of the roof SIPS upon the Branch River warranties that had been mentioned in various proposals and estimates. Mr. Arcand, on behalf of Branch River, advised Kel House that Branch River would not honor its express warranty of the roof SIPS because they had not been installed properly. TT 4:23. Branch River considered the express warranty to have been voided as a result of the improper installation. TT 5:44-45. *See also* Pl. Ex. 56.

20. Eventually, Branch River agreed to “reinstate” the express warranty after certain remedial measures were taken to address the installation error. TT 1 at 250-51; Pl. Ex. 57. By that time, Arundel Valley was more concerned with the fact that the roof SIPs were not R-Control and might have to be removed from the building, and it purported to reject Branch River’s reinstatement of the warranty.

21. There is no evidence in the trial record that any Branch River warranty document reflected in Defendant’s Exhibit 21 was forwarded to House & Sun, Peachey Builders or Arundel Valley until Branch River offered to “reinstate” the express warranty in June or July 2012, well after the Branch River roof SIPS had been purchased, delivered and installed on the Kate’s Butter structure. No witness other than Robert Mayo, Branch River’s president, was shown Defendant’s Exhibit 21. No witness (including Mr. Mayo) testified that Branch River had furnished the warranty document reflected in Defendant’s Exhibit 21 to any of the other parties—House & Sun, Peachey Builders or Arundel Valley—until after the problem with the roof SIPS not being R-Control and not properly installed had emerged.

22. The “Limited 20 Year Warranty” document on which Branch River relies is designated as being for the Kate’s Butter project and bears signature lines for Kate’s Homemade Butter, Peachey Builders and House & Sun, as well as a line for Branch River, but only Mr. Mayo’s signature appears on the document. *See* Def. Ex. 21. There is no Branch River warranty document signed by House & Sun, Peachey Builders and/or Arundel Valley in the trial record.

23. The evidence is conflicting on whether the “Limited 20 Year Warranty” marked as Defendant’s Exhibit 21 is, in fact, the warranty that was applicable to Branch River’s Air-Flo roof SIPS. Robert Mayo, Branch River’s president and owner, testified that the “Limited 20

Year Warranty” reflected in Defendant’s Exhibit 21 applied to all of Branch River’s SIPs,⁵ but that testimony was contradicted by the testimony of Branch River’s sales manager, Kevin Arcand. Mr. Arcand testified that Branch River had a 20-year warranty for its R-Control panels but a different warranty—“probably” a 10-year warranty—for its Air-Flo panels, which were what were installed on the roof of the Kate’s Butter structure. TT 4:24.⁶ There is no 10-year warranty document in the trial record. Mr. Arcand was not shown Defendant’s Exhibit 21.

24. Branch River has a standard warranty for its R-Control SIPs, but no standard warranty for its Air-Flo SIPs. TT 4:36. Thus, the various references to standard warranties in Mr. Arcand’s communications with House & Sun appear to apply to the R-Control wall SIPs, but not the Air-Flo roof SIPs.

25. Based on House & Sun’s extensive dealings with Branch River, it is possible, and even likely, that House & Sun had seen, at some point, the actual warranty or warranties issued

⁵ Branch River’s president, Robert Mayo, testified as follows:

Q: [The] warranty that you offer... Is this the Branch River Warranty?

(Defendant’s Exhibit 21 identified)

A: Yes.

Q: And is this the warranty that applies to the Air-Flo panels?

A: Air-Flo and any other laminate product that would be produced not under our control.

TT 5:30-31. Mr. Mayo also testified that the Branch River warranty is “a duplicate of the same warranty that’s issued by R-Control. It just says Branch River.” TT 5:29.

⁶ Kevin Arcand, Branch River’s sales manager, testified as follows:

Q: And what is the standard warranty for an R-Control panel on a commercial job?

A: Twenty years on the lamination on the R value.

...

Q: Now tell me about the warranty that came with the Branch River Air-Flo panels; what do you know about that is it also a 20 year warranty?

A: No, I would say probably 10 years.

...

Q: Do you at Branch River have standard or standardized warranties?

A: Do we have standardized warranties; we do for the R-Control panel.

Q: What about the Air-Flo panel?

A: No, no.

TT 4:24, 4:36.

by Branch River for various projects. But Kel House, the owner of House & Sun, was not shown Defendant's Exhibit 21 and was not questioned about the terms of Branch River warranty for roof SIPs, so the uncertainty created by the discrepancy between Mr. Mayo's testimony and Mr. Arcand's testimony remains unresolved.

26. Moreover, an e-mail message dated June 22, 2012 from Gary Peachey to Daniel Patry of Arundel Valley indicates, "Branch River *will provide* the MFG warranty for your R-Control wall panels and the Branch River Structural airflow [sic] roof panels," *see* Pl. Ex. 36 (emphasis added). This message raises doubt about whether, as of June 2012, Branch River had ever provided the warranty document applicable to the Kate's Butter project to any of the other parties involved in the project. No witness testified that any warranty document *had* been provided previously.

27. What Mr. Mayo identified as the Branch River warranty applicable to the roof SIPs furnished to the Kate's Butter project contains a disclaimer of warranties in all capital letters and bold font, as follows:

THE WARRANTY SET FORTH HEREIN IS IN LIEU OF ALL OTHER GUARANTIES AND/OR WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND THIS WARRANTY SHALL NOT BE EXTENDED OR ALTERED EXCEPT BY A WRITTEN INSTRUMENT SIGNED BY BRANCH RIVER PLASTICS, INC. AND THE OWNER. THERE ARE NO WARRANTIES AND/OR GUARANTEES WHICH EXTEND BEYOND THE TERMS AND PROVISIONS SET FORTH IN THIS WARRANTY.

Def. Ex. 21.

28. Based on the absence of evidence that the actual warranty document applicable to the Branch River roof and wall SIPs was provided in the course of the purchase transactions to

either Branch River's purchaser, House & Sun, Inc., or to the subsequent purchasers, Peachey Builders and Arundel Valley, the evidence is insufficient to enable an affirmative finding that, prior to when the Branch River roof SIPS were installed at the Kate's Butter project, House & Sun, Peachey Builders and/or Arundel Valley were made aware of, or were on notice of the disclaimers of implied warranties contained in the Branch River warranty document.

29. Branch River bears the burden of proving by a preponderance of the evidence that it effectively disclaimed the implied warranties of merchantability and fitness for a particular purpose. *Cent. Maine Power Co. v. Foster Wheeler Corp.*, 116 F.R.D. 339, 342 (D. Me. 1987).

30. Implied warranties are created by operation of law but may be disclaimed under Maine law for non-consumer goods. 11 M.R.S. § 2-316. Maine's enactment of the Uniform Commercial Code imposes certain requirements for a valid disclaimer of implied warranties.

[T]o 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. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

Id.

31. The warranty document reflected in Defendant's Exhibit 21 meets all requirements of 11 M.R.S. § 2-316, including the necessary reference to "merchantability." *Id.* (dictating that it is a sufficient disclaimer to state "There are no warranties which extend beyond the description on the face hereof.").

32. However, the sufficiency of the "Limited 20 Year Warranty" in Defendant's Exhibit 21 for purposes of section 2-316 does not mean that Branch River's disclaimer of warranties was effective. To be effective, a warranty disclaimer must be part of the bargain between a buyer and seller. *See S.H. Nevers Corp. v. Husky Hydraulics, Inc.*, 408 A.2d 676, 680-81 (Me. 1979)

(manufacturer of equipment failed to prove that plaintiff's purchase through dealer was subject to manufacturer's express warranty and disclaimer of implied warranties). *See also American Aerial Servs. v. Terex USA, LLC*, 39 F. Supp. 3d 95, 106 (D. Me. 2014) ("under Maine law, a limitation or disclaimer of warranty is not effective unless it has been received by the buyer subject to those provisions").

33. The parties disagree about whether Maine law requires the manufacturer to prove that the disclaimer was part of the ultimate purchaser's transaction—meaning the transaction between Peachey Builders and Arundel Valley in this case—but the law is clear that Branch River must prove at least that the disclaimer was part of the transaction between it and House & Sun. For the reasons set forth hereinafter, the court finds and concludes that Branch River has failed to meet its burden.

34. As Branch River contends, its voiding of the express warranty in June 2012 affected only the express warranty and did not affect the disclaimer of implied warranty, but that point begs the question as to whether the disclaimer was ever effective. If the warranty, including the disclaimer, was not part of the bargain between Branch River and its immediate purchaser, then the disclaimer was ineffective.

35. For two independent reasons, the court concludes, based on the evidence at trial, that Branch River has failed to meet its burden to prove by a preponderance of the evidence that it effectively disclaimed the implied warranties of merchantability and fitness for particular purpose.

36. First, the evidence is in equipoise as to whether the Limited 20 Year Warranty reflected in Defendant's Exhibit 21—the only written warranty with disclaimer language in the record—is, in fact, the warranty applicable to the Air-Flo roof SIPs. Mr. Mayo said that the Limited 20 Year Warranty is Branch River's standard warranty for all of its SIPs, but Mr.

Arcand said that there is no standard warranty for Air-Flo SIPs and that the warranty period for those SIPs is shorter. Moreover, in his communications with House & Sun, Mr. Arcand used terms other than “Limited 20 Year Warranty” to Branch River’s warranty, raising unanswered questions as to whether the warranty Mr. Arcand was referring to is the one that Mr. Mayo said is applicable. Because the evidence is in equipoise, the court is unable to make an affirmative finding that Defendant’s Exhibit 21—the only warranty document in the evidentiary record—applies to Branch River’s roof SIPs.

37. Second, Branch River failed to prove that the “Limited 20 Year Warranty” reflected in Defendant’s Exhibit 21 was part of the bargain between it and House & Sun. As noted above, although warranties were referred to by different names in communications between Mr. Arcand and Mr. House, there is no evidence in the record that the Limited 20 Year Warranty reflected in Defendant’s Exhibit 21 was provided to House & Sun, not to mention Peachey Builders or Arundel Valley, at any time before the roof SIPs had already been installed on the Kate’s Butter structure. Only after the roof SIPS had been purchased, delivered and installed and the issues regarding R-Control and installation had surfaced does the evidence indicate that Branch River provided a warranty document to any other party.

38. Because Branch River tendered the Limited 20 Year Warranty reflected in Defendant’s Exhibit 21 only well after all of the purchase transactions had been completed, and after problems had arisen regarding the product, Arundel Valley was not required to accept Branch River’s so-called reinstatement of the Limited 20 Year Warranty with its disclaimers.

39. Each of these grounds independently supports the conclusion that Branch River has not met its burden of persuasion on the defense of disclaimer of the implied warranties of merchantability and fitness for particular purpose.

C. Conclusion

Defendant Branch River Plastics, Inc. made no legally operative disclaimer of the implied warranties of merchantability and fitness for particular purpose regarding the roof SIPs it sold to House & Sun for the Kate's Butter project. Based on that conclusion, the court is again granting judgment in favor of Plaintiff Arundel Valley, LLC on Counts XI and XII of the Complaint herein. The Law Court having vacated this court's July 13, 2015 Judgment only as to Counts XI and XII of the Complaint, the Judgment After Remand entered herewith addresses only those two counts and the July 13, 2015 Judgment stands as to the other counts of the Complaint.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Ruling on Remand by reference in the docket.

Dated March 20, 2017

_____/s_____

A. M. Horton, Justice