

No. 34757-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NATKIN-SCOTT, et al.

Appellant,

v.

M + W ZANDER, U.S. OPERATIONS, INC.

Respondent

BY STATE APPELLANT
COURT OF APPEALS
DIVISION II
JULY 22 2015

REPLY BRIEF OF APPELLANT NATKIN-SCOTT

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I. INTRODUCTION

Respondent M+W Zander, U.S. Operations, Inc.'s ("M+W") brief relies upon the premise that a passing reference to "covenants" in an integration clause is a specific and clear disclaimer of M+W's implied warranty to Natkin/Scott that M+W's right to sue the owner WaferTech was not subject to defenses against M+W. This premise fails because the passing reference to "covenants" was not a clear and specific disclaimer, as required under Washington law. In addition, M+W's brief fails to address Section 6 of the Severin Agreement which states:

Nothing herein contained will adversely affect the validity of the claims and causes of action of N/S to be pursued against Waftertech herein.

CP 360. This clause disposes of M+W's contention that the Severin Agreement intended to disclaim M+W's implied warranty that it had the right to sue WaferTech.

II. THE COURT'S LETTER OPINION IS NOT LEGALLY IRRELEVANT

Contrary to M+W's contention at page 9 of its brief, the trial court's April 18, 2006 order incorporates the trial court's erroneous letter opinion finding that Natkin/Scott contended that the Severin Agreement was not enforceable for various reasons. CP 414. The April 18, 2006 trial court order states in pertinent part:

The parties bargained for the Severin Agreement and the Severin Agreement, along with the releases contained therein, are fully enforceable and have not been breached by M+W. [emphasis added].

CP 453-54.

The trial court missed Natkin/Scott's point that while the releases in the Severin Agreement were fully enforceable, they contained an exception which allowed Natkin/Scott to sue M+W for breach of the Severin Agreement. See pages 10-11 of Natkin/Scott's brief.

III. M+W'S BRIEF IGNORES THE PARTIES' STIPULATION BELOW THAT THE ISSUE OF M+W'S REGISTRATION STATUS WAS NOT CONTEMPLATED BY THE PARTIES WHEN THEY SIGNED THE SEVERIN AGREEMENT

M+W makes the extraordinary assertion at pages 17-18 of its brief that the contractor registration defense was apparent at the time of the Severin Agreement. That assertion ignores the trial court's reference to the parties' stipulation in the judgment order:

The parties also agreed on the record that none of the individuals representing either of the parties or their attorneys discussed or contemplated the issue of either M+W's or Natkin/Scott's contractor registration status or the effects of such registration (or lack thereof) on M+W's assignment of pass-through rights to plaintiffs at the time the Severin Agreement was negotiated and executed.
[emphasis added]

CP 430.

The court's order was drafted by M+W's counsel pursuant to the trial court's opinion letter which stated that: "The prevailing party will prepare findings and conclusions based on the record, argument and authorities cited." CP 414-15. M+W's brief fails to address this stipulated finding which Natkin/Scott raised at page 13 of its brief. M+W cannot ignore the stipulated record it created below. M+W effectively is

seeking this Court to reverse the stipulated finding that M+W drafted for the trial court to sign.

In addition, M+W's brief at page 17 refers to the issue of Natkin/Scott's registration status at the time the Severin Agreement was signed. Nothing had been raised challenging M+W's contractor status when the Severin Agreement was signed. Thus, there is nothing in the record to support M+W's position, if this Court was to ignore the parties' stipulation below on this issue. The owner's challenge to M+W's registration status did not arise until after the Severin Agreement was signed. See this Court's unpublished opinion in *Business Services of America II, Inc. v. WaferTech LLC*, No. 2886-9-II (2004), pp. 6-7.

IV. THERE WAS NO DISCLAIMER OF M+W'S IMPLIED WARRANTY THAT IT HAD THE RIGHT TO SUE THE OWNER WAFERTECH

A. M+W miscites the holding of *Lonsdale*.

At the trial court level and before this Court Natkin/Scott has argued that RESTATEMENT (SECOND) OF CONTRACTS, § 333 was applicable under Washington law because of the Supreme Court's reliance upon it in *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P.2d 385, 388 (1983). *Lonsdale* specifically applied § 333(1)(a) to the facts of that case. Natkin/Scott relies upon § 333(1)(b) to support its argument that M+W impliedly warranted to Natkin/Scott that it had the right to sue the owner WaferTech.

At page 10 of its brief, M+W argues that *Lonsdale* is dispositive that M+W effectively disclaimed the implied warranty imposed under

RESTATEMENT (SECOND) OF CONTRACTS, § 333(1)(b). This position contradicts M+W's prior assertions to the trial court and this Court.

At the summary judgment hearing before the trial court, M+W argued that the *Lonsdale* decision had nothing to do with the RESTATEMENT (SECOND) section Natkin/Scott relied upon. RP (3/24/06:33). In its Motion on the Merits of Respondent filed previously with this Court, M+W states at page 6, fn2:

Lonsdale is a section 333(1)(a) case, not a section 333(1)(b) case Because *Lonsdale* is a section 333(1)(a) case only, M+W reserves the right to argue that the implied warranty found in section 333(1)(b) is not implied under Washington law.

This reverse in position undermines the credibility of M+W's current argument that *Lonsdale* is dispositive of Natkin/Scott's § 333(1)(b) implied warranty claim. *Lonsdale* addressed the implied warranty of noninterference under § 331(a) – not the implied warranty under § 331(b). Natkin/Scott has always cited *Lonsdale* for the proposition that § 333 is generally applicable under Washington law, and that the Supreme Court would apply § 333(1)(b) as well as § 333(1)(a).

The Supreme Court's discussion of § 333(1)(a) in *Lonsdale* did not address whether a passing reference to "covenants" in an integration clause is an effective disclaimer of the warranty under § 333(a)(b). M+W at page 10 of its brief argues that "*Lonsdale* stands for the proposition that an implied warranty under section 333 is a type of 'implied covenant.'" M+W's brief at page 11 goes so far as to misrepresent the holding of *Lonsdale* by quoting § 333(1)(b) and deleting the reference to § 333(1)(a),

which is italicized for emphasis in the *Lonsdale* opinion at 666 P.2d 388. The italicized § 333(a)(1) quoted in the *Lonsdale* opinion clearly indicates that the court was interpreting § 333(a)(1) – not § 333(1)(b) – which M+W misrepresents at page 11 of its brief to be the point of the *Lonsdale* ruling.

Obviously, it was logical for the *Lonsdale* opinion to treat the implied duty of good faith and fair dealing as being similar to the obligation imposed by the implied duty of non-interference under § 333(1)(a) of RESTATEMENT (SECOND) OF CONTRACTS. But one cannot reasonably read the *Lonsdale* discussion to be a ruling by the Supreme Court that a reference to “covenants” in an integration clause is an effective disclaimer of all implied warranties. There is no discussion at all in *Lonsdale* to disclaimers of the implied warranties under § 333 of RESTATEMENT (SECOND) OF CONTRACTS.

B. Disclaimers of Implied Warranties Must Be Specific Under Washington Law.

RESTATEMENT (SECOND) § 333 at section b. states that the implied warranties in this section may be excluded or modified in the same way as under the UCC. Under Washington law, disclaimers of an implied warranty between merchants must involve specific and clear language to be effective. *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wash. 2d 217, 798 P.2d 477, 482 (Wash. 1990). M+W’s argument rests on the assumption that a reference to the word “covenant” in a standard integration clause clearly tells the parties of an intent to exclude all implied warranties under § 333.

M+W's brief at page 12 cites *McInnis & Co. v. W. Tractor & Equip. Co.*, 63 Wash.2d 652, 656, 388 P.2d 562 (1964) to support its position that the Severin Agreement's integration clause effectively disclaimed a § 333(1)(b) implied warranty. M+W fails to point out to this Court that the clause in *McInnis* stated:

9. No warranties of any kind whether express or implied are made by the seller with respect to any products described herein unless endorsed hereon and signed by the parties hereto. [emphasis added]

388 P.2d at 564. No such specific disclaimer of warranties exists in the integration clause of the Severin Agreement. Such specific language is required under Washington law.

C. “Covenant” Is Not Commonly Understood to Mean “Implied Warranty” For Disclaimer Purposes Under the UCC.

Neither does common sense nor usage support M+W's unsupported argument at pages 11-13 of its brief that the word “covenant” in a contract is commonly understood to mean the same thing as “implied warranty” for disclaimer purposes under the UCC. A covenant pure and simple is a “formal agreement or promise, usu. in a contract.” Black's Law Dictionary (8th Ed.), p. 391. On the other hand an implied warranty is an obligation imposed by the law – not a promise:

. . . implied warranty. An obligation imposed by the law when there has been no representation or promise . . .

Id., p. 1619.

Thus, there is no support in logic or case law for M+W's position that a reference to a “covenant” in an integration clause in a contract is

commonly understood to be a disclaimer of all implied warranties under UCC § 2-316(3)(c). See M+W brief at page 12. M+W does not cite to any authority for this position. M+W has failed to demonstrate how a reference to “covenant” in a common integration clause “...in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.” UCC § 2-316(3)(c).

D. The Severin Agreement Specifically Represented That Nothing In It Affected The Validity Of The M+W Claims Against WaferTech

Finally, M+W’s brief does not address Natkin/Scott’s argument at page 16 of its brief that Section 6 of the Severin Agreement contradicts M+W’s assertion that the integration clause’s reference to “covenants” intended to disclaim the implied warranty that M+W was assigning a valid right to sue the owner, WaferTech. Section 6 states:

Nothing herein contained will adversely affect the validity of the claims and causes of action of N/S to be pursued against WaferTech herein.

CP 360. That specific language disposes of M+W’s contention that the Severin Agreement intended to disclaim M+W’s implied warranty that it had the right to sue the owner, Watertech.

V. CONCLUSION

Natkin/Scott requests this Court to reverse the trial court’s judgment on summary judgment in its entirety and rule that: (1) Natkin/Scott did not release its rights to sue for breach of the Severin Agreement; and (2) WaferTech breached its implied warranty in the Severin Agreement that the rights it assigned to Natkin/Scott to sue

WaferTech existed and were not subject to defenses good against the assignor; and (3) M+W is not entitled to recover attorney fees.

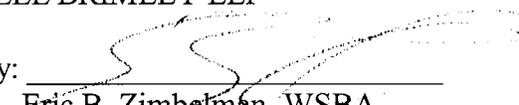
Natkin/Scott is entitled to a trial on the merits. It is further entitled to recover its attorney fees and costs for this appeal.

Dated this 14 day of May, 2007.

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STATE OF WASHINGTON
BY *[Signature]*
IDENTITY

No. 34757-1-II

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CERTIFICATE OF SERVICE

OF

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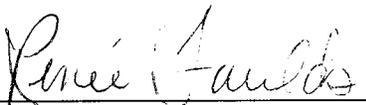
The undersigned hereby declares under penalty of perjury under the laws of the State of Washington as follows:

I am an employee of the firm of Peel Brimley LLP. I caused to be filed in the above-entitled Court Reply Brief of Appellant Natkin/Scott. I further caused the same to be placed in the United States Mail, postage paid addressed to the following opposing counsel:

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STATE OF WASHINGTON
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DEPUTY

DATED this 1st day of May, 2007 at Seattle, Washington.



Renee Faulds