STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-07-30

George Donahue, d/b/a,
Donahue & Associates,

Plaintiff

v.

DECISION AND ORDER

Fox & Gammon Rigging, Inc.,

Defendants

This matter is before the Court on Defendant's Motion for Summary Judgment. The Court has reviewed the record and the parties' memoranda.

Factual Background

The record establishes the following facts:

1. At all times pertinent hereto, Plaintiff was under contract with WinAmerica to sell, service and supply parts for WinAmerica products in Maine, Vermont and New Hampshire.

2. In his capacity as a representative of WinAmerica, in March, 2006, Plaintiff entered into a contract with Down East Graphics of Ellsworth, Maine, for the sale of a printing press.

3. Plaintiff arranged for Graphic Equipment Co. to setup the printing press for Down East Graphics. Graphic Equipment Co. contracted with Defendant to transfer the printing press to its ultimate location. As part of the agreement between Plaintiff and Graphic Equipment Co., Plaintiff was to reimburse Graphic Equipment Co. for the expenses incurred in the installation of the printing press.

4. On April 4, 2006, while Defendant was transferring the printing press to the Down East Graphics facility, the printing press was damaged beyond repair.

5. At all times pertinent hereto, WinAmerica held title to the printing press.

6. Although Down East Graphics was willing to accept a replacement printing press from Plaintiff, because of a delay in the resolution of the claim arising out of the damage to the printing press, Down East Graphics cancelled its contract with Plaintiff.

7. On April 18, 2006, WinAmerica, in consideration for a payment of $158,471.23 paid by Defendant's insurance company, released Defendant and "their associations, heirs, administrators, executors, successors and assigns from any and all actions, causes of actions, claims and demands for, upon or by reason of any damage, loss or injury, which heretofore have been or which hereafter may be sustained in consequence of" the damage to the printing press.

Discussion

Summary judgment is warranted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits demonstrate that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. *Spencer v. V.I.P., Inc., 2006 ME 120, ¶ 5, 910 A.2d 366, 367;* M. R. Civ. P. 56(c). Through its motion, Defendant asserts that it is entitled to judgment as a matter of law because (1) the release executed by WinAmerica precludes Plaintiff's recovery, and (2) Plaintiff cannot recover for loss profits under the facts of this case.

A. WinAmerica Release

Defendant contends that Plaintiff was an agent of WinAmerica and, therefore, is bound by the terms of the release executed by an authorized representative of WinAmerica. Plaintiff argues that he was not an agent of WinAmerica, and that the release did not include the release of Plaintiff's claims against Defendant.

Both parties concede that whether an agency relationship exists is a question of fact. *(Defendant's Motion for Summary Judgment, p. 3; Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 2-3, citing, Johnson v. Gourmet Gardens, Inc., 827*

So.2d 1020 (Fla. App. 2002)). A review of the record demonstrates that in this case, the question of whether Plaintiff was an agent of WinAmerica is a fact in dispute. The contract language upon which Defendant relies suggests that WinAmerica attempted to designate Plaintiff as an independent contractor. Specifically, section 4.5 of the contract between WinAmerica and Plaintiff states, "[t]he DEALER [Plaintiff] is a business independent of the COMPANY [WinAmerica] and shall not portray themselves as a direct representative or agent of the COMPANY or the Manufacturer." Given the contract language describing Plaintiff as a "business independent", and given the absence of undisputed record evidence to establish that in practice Plaintiff and WinAmerica had a principal-agent relationship, the Court cannot conclude as a matter of law that Plaintiff was an agent of WinAmerica such that Plaintiff is included within the scope of the release.[1]

Even if Plaintiff is considered an agent for WinAmerica, the terms of the release reveal a disputed material fact as to whether Plaintiff would have been among those against whom WinAmerica released its claims. WinAmerica released Defendant from the claims that it or its "heirs, administrators, executors, successors and assigns" might have against Defendant. Not insignificantly, the explicit language in the release does not include WinAmerica's agents. Whether the parties intended for the release to cover WinAmerica's "agents" is a factual question that remains unresolved. The Court cannot conclude as a matter of law, therefore, that WinAmerica intended to release the claims of any or all of its "agents". Accordingly, even if the Court were to determine that Plaintiff is an agent of WinAmerica, the Court cannot enter judgment in favor of Defendant.

B. Claim for lost profits

Citing the economic loss doctrine, Defendant also seeks summary judgment on the ground that Plaintiff cannot, under the circumstances of this case, recover for lost profits. Plaintiff does not dispute that through this action, he is attempting to recover the income that he lost as the result of Defendant's alleged negligence. Plaintiff argues, however, that the economic loss doctrine is inapplicable in this case.

In *Oceanside at Pine Point v. Peachtree, 659 A.2d 267 (Me. 1995)*, the Law Court recognized the economic loss doctrine, which prohibits the recovery of economic damages in tort when it is alleged that a product is defective and that the loss resulted from damage to the product.

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[1] Because Plaintiff signed the contract for the sale of the printing press, the Court also cannot determine as a matter of law that Plaintiff was an independent contractor.

The Law Court explained that "[t]he rationale underlying this rule is that damage to a product itself 'means simply that the product has not met the customer's expectations, or, in other words, that the customer has received insufficient product value. The maintenance of product value and quality is precisely the purpose of express and implied warranties." *659 A.2d at 270.* (*citations omitted*).

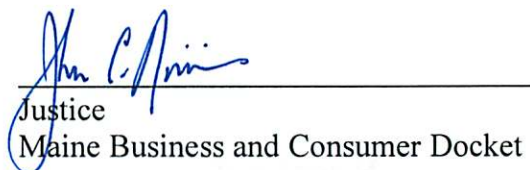
Here, although Plaintiff alleges that he suffered a loss due to damage to a product (i.e., the printing press), based on the allegations of record, he is not asserting a claim that can be or should be addressed under a warranty theory. Plaintiff is not a "customer" claiming that he has "received insufficient product value" as referenced by the Law Court in *Oceanside at Pine Point v. Peachtree. Id.* That is, Plaintiff is not alleging that the printing press was defectively manufactured, or that a contractual relationship existed between Plaintiff and Defendant pursuant to which Plaintiff could recover. Rather, Plaintiff alleges that Defendant, as the "rigger" of the printing press, had a duty to Plaintiff to use reasonable care when transferring the printing press, that he breached the duty, and as a result of the breach, he suffered a foreseeable loss. In other words, Plaintiff asserts that Defendant breached a duty that arose outside the context of a contractual relationship between the parties. The Court concludes, therefore, that the economic loss doctrine does not operate to preclude Plaintiff's claim in this case.

Conclusion

Based on the foregoing analysis, the Court denies Defendant's Motion for Summary Judgment.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 2/27/08



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