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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
6100 W. 10TH ST., WICHITA, KS

jdq

GEORGE D. HOPKINS,

Plaintiff,

v.

Case No. 07 LM 18333

MIKE DOWNEY, d/b/a
CONTRACTOR'S WATERPROOFING
SYSTEMS,

Defendant.

JOURNAL ENTRY

NOW on this 22nd day of April 2008, comes on for trial the above-captioned case. Plaintiff George D. Hopkins appears by and through his attorney Barry L. Arbuckle. Defendant Mike Downey d/b/a Contractor's Waterproofing Systems appears by and through his attorneys Michelle K. Moe and Ross A. Hollander of Joseph & Hollander, P.A. There were no other appearances.

THEREUPON, the Court after hearing evidence issued findings of fact and conclusions of law.

The Court issued the following findings of fact:

1. Plaintiff is a resident of Sedgwick County, Kansas.
2. Defendant Mike Downey owns and operates Contractors' Waterproofing Systems. Part of Defendant's business involves metal fabrication and design, which includes the manufacture and sale of metal fences.

3. Tad Cullum is a former employee of Defendant. Mr. Cullum managed Defendant's metal fabrication and design division from approximately 2004 through May 2006.

4. Mr. Cullum has no monetary or other interest in the outcome of this lawsuit.

5. While the sale of fences currently makes up a small percentage of Defendant's business, at the time Mr. Cullum was managing Defendant's metal fabrication and design division, Defendant was installing about four fences per week.

6. Defendant sells fences constructed of two different metals – steel and aluminum.

7. Steel fences rust. As a steel fence is exposed to the elements, it oxidizes and rust appears. The time it takes for a steel fence to rust will vary based on the severity and frequency of the fences exposure to elements that may speed up the oxidation process, but eventually all steel fences will rust.

8. Aluminum fences do not rust. An aluminum fence will oxidize over time causing the fence to appear less bright, but it will not rust.

9. An aluminum fence is more expensive than a steel fence.

10. Plaintiff contacted Defendant's company about purchasing a fence for his home. Plaintiff spoke with Mr. Cullum about the different types of fence Defendant offered for sale. Mr. Cullum told Plaintiff that Defendant sold both steel and aluminum, powder coated fences. Mr. Cullum told Plaintiff that a steel fence will rust, but an aluminum fence will not rust.

11. Plaintiff had the option to purchase either a steel or an aluminum fence.

12. Plaintiff chose to purchase a steel fence from Defendant. Plaintiff chose to purchase a fence that Mr. Cullum told him would rust.

13. Plaintiff paid Defendant \$5,000.00 for a powder coated steel fence.

14. Powder coat is a dry mix, not a liquid paint. There are three basic steps in the powder coat process. First, the fence is prepared by removing all of the oil, grease and other substances on the fence's surface. Second, the powder is applied to the fence using an electrostatic gun. Third, the fence is heated in an oven where the powder melts and chemically reacts to form the solid powder coat that appears on the surface of the fence. Defendant followed these steps when powder coating Plaintiff's fence.

15. Powder coat on a steel fence may delay the time it takes for the fence to rust, but it will not prevent a steel fence from rusting. The powder coat surface may be damaged by hard water or a weed eater, among other factors. Damage to the powder coat will accelerate rusting of a steel fence.

16. Powder coat is not intended to prevent water staining. Defendant did not represent to Plaintiff that powder coat would prevent water staining.

17. At one time, Defendant had a problem with employee Cody Brown not properly rinsing under the bottom rail of a fence during part preparation. Defendant corrected the problem as soon as he became aware of it by retraining Mr. Brown on how to rinse under the bottom rail of a fence. This problem did not affect Plaintiff.

18. Plaintiff did not receive a written warranty from Defendant when he purchased his fence. Defendant does not provide written warranties on the fences he sells.

19. In early 2005, Defendant installed a powder coated, steel fence on Plaintiff's property.

20. It was Plaintiff's responsibility to provide Defendant with information about the location of Plaintiff's property line. When Defendant's employees arrived to install the fence, Plaintiff did not know where his property line was located. Plaintiff asked the employees for assistance measuring his property, but ultimately Plaintiff decided where Defendant's employees should install his fence.

21. The information Plaintiff provided to Defendant's employees about the location of his property line was wrong. As a result, part of Plaintiff's fence was installed on his neighbor's property. Plaintiff's neighbor asked Plaintiff to move the fence.

22. Plaintiff called Defendant's company complaining that his fence was installed in the wrong location. Plaintiff blamed Defendant for installing the fence on his neighbor's property even though it was his responsibility to provide Defendant with information about the location of his property line. Nevertheless, Defendant wanted Plaintiff to be happy so Defendant's employees moved Plaintiff's fence. Plaintiff was not charged for Defendant's time, labor, materials or expense involved to relocate his fence.

23. Plaintiff installed a sprinkler system on his property. The majority of the sprinkler heads run along the perimeter of Plaintiff's property, right along side of Plaintiff's fence. Plaintiff's sprinkler system operates on well water.

24. Plaintiff's neighbors also have sprinkler systems on their property. The neighbors' sprinkler heads run along the perimeter of Plaintiff's property, right

alongside of Plaintiff's fence. Plaintiff's neighbors' sprinkler systems also operate on well water.

25. Plaintiff's neighborhood association installed a sprinkler system in the commons area behind Plaintiff's property. The neighborhood association's sprinkler heads also run along the perimeter of Plaintiff's property, right alongside of Plaintiff's fence. The neighborhood association's sprinkler system operates on well water.

26. Plaintiff used his sprinkler system to water his lawn because he wanted the lawn to look nice and green.

27. Defendant Downey and Mr. Cullum both told Plaintiff not to allow water from sprinklers to run on the fence because it would cause the fence to rust.

28. Defendant is familiar with the nature of the water in the area around Plaintiff's home. He knows it to be very "hard", meaning that it is heavy with minerals, including salts.

29. A water stain is caused by a build up of mineral deposits left behind from repeated exposure to hard water, like well water.

30. On a dark surface, like Plaintiff's fence, a water stain will appear milky white in color.

31. Water stains were visible on Plaintiff's fence.

32. The visible presence of water stains on Plaintiff's fence indicate he was allowing water from sprinklers to run on his fence even though he was told that doing so would cause his fence to rust.

33. Rust did appear on the surface of a portion Plaintiff's fence. Plaintiff testified that about 30 percent of his fence is not affected by rust.

34. In the summer of 2005, Plaintiff contacted Defendant complaining that surface rust was appearing on his fence.

35. Mr. Cullum met with Plaintiff, looked at the fence, and gave Plaintiff two options. Defendant could either (1) remove the fence and refund Plaintiff's money; or (2) remove the fence panels and blast, re-powder coat, and reinstall the panels and strip and repaint the fence posts on site.

36. Rather than accept a full refund of his money, Plaintiff chose to have the fence panels removed, blasted, re-powder coated and reinstalled and to have the fence posts stripped and repainted onsite.

37. Defendant's employees removed the fence panels from Plaintiff's property and took them back to his business where the panels were blasted and re-powder coated. Defendant's employees stripped and repainted the posts onsite at Plaintiff's property. Defendant's employees then reinstalled the panels on Plaintiff's property.

38. Defendant incurred considerable expense making these costly repairs for Plaintiff. He made these repairs because he takes pride in his business and he wanted Plaintiff to be pleased with his fence. Defendant did not charge Plaintiff for any of the time, labor, materials, or expense associated with the repairs.

39. After the repairs were made, Plaintiff contacted Defendant complaining that the fence panels did not match the fence posts. Defendant personally went to visit Plaintiff's property and look at the fence. While there, Defendant realized that his

employees painted the Plaintiff's fence posts with a flat black paint instead of a satin paint.

40. Because the panels did not match the posts, Defendant offered Plaintiff two options. Defendant could either (1) remove the fence and refund Plaintiff's money, or (2) remove the fence panels and posts and blast, re-powder coat and reinstall the fence.

41. Rather than accept a full refund of his money, Plaintiff again chose to have his fence panels and posts remove, blasted, re-powder coated and reinstalled.

42. Defendant's employees removed Plaintiff's fence panels and posts for the second time and took them back to Defendant's business where the panels and posts were blasted and re-powder coated. Defendant's employees then reinstalled the posts and panels on Plaintiff's property.

43. Defendant incurred great expense making these additional repairs for Plaintiff. He made these repairs because he takes pride in his business and he wanted Plaintiff to be pleased with his fence. Defendant did not charge Plaintiff for any of the time, labor, materials, or expenses associated with the repairs for the second time.

44. When Defendant's employees removed Plaintiff's fence panels and posts, they also removed Plaintiff's window well cover. They removed the window well cover so it could be blasted and re-powder coated. Defendant wanted to make sure that the panels, posts, and window well cover all matched.

45. Defendant's employees misplaced Plaintiff's window well cover. Defendant admits he owes Plaintiff a window well cover.

46. The fence Plaintiff purchased had flat, plastic caps on the top of each fence picket. Because of the heat used in the powder coat process, some, but not all, of the plastic caps melted when the fence panels were re-powder coated.

47. Plaintiff contacted Defendant complaining about the plastic caps. At the time, Defendant was recovering from a severe injury he suffered after being thrown from a horse. Defendant's injuries required surgery, which delayed his ability to address Plaintiff's complaint.

48. When Defendant was finally ready and able to address Plaintiff's complaint about the plastic caps, Plaintiff contacted Defendant again complaining about surface rust on his fence.

49. Defendant was not willing to blast, re-powder coat and reinstall Plaintiff's fence for a third time because of complaints of surface rust when Plaintiff had purchased a steel fence, which was known to rust, and Plaintiff was allowing sprinklers to run on his fence despite being told that doing so would cause the fence to rust.

50. Plaintiff has used the fence for the past three years. The fence has served its purpose of keeping things in or out of Plaintiff's yard.

51. Plaintiff notified Defendant that he was contacting an attorney. Defendant had no contact with Plaintiff from that point forward.

52. Plaintiff's counsel contacted Defendant by phone attempting to solicit information, including Defendant's last name. Upon hearing that counsel represented Plaintiff, Defendant hung up the phone.

53. Plaintiff filed this lawsuit November 28, 2007.

The Court issued the following conclusions of law:

1. Plaintiff purchased a powder coated, steel fence from Defendant. Defendant provided no written warranty to Plaintiff. Plaintiff was told that a steel fence would rust, but an aluminum fence would not. Plaintiff had the option to purchase either a steel or an aluminum fence. Plaintiff chose to purchase a steel fence. He chose to purchase a fence that would rust.

A steel fence is not unmerchantable simply because it requires more maintenance than an aluminum fence. The fence has served the purpose for which it was designed and sold. It has served its ordinary purpose, which is to keep things in and out of Plaintiff's yard. There was no breach of warranty. Therefore, judgement is rendered to Defendant on Plaintiff's breach of warranty claim.

2. Defendant told Plaintiff the fence would rust, and it did. Defendant told Plaintiff he would make the repairs, and he did. There is no evidence of any oral misrepresentations made to Plaintiff.

The Kansas Consumer Protection Act outlines circumstances the court should consider in determining whether a supplier acted unconscionably. The circumstances outlined in K.S.A. § 50-627(b) are not present in this case. Defendant did not take advantage of Plaintiff's inability to protect his interest. Defendant did not sell Plaintiff a fence at a price which grossly exceeded the price at which Plaintiff could buy a fence elsewhere. Defendant only charged Plaintiff \$5,000.00 for the fence, which was significantly less than bids Plaintiff received from other companies. Plaintiff received a material benefit from his transaction with Defendant. Plaintiff received a fence, which

does exactly what it was designed to do. It keeps things in and out of Plaintiff's yard. Defendant did not enter into the transaction knowing Plaintiff could not pay. Plaintiff paid Defendant in full before the fence was installed. This was not a one-sided transaction. Plaintiff paid Defendant \$5,000.00 and in exchange, he received a fence. Defendant did not make any misleading statements of opinion. Defendant told Plaintiff a steel fence would rust, and Plaintiff's fence did rust. Defendant did not attempt to limit the implied warranties of merchantability or fitness for a particular purpose. There is no evidence that Defendant acted unconscionably.

The Court having found no evidence of oral misrepresentations or unconscionable conduct by Defendant renders judgment to Defendant on Plaintiff's claim for violations of the Kansas Consumer Protection Act.

3. The repairs to Plaintiff's fence were performed as agreed between the parties. When Defendant realized that his employees had painted Plaintiff's fence posts with a flat black paint instead of a satin paint, Defendant remedied the situation by blasting, re-powder coating and reinstalling Plaintiff's panels and posts. As a result, Plaintiff suffered no damages from Defendant's employee's mistake. The remainder of Plaintiff's negligence claim relates to water stains on his fence; however, Defendant never told Plaintiff that his fence would be protected from water stain. Therefore, judgment is rendered to Defendant on Plaintiff's negligence claim.

4. Plaintiff has no damages because he failed to mitigate his damages. Plaintiff was twice offered a full refund of his money, once by Defendant and once by Mr. Cullum.

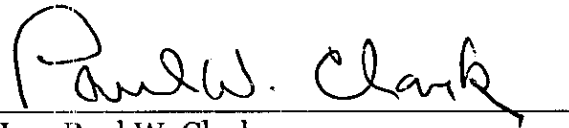
Plaintiff would have suffered no loss, and in fact would have gained the benefit of a fence for the period of time he had it, had he simply agreed to accept his money back.

5. Defendant admits that his employees misplaced Plaintiff's window well cover. The Court finds that a reasonable value of a replacement window well cover is \$50.00. Therefore, Plaintiff is rendered judgment against Defendant for \$50.00.

6. Costs in this case are assessed against Plaintiff.

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is entered in Defendant's favor on Plaintiff's breach of warranty claim, negligence claim, and claim for violations of the Kansas Consumer Protection Act. In addition, Plaintiff is rendered judgment against Defendant for \$50.00. Costs in this case are assessed against Plaintiff.

IT IS SO ORDERED.



Hon. Paul W. Clark
District Judge

Prepared and approved by:

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