

1995

Melvin Grossgold and Bruce Manka v. James C. Ziter : Reply Brief

Utah Court of Appeals

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APR 26 1995

IN THE UTAH COURT OF APPEALS

**MELVIN GROSSGOLD and
BRUCE MANKA,**

Plaintiffs/Appellants,

vs.

JAMES C. ZITER,

Defendant/Respondent.

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Case No. 950086-CA

Priority No. 15

(Oral Argument Requested)

APPELLANTS' REPLY BRIEF

**Plaintiff's appeal from an Order of the Third District
Court, Frank G. Noel presiding, granting defendants'
Motion to Dismiss.**

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ARGUMENT

The appellants file this memorandum in reply to the brief of James C. Ziter.

I.

REPLY TO ZITER'S STATEMENT OF "FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW."

In paragraphs 6, 7 and 8 (page 6) of Ziter's Statement of the Facts Relevant to Issues Presented for Review, Ziter does not set forth facts, but conclusions. This confusion of facts with conclusions is a harbinger of the circular reasoning used by Ziter throughout his Reply Memorandum.

Paragraph 6. Contrary to Ziter's conclusory statements in paragraph 6 of his Statement of Facts, paragraph 11 of the Earnest Money Sales Agreement (the "Agreement" or the "EMSA") states:

11. **GENERAL PROVISIONS.** **UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISIONS SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE.**

It is a fact that no language added to the Earnest Money Sales Agreement form makes any specific reference to this paragraph 11 or to the Seller's express warranties contained in General Provision "C" of the Earnest Money Sales Agreement. (The Earnest Money Sales Agreement is at R.6.)

Paragraph 7. Again, Ziter's statements in paragraph 7 of his Statement of Facts are conclusions on ultimate issues and not statements of fact. Contrary to Ziter's statement, paragraph 6 of the Agreement does not state that "Buyer accepts property 'as is'." In fact, paragraph 6 of the Earnest Money Sales Agreement states:

6. **SELLER'S WARRANTIES.** In addition to warranties contained in Section C, the following items are also warranted: None

Exceptions to the above and Section C shall be limited to the following: None
(Emphasis added).

It is in this paragraph 6 that the parties expressly state their agreement that there are no exceptions to the express warranties in Section C. The Section C warranties are the basis of plaintiffs' claims.

Paragraph 8. Ziter's statement that "the boiler plate warranties made in fine print on the back side of the Agreement are inconsistent with the typed in terms on the front of the Agreement. . ." is not a statement of fact but a statement of conclusion or opinion. As set forth above, in paragraph 6 of the Agreement the parties expressly agreed that there were no exceptions to the Seller Warranties in Section C, the same warranties which are the subject of this litigation. (R.6, 7).

II.

THE EXPRESS WARRANTIES AT ISSUE IN THIS LITIGATION WERE NOT EXCLUDED BY THE EARNEST MONEY SALES AGREEMENT.

Ziter, the seller of the Hollywood Apartments, places great emphasis upon the fact that the Earnest Money Sales Agreement is a pre-printed form, somehow implying that agreement should be construed against Grossgold, the buyer. This argument is an about face from the normal posture of a Seller. In this case, it is the Seller ("Ziter") who had the sole and exclusive right to determine the content of the sales contract who seeks to avoid express warranties clearly stated within the Agreement. This effort is made in spite of the fact that language added by the parties to paragraph 6 of the EMSA clearly states that there are no exceptions to the very warranties which the Seller seeks to avoid.

Ziter's argument that language added to paragraph 1(e) of the EMSA is inconsistent with the express warranties, and therefore supersedes the warranties (pages 9 and 10 of Ziter's Memorandum) is a classic example of circular reasoning. The argument assumes the conclusion, (i.e. - that the statement in paragraph 1(e) is inconsistent with the express warranties) as the beginning point. In fact, paragraph 1(e) of the EMSA states that it is "subject to Section 1(c) and 6 below." Paragraph 6 of the EMSA specifically provides that there are no

exceptions to the express warranties that are the subject of this litigation. Thus, the "as is" language in paragraph 1(e) remains "subject to" the express warranties that are the subject of this action.

As discussed above, this EMSA was not a contract forced upon Ziter by the Buyer. Ziter, as the Seller had exclusive control over the language of the EMSA. If he did not approve of the language, he was not obliged to sign the Agreement. If Ziter intended to exclude express and implied warranties, he could have added the simple language that: "all warranties, express or implied, are excluded." If he had done this, the Buyer would not have entered into the EMSA. (Affidavit of Bruce Manka, R.69). Instead of doing this, the Seller asks this court to rewrite the Agreement by ignoring the language in paragraph 1(e) and paragraph 6, the language that makes the "as is" statement "subject to" the express warranties, none of which were excluded. (Paragraph 6 of EMSA, R.6).

Ziter discusses the Tibbitts v. Openshaw case, 425 P.2d 160 (Utah 1980) only in passing, apparently acknowledging that Tibbitts addresses only implied, and not express warranties. In Tibbitts, the Supreme Court did not have before it the form EMSA and was not addressing express warranties. In short, Tibbitts is not dispositive of any issue before this court.

Ziter appears to rely next (page 10) upon the Utah UCC to support his broad interpretation of the "as is" language in the EMSA. Ziter fails to acknowledge, however, that the UCC language in U.C.A. §70-2-316 addresses only implied warranties, and that the warranties that Ziter seeks to have excluded in this case are express warranties. Ziter has offered this court no authority from the UCC in support of his apparent argument that "as is" language can also disclaim express warranties. The Washington Court of Appeals, in Olmstead v. Mulder, 863 P.2d 1355 rev. den. 875 P.2d 635 (Wash. App. 1993), reached a contrary result, rejecting Ziter's argument.

Ziter's argument (page 11) that the "as is" language excludes the express warranties is entirely inconsistent with the language added to paragraph 6 of the EMSA. Paragraph 6 (which is set forth in its entirety on page 2) states that there are no exceptions to the express warranties that are the basis for plaintiffs' Complaint. Ziter has not suggested to this court any other interpretation for paragraph 6.

Contrary to Ziter's assertion (at page 13 of his Memorandum), plaintiffs do not claim that express warranties can never be disclaimed. Express warranties can be disclaimed. The facts in this case are, however, that paragraph 6 of the EMSA says that there are no exceptions to the express warranties. In the context

of this EMSA, instead of saying that there were no additional warranties and no exceptions to the warranties in Section C, the parties could have disclaimed the express warranties by stating: "all of the express warranties contained in Section C are excluded." This simple statement is not contained anywhere within the EMSA.

In Olmstead v. Mulder, 863 P.2d 1355, rev. den. 875 P.2d 635 (Wash. App. 1993), the Washington court concluded that "as is" language which may be sufficient to override implied warranties cannot override express warranties contained in an agreement unless those express warranties are specifically identified. The reasoning in Olmstead is consistent with this state's decision in Tibbitts, supra, where our Supreme Court confirmed that "as is" language is sufficient to overcome implied warranties.

At page 14 of Ziter's memorandum, Ziter attempts to argue that the Olmstead, supra, decision is inconsistent with Tibbitts, supra. If Tibbitts dealt with express warranties, which it does not, Ziter's point might be well taken. His attempt to claim that Olmstead is inconsistent with Tibbitts ignores the distinction between express and implied warranties, a distinction that Ziter fails to make throughout his entire memorandum.

The plaintiffs acknowledge that Olmstead is not controlling authority in Utah, but Ziter's efforts to distinguish the reasoning and the result in Olmstead fail. Ziter argues first that because the "as is" terms were contained in an addendum in Olmstead they are not as effective as the "as is" language in his EMSA. The opposite conclusion would appear to be more probable. In this case, the "as is" language appears in a limited context in the provision dealing with the physical inspection of the property. In Olmstead, the "as is" language appeared in a separate addendum at the end of an agreement where it could be argued that it overrides all of the warranties in the agreement. And yet, the Washington Court concluded that the "as is" language did not override the expressed warranties.

Ziter argues that the commercial status of the Hollywood Apartments distinguishes Olmstead because *caveat emptor* applies to commercial properties. Ziter has not explained how *caveat emptor* could possibly apply where Ziter gave express warranties for the plumbing, heating, air conditioning, ventilating, and electrical systems at the Hollywood Apartments. Ziter's express warranty was that these systems would be "in sound or satisfactory working condition at closing." (EMSA, R.6). Plaintiffs are aware of no authority which supports the proposition that *caveat emptor* overrides express warranties. The opposite

appears to be true. Accord: Schafir v. Harrington, 879 P.2d 1384 (fn. 12, page 1389) (Utah App. 1994). The case relied upon by Ziter in support of his *caveat emptor* argument, Utah State Medical Association v. Utah State Employees Credit Union, 655 P.2d 643 (Utah 1982) does not deal with an Earnest Money Sales Agreement. Instead, it addresses who bears the risk of loss for property subsequent to closing but prior to delivery of the property. These issues do not exist in this case.

In a further effort to distinguish Olmstead, Ziter argues, without support from the record, that the parties in this case were real estate agents "who were fully aware of the use of terms 'buyer accepts property as is' to disclaim warranties" (page 16). In reality, one of the parties to the Agreement that was closed, Grossgold, is not a real estate agent. Manka's affidavit (R.69, paragraph 6) states that he never understood that the "as is" language disclaimed express warranties within the Agreement. Ziter argues that a further distinguishing factor in Olmstead is the use of the Single Family Residence Property Information form which was signed by the seller in that case. Perhaps Ziter is arguing that a warranty is effective only if it is made in writing at least twice during the course of the sales transaction. This argument does little to distinguish the fact that Ziter

expressly warranted that the heating and plumbing systems would be in "sound or in satisfactory working condition at closing."

The Olmstead court concluded that the reasoning of the Uniform Commercial Code limiting an "as is" disclaimer to implied warranties was persuasive and should be applied to cases involving cases of realty:

We interpret the "as is" clause to be consistent with the express warranties relating to the sewer system and well. It makes no reference to these express warranties, and therefore cannot be fairly read as disclaiming them. The clause fails because it does not state with particularity the items being disclaimed. (863 P.2d 1359-1360)

Ziter's discussion of the Montana case of Wagner v. Cutler, 757 P.2d 779 (Mont. 1988), misses the point. In Wagner, the LDS Church was selling the home of a former employee. The LDS Church had purchased the house from the employee when the employee was relocated. The sales agreement used by LDS contained a statement that the purchaser accepted the property and appliances "as is". The LDS Church contended that it had no knowledge of any defects and that the "as is" clause should have, at a minimum, triggered the purchasing party's obligation to thoroughly investigate the property. The Montana court held that this language did not shift the burden to the buyer to be responsible for latent defects. Nothing further is claimed by the plaintiffs for Wagner. Wagner

supports the conclusion that "as is" language is not a cure all for a seller's broken warranty.

Ziter appears to argue at page 17 of his memorandum that the only manner that this court can give meaning to all of the words added to the Agreement is to conclude that the "as is" language excludes all express warranties. What Ziter fails to address in this discussion is the following:

A. If the "as is" language is interpreted to control the express warranty, then no meaning is given to paragraph 6 of the EMSA which states:

6. **SELLER'S WARRANTIES.** In addition to warranties contained in Section C, the following items are also warranted: *None*.

Exceptions to the above and Section C shall be limited to the following: *None*.
(Emphasis added).

B. The argument asks this court to read the "subject to" language in paragraph 1(e) out of the EMSA.

Paragraph 1(e) states that:

(e) **BUYER INSPECTION.** Buyer has made a visual inspection of the property and subject to Section 1(c) above and 6 below, accepts it in its present physical condition, except: *None. Buyer accepts property "as is"*.

An integral part of each of this provision is that the property remains subject to the Seller's express warranty for the plumbing and heating systems.

C. The argument asks the Court to read paragraph O out of the agreement. Paragraph O states that the express warranties survive closing.

D. It asks the Court to ignore paragraph C, which contains the express warranties.

Ziter asks this court to harmonize the Agreement by reading out of it at least four critical paragraphs. No rule of construction supports such a result.

Ziter suggests that limiting the "as is" language in paragraph 1(e) to implied warranties makes it redundant because of language in General Provision B. Just because parties write the same words into an agreement where the words are already present does not mean that some new meaning has to be attached to them. The same words should mean the same thing. Even if the "as is" is repetitive, the response should not be to ignore or read other language out of the Agreement. U.C.A. §70A-2-316(1) suggests that in this circumstance, the negation or limitation is inoperative.

The most logical construction of the "as is" language is that it excludes only implied warranties. This construction avoids the need to read other paragraphs out of the EMSA. The construction is consistent with the ordinary interpretation

of "as is" that it excludes only implied warranties. Tibbitts v. Openshaw, supra, Olmstead v. Mulder, supra, U.C.A. §70A-2-316. There is absolutely no support in the record, from industry standards or case authority, that the use of "as is" in the EMSA disclaims the express warranties which are the subject of the Complaint.

In subpoint E, page 18 of his Memorandum, Ziter argues that paragraph 11 of the EMSA precludes the express warranties in subsection C from being incorporated into the Agreement. Paragraph 11 states:

11. GENERAL PROVISIONS. UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISIONS SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE. (Emphasis added).

None of the language added to the EMSA by the parties makes any reference to paragraph 11. None of the added language makes any reference to the express warranties in paragraph C of the General Provisions. Again, Ziter uses circular reasoning to argue that the "as is" language addresses the paragraph C warranties.

Finally, Ziter argues that his agreement to discount the sales price by \$5,000 for a new boiler confirms his legal claim that the "as is" language disclaims even the express warranties. This case was dismissed on the pleadings. There is no evidence in the record as to why the Seller agreed to reduce the down

payment. It is as logical to conclude that if the Buyer could have discovered the leaks in the plumbing and heating system that were buried within the walls and the floor of the apartment that he would have offered an even lower price and that the Seller would have accepted it. It is as logical to conclude that Grossgold relied upon the express warranties made by Ziter to save each of the parties the cost and inconvenience of tearing up walls and floors to determine the status of the entire system.

This case is before this Court from a judgment granting a motion to dismiss the complaint. There has been no evidence taken in this case. There is no record to show what the parties intended or believed was agreed to. While it is the plaintiffs' position, first and foremost, that the "as is" clause does not and cannot exclude the express warranties, at a minimum, there is an ambiguity which can be resolved only by testimony and trial. The ambiguity is this:

- (i) Paragraph 6 of the EMSA states that there are no exceptions to the express warranties; and
- (ii) Paragraph 1(e) of the Agreement states, according to Ziter, that the sale is "as is".

In granting a motion to dismiss for failure to state a claim, as the trial court did in this case, the court must construe the complaint in the light most favorable


to the plaintiff and indulge all reasonable inferences in his favor. Mounteer v. Power and Light Company, 823 P.2d 1055. (Utah 1991). The trial court did not do this. It resolved all inferences about what "as is" means contrary to law and contrary to the reasonable inferences to be drawn in favor of the plaintiff.

CONCLUSION

For the foregoing reasons, the order of the District Court dismissing the complaint should be set aside in its entirety, this court should determine as a matter of law that the express warranties for the plumbing and heating systems were not excluded, and the matter should be remanded to the District Court for trial on the issue of plaintiffs' damages.

DATED this 26 day of April, 1995.

COHNE, RAPPAPORT & SEGAL, P.C.




Keith W. Meade
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Reply Brief were mailed, postage fully prepaid, on the 26 day of

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