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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000946-MR

CARLY LARISON, JEREMY S. BANKS,
AND WILLIAM BARBIEUX — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 98-CI-01256

HEBRON AUTO SALES AND BROKERAGE, INC.
D/B/A HEBRON AUTO SALES — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Carly Larison, Jeremy S. Banks, and William Barbieux appeal from an order of the Boone Circuit Court, entered on March 14, 2001, dismissing their action against Hebron Auto Sales and Brokerage, Inc., d/b/a Hebron Auto Sales. We affirm.

On July 31, 1998, Larison, Banks, and Barbieux purchased a used 1990 Pontiac Sunbird automobile from Hebron Auto Sales for $5,216.30.[1] According to the appellants' complaint,

[1] Banks and Larison are husband and wife, and Barbieux is Larison's father. Banks and Barbieux purchased the vehicle for Larison's use.

while negotiating the purchase of this vehicle, an employee of Hebron Auto Sales promised to fix several defects found on this automobile. These defects included an oil leak, defective dashboard lights, a broken seat belt and seat belt lever, a faulty RPM gauge, and a broken window. Hebron Auto Sales asserts that it agreed to and successfully repaired these defective items to the appellants' satisfaction on August 1, 1998. The appellants disagree, and they claim that only the broken window was repaired.

In purchasing the 1990 Pontiac Sunbird from Hebron Auto Sales, Banks executed a document entitled AUsed Vehicle Order.@ This document states that Banks[2] acknowledged that the vehicle was ASOLD AS IS@ and that the purchase was made Aknowingly without any guarantee, expressed or implied, by the dealer or his agent.@ Additionally, the ABuyer's Guide,@ affixed to the window of the automobile, stated that the vehicle was offered for sale AAS IS - NO WARRANTY.@ Based upon this information, Banks purchased a ALimited Used Vehicle Service Contract@ from Hebron Auto Sales for $770.00.

In September 1998, Larison returned the vehicle to Hebron Auto Sales after the engine caught on fire. Employees of Hebron Auto Sales inspected the vehicle and discovered that a new oil leak had caused the fire. At this point, Hebron Auto Sales informed Larison that she must contact the administrator of her service contract. The record is unclear as to whether Larison

[2] Banks was the only individual to execute the AUsed Vehicle Order.@

attempted to repair this vehicle pursuant to the service contract. In any event, the vehicle was eventually repossessed by a financing company and sold at auction for $1,300.00.

The appellants filed this action on December 7, 1998, alleging that Hebron Auto Sales breached an express warranty by not properly fixing the defective items found on the car at the time of purchase.[3] Hebron Auto Sales moved the trial court to dismiss this action on January 3, 2001. The trial court granted the motion, and this appeal followed.

This appeal revolves around one argument. Appellants argue that the trial court erred in granting Hebron Auto Sales' motion to dismiss because an express warranty cannot be abrogated by the phrase AAS IS.@ After a review of the record and applicable law, we disagree.

As a preliminary matter, we note that the record is unclear as to which civil rule Hebron Auto Sales was intending to proceed under when it filed its motion to dismiss. In its order dismissing this action, the trial court stated that it reviewed memoranda and exhibits filed by the parties in support of their respective positions. Since the trial court considered matters outside of the pleadings in reaching its decision to dismiss this

[3] The appellants did not assert at any time during the litigation of this matter that Hebron Auto Sales breached the service contract or any express warranties contained within that agreement by failing to fix the identified defects. Although Hebron Auto Sales concedes on appeal that the service contract contains certain express warranties, this argument was not presented by the appellants. Therefore, since the issue was not preserved and identified in the lower court, we decline to address it herein. See Skaggs v. Assad ex rel. Assad, Ky., 712 S.W.2d 947 (1986).

matter, the motion to dismiss effectively became a motion for summary judgment. CR 12.02; Kreate v, Disabled American Veterans, Ky. App., 33 S.W.3d 176, 178 (2000). Therefore, we will review this appeal accordingly.

The law is clear that summary judgment should be cautiously granted in Kentucky. However, summary judgment should be used to terminate litigation only when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in her favor and against the movant. Steelvest v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991). In considering a summary judgment motion, all doubts are to be resolved in favor of the party opposing the motion. City of Florence, Kentucky v. Chipman, Ky., 38 S.W.3d 387 (2001). However, the party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial. Id. In other words, any party Aopposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment.@ Wymer v. JH Properties, Inc., Ky., 50 S.W.3d 195, 199 (2001). The standard of review of a summary judgment is Awhether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law.@ Moore v. Mack Trucks, Inc., 40 S.W.3d 888, 890 (2001) (citations omitted).

Kentucky Revised Statutes (KRS)355.2-313(1)(a) governs the creation of an express warranty by the seller, and states in pertinent part:

> Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

Express warranties, if created, are not absolute. KRS 355.2-316 provides that parties may exclude express warranties. Specifically, KRS 355.2-316(1) states:

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (KRS 355.2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

The wording used in any agreement limiting express or implied warranties must be conspicuous. Greg Coats Cars, Inc. v. Kasey, Ky. App., 576 S.W.2d 251, 253 (1978). In Kasey, a panel of this court held that a document executed in connection with the sale of a used automobile stating that the vehicle is being sold Aas is with all defects@ effectively and validly disclaims all warranties. Id.

The language of the contract herein could not be any clearer. The AUsed Vehicle Order@ states that this particular 1990 Pontiac Sunbird was ASOLD AS IS.@ Further, Banks, in executing this document, acknowledged that AI (Banks) hereby make this purchase knowingly, without any guarantee, expressed or

implied, by this dealer or his agent.@ Also, the Buyers Guide, which is incorporated by reference into the AUsed Vehicle Order,@ specifically states AAS IS - NO WARRANTY.@ These documents are very clear on their face that all warranties, express and implied, are disclaimed.

Also, in any case submitted for summary judgment, there is an obligation to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Unisign, Inc. v. Commonwealth, Ky., 19 S.W.3d 652, 657 (2000). The appellants herein produced no affirmative evidence supporting their claim that Hebron Auto Sales failed to make the promised repairs or that any failure to make such repairs actually caused the automobile to catch on fire. The appellants had sufficient opportunity to place affirmative evidence in the record to support their allegations, but they failed to do so. Thus, with no affirmative evidence being produced by the appellants, coupled with an effective disclaimer of all warranties, the trial court correctly granted judgment in favor of Hebron Auto Sales.

The judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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