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**IN THE
COURT OF APPEALS OF INDIANA**

FIRST CONSUMER CREDIT, INC.,)
)
Appellant,)
)
vs.) No. 49A02-1010-CC-1245
)
SHO-PRO OF INDIANA, INC.,)
)
Appellee.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Thomas J. Carroll, Judge
Cause No. 49D06-0911-CC-54191

April 6, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

First Consumer Credit, Inc. (FCC) appeals a grant of summary judgment in favor of Sho-Pro of Indiana, Inc. (Sho-Pro) in FCC's action alleging breach of contract. FCC presents several issues for review, one of which we find dispositive. Restated, that issue is: Did the trial court err in granting summary judgment in favor of Sho-Pro and denying FCC's summary judgment motion?

We reverse and remand.

The facts are that Sho-Pro sells and installs sunrooms to homeowners on credit. The credit agreements thus created are referred to as retail installment contracts, or RIO contracts. Sho-Pro sells its RIO contracts to institutions such as FCC pursuant to the terms of what the parties herein refer to as a "Closed-End Credit Receivable Continuous Buy-Sell Agreement" (a buy/sell agreement). *Appellant's Appendix* at 4. FCC and Sho-Pro executed their buy/sell agreement on November 20, 2006. Pursuant to their buy/sell agreement, Sho-Pro is obligated to repurchase an RIO contract under certain circumstances. The relevant provision of the parties' buy/sell agreement reads as follows:

7. **Repurchase and Indemnification.** In the event of a breach of any representation, warranty or covenant of Merchant [i.e., Sho-Pro], any claim by an Obligor [i.e., a customer of Sho-Pro] based upon allegations of fact which if found to be true would constitute a breach of Merchant's promises herein, or if Merchant or Buyer [i.e., FCC] is named as a defendant or responding party in any administrative, regulatory, or judicial proceeding or complaint based upon allegations of fact which if found to be true would constitute a breach of Merchant's warranties or representation herein, or if an Obligor shall fail to make the first scheduled payment on their RIO when due, Merchant shall:

(a) At Buyer's request, immediately repurchase the RIO affected by the breach of representation or warranty or alleged breach of representation or warranty by paying to Buyer the total purchase price for such account, plus accrued interest at the RIO rate, plus expenses,

less actual payments received by Buyer after purchase. Said repurchase is without any representation, warranty, or recourse on part of Buyer[.]

Id. at 9.

On October 6, 2007, Linda Moore entered into a work-order contract with Sho-Pro to construct a sunroom for her home. The work-order contract contained the following provision: “Any materials or services which are found to be defective will be repaired or replaced by SHO-PRO of Indiana, Inc. ... provided written notice of the same is given to SHO-PRO of Indiana, Inc. within one year after the date of this agreement specifying in detail the defect.” *Appellee’s Appendix* at 7. Moore executed an RIO contract with Sho-Pro in the amount of \$24,278.00 to finance the project.

On January 8, 2008, FCC purchased the Moore RIO contract from Sho-Pro pursuant to the terms of the buy/sell agreement. Sho-Pro completed the construction at Moore’s home by February 29, 2008. Thereafter, Moore signed a completion certificate certifying that all work was satisfactory and complete. It is undisputed that at some point more than one year after the work was completed, Moore contacted Sho-Pro and complained that the sunroom seemed cold. Although the warranty period had expired, Sho-Pro’s production director, Don Lee, traveled to Moore’s house to investigate her complaint.

Sometime around July 2009, Moore stopped making payments to FCC. FCC engaged the services of Osborne Property Inspection to perform an inspection of Sho-Pro’s work at Moore’s home. On October 6, 2009, FCC sent a letter to Sho-Pro stating, in relevant part, as follows:

[Moore] has defaulted on her payment obligation to FCC and is currently three

months in arrears. As you will recall, when my client previously contacted Ms. Moore concerning the payment default, she advised FCC that there were and are a number of outstanding workmanship and warranty issues that have not been satisfactorily addressed by Sho-Pro.

FCC engaged Osborne Property Inspection to provide it with an independent inspection of the work. The inspection revealed a number of serious construction deficiencies that substantiated Ms. Moore's claims. The specific defects are set forth in Donald Osborne's September 3 inspection report To date, the necessary corrective work has not been performed despite Sho-Pro's representations to FCC that the issues would be promptly addressed.

The existence of the cited construction defects constitutes a breach of a number of representation and warranties made by Sho-Pro to FCC under the Closed-End Credit Receivable Continuous Buy-Sell Agreement dated November 20, 2006 Among other things, Sho-Pro represented and warranted to FCC that the Contract is "free of any and all alleged setoffs, alleged defenses or alleged counterclaims of each Obligor thereunder, including those for ... breach of warranty, defective or substandard workmanship or materials...."

Accordingly, pursuant to Article 7(a) of the Agreement, FCC hereby makes formal demand upon Sho-Pro to repurchase the Contract for the full purchase price, plus expenses and accrued interest at the contract rate, less actual payment received by FCC from Ms. Moore.

Appellant's Appendix at 44-45. Sho-Pro refused FCC's demand and FCC filed the instant lawsuit on November 25, 2009, alleging breach of contract.

On July 12, 2010, FCC moved for summary judgment, citing as the basis of its motion paragraph 7(a) of the buy/sell agreement between FCC and Sho-Pro. On August 6, 2010, Sho-Pro filed its response to FCC's motion for summary judgment and also filed a cross-motion for summary judgment. On August 24, 2010, the trial court denied FCC's summary judgment motion and granted Sho-Pro's cross-motion for summary judgment. The trial court designated the summary judgment as a final appealable order. On September 22, 2010, FCC

filed a motion to correct error, which the trial court denied on September 28, 2010.

FCC contends the trial court erred in resolving this breach-of-contract action between Sho-Pro and FCC by considering the terms of Sho-Pro's work-order contract with Moore and granting summary judgment in favor of Sho-Pro on that basis. Our standard of review in appeals from the grant or denial of a motion for summary judgment is well established:

When reviewing a grant or denial of a motion for summary judgment our well-settled standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. All factual inferences must be construed in favor of the non-moving party, and all doubts as to the existence of a material issue must be resolved against the moving party.

Kroger Co. v. Plonski, 930 N.E.2d 1, 4-5 (Ind. 2010) (some citations omitted). The trial court's decision on summary judgment "enters appellate review clothed with a presumption of validity." *Trustcorp Mortg. Co. v. Metro Mortg. Co., Inc.*, 867 N.E.2d 203, 211 (Ind. Ct. App. 2007) (quoting *Malone v. Basey*, 770 N.E.2d 846, 850 (Ind. Ct. App. 2002), *trans. denied*). Moreover, "[a] grant of summary judgment may be affirmed upon any theory supported by the designated evidence." *Van Kirk v. Miller*, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*.

At the heart of this dispute is paragraph 7(a) of the buy/sell agreement. FCC contends this provision required Sho-Pro to repurchase Moore's RIO contract after she alleged that Sho-Pro's installation was deficient. Thus, the trial court was called upon to construe the meaning of paragraph 7(a). We review the trial court's decision in the following manner:

The construction of a contract and an action for its breach are matters of judicial determination. Construction of a written contract is generally a question of law for which summary judgment is particularly appropriate. Our standard of review in such cases is *de novo*. The elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages. When construing a contract, unambiguous contractual language is conclusive upon the parties and the courts. If an instrument's language is unambiguous, the parties' intent is determined from the four corners of the instrument.

If, however, a contract is ambiguous or uncertain, its meaning is determined by extrinsic evidence and its construction is a matter for the fact-finder. When interpreting a written contract, the court should attempt to determine the parties' intent at the time the contract was made, which is ascertained by the language used to express their rights and duties. The contract is to be read as a whole when trying to determine the parties' intent. The court will make every attempt to construe the contractual language such that no words, phrases, or terms are rendered ineffective or meaningless. The court must accept an interpretation of the contract that harmonizes its provisions as opposed to one that causes its provisions to conflict.

Niezer v. Todd Realty, Inc., 913 N.E.2d 211, 215-16 (Ind. Ct. App. 2009) (internal citations to authority omitted), *trans. denied*.

As set out above, paragraph 7(a) provides that Sho-Pro is obligated to repurchase an RIO contract in the event one of its customers asserts a claim that, "if found to be true would constitute a breach" of Sho-Pro's "promises herein." *Appellant's Appendix* at 2. Sho-Pro asks us to affirm the trial court's conclusion that the promises thus alluded to are those set out in Sho-Pro's work-order contract with Moore, i.e., the warranties relating to the installation project at Moore's home. We conclude, however, that to do so would be to disregard the word "herein." We believe that this word directs our attention exclusively to the document in which the term "herein" is found, i.e., the buy/sell agreement. Therefore, we must examine the promises made by Sho-Pro in the buy/sell agreement, if any.

Paragraph 5 of the buy/sell agreement provided that Sho-Pro “hereby represents, warrants and covenants” to FCC an itemized list of 17 promises, including the following:

- (e) Each RIO and the origination, collection and servicing practices of [Sho-Pro] respecting such RIO, do comply and have at all times complied with all relevant federal, state, and local laws, ordinances, regulations, orders or rulings, including any state or federal consumer protection act, truth-in-lending laws, installment lending or consumer credit sales laws;
- (f) Each RIO is free of any and all alleged setoffs, alleged defenses or alleged counterclaims of each Obligor thereunder, including those for fraud, lack of consideration, unconscionability, usury, claims of rescission, breach of warranty, defective or substandard workmanship or materials, or false representations relating to the home improvement made by [Sho-Pro] or anyone on [Sho-Pro’s] behalf[;]
- (g) Each home improvement applicable to each RIO was properly completed in a [sic] accordance with all applicable federal, state, and local laws, ordinances, regulation, orders or rulings, any applicable door-to-door cancellation notices were properly provided to the Obligors, the price charged was fair, each Obligor has accepted the said improvement, and [Sho-Pro] has no actual or constructive knowledge of any dispute relating to any such home improvement[.]

Id. at 6. We conclude that these are the promises referenced in paragraph 7(a).

FCC contends that Moore asserted a claim contemplated by paragraph 7(a) in conjunction with ceasing to make installments payments commencing around July 2009. According to FCC, this, without more, triggered Sho-Pro’s duty to repurchase Moore’s RIO contract. Sho-Pro counters, in essence, that its duty to repurchase is not triggered by the mere assertion of a claim by an obligor that Sho-Pro breached its work-order contract with the obligor. Rather Sho-Pro contends that in order to trigger its obligation to repurchase the RIO contract, an obligor must assert a *colorable* claim that it has a defense to its obligation to

pay under the RIO contract. We agree. Sho-Pro further contends that FCC pointed to only one claim that would trigger paragraph 7(a), i.e., Moore's allegation that Sho-Pro breached the express warranties in installing the sunroom, and that this claim is not a colorable claim because it was asserted after the one-year express warranty period had expired. We conclude that Moore's allegation of defective installation implicated all of the warranties made by Sho-Pro in relationship to the work-order contract, not merely the express warranties.

Indiana's Statutory Home Improvement Warranties Act, Ind. Code Ann. § 32-27-1-1 et seq. (West, Westlaw through 2010 2nd Regular Sess.) (the Act), imposes certain implied warranties upon remodelers performing home improvements. Those implied warranties include:

(1) During the two (2) year period beginning on the warranty date, the home improvement must be free from defects in workmanship or materials.

(2) During the two (2) year period beginning on the warranty date, the home improvement must be free from defects caused by faulty installation of:

(A) new plumbing systems;

(B) new electrical systems;

(C) new heating, cooling, and ventilating systems; or

(D) extended parts of existing systems.

The warranty does not cover appliances, fixtures, or items of equipment that are installed under the home improvement contract.

(3) During the four (4) year period beginning on the warranty date, the home improvement must be free from defects caused by faulty workmanship or defective materials in the roof or roof systems of the home improvement.

(4) During the ten (10) year period beginning on the warranty date, the home improvement and affected load bearing parts of the home must be free from major structural defects.

I.C. § 32-27-1-12(a) (West, Westlaw through 2010 2nd Regular Sess.). A remodeler must follow certain specific steps in order to disclaim these warranties. *See* I.C. § 32-27-1-13 (West, Westlaw through 2010 2nd Regular Sess.). It is undisputed that Sho-Pro did not

follow the procedures set out in I.C. § 32-27-1-13 and thus did not disclaim the implied warranties imposed by the Act. Moore's allegations, if true, present a colorable claim of breach of warranty against Sho-Pro, which in turn triggers Sho-Pro's paragraph 7(a) obligation to repurchase Moore's RIO contract.

The trial court's ruling with respect to the breach of express warranties was correct as far as it went. Nevertheless, we have reviewed FCC's complaint, motion for summary judgment, and the brief in support thereof, and find no basis upon which to support the conclusion that FCC's claim was limited to a consideration of only the express warranties. To be sure, it would have been preferable for FCC to have explicitly cited all of the warranties Moore's allegations of fact, if true, would have breached. Be that as it may, FCC's materials¹ do not limit its claims in that regard to just the express warranties. Rather, its claim was that Moore's allegations constituted a breach of Sho-Pro's promise that its RIO contract with Moore was free of any viable defenses on Moore's part with respect to her obligation to pay. Such a defense would include breach of the implied warranties imposed under I.C. § 32-27-1-12(a), which Sho-Pro failed to disclaim.

¹ For example, FCC's complaint alleged:

5. Ms. Moore later defaulted on her payment obligation to FCC under the Moore Contract, alleging a number of construction deficiencies committed by Sho-Pro.

6. FCC engaged Osborne Property Inspection to provide it with an independent inspection of Sho-Pro's work. That inspection revealed a number of serious construction deficiencies which validated Ms. Moore's claims. ...

Appellant's Appendix at 2.

In summary, Moore's allegations, if true, would constitute, at a minimum, a colorable claim of breach of implied warranties made by Sho-Pro with respect to its installation of Moore's sunroom. This, in turn, triggered Sho-Pro's obligation to repurchase Moore's RIO contract, as provided in paragraph 7(a) of the buy/sell agreement between FCC and Sho-Pro. Accordingly, we reverse the grant of summary judgment in favor of Sho-Pro and remand with instructions to enter summary judgment in favor of FCC.

Judgment reversed and remanded.

MAY, J., and MATHIAS, J., concur.