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QUESTIONS PRESENTED FOR REVIEW

A. Did the trial court err in its interpretation of the parties' Purchase and Sale Agreement when it ruled the plaintiff had a right to a refund of the horse's purchase price versus a credit towards an exchange for another horse.

Record Citation: McCarthy v. Lasalle, No. 09-SC-35 (Nashua Dist. Ct.) (final order) (attached to the Appellant's Brief at 12-13); Trial Transcript at pg. 11/lines 13-16; pg. 13/lines 6-19; pg. 15/line 21 to pg. 16/line 10.

STATEMENT OF THE CASE

This is an appeal from a final decision on the merits issued by the Nashua District Court (Ryan, J.) on June 16, 2009. The plaintiff, Marianne E. McCarthy, sued the defendant, Richard LaSalle, to recover the money she paid towards the purchase of a horse. The defendant argued the Purchase and Sale Agreement did not entitle her to a refund. Instead, the defendant asserted the express terms of the Agreement only allowed the plaintiff a credit and an exchange for a new horse. The District Court ruled the plaintiff had the right to a refund of the purchase price. This appeal followed.

STATEMENT OF FACTS

The defendant operates a business known as Hollis Ranch, LLC (hereinafter "the Ranch"). Hollis Ranch sells horses, which are advertised on the internet. Appellant's Brief at 17-19. Its website stated, in part, that the Ranch "specializes in quality horses for show, trail and pleasure." Id. at 18. The website further stated that the horses "are fully supported by our unconditional guarantee." Id.

In 2008, the plaintiff decided to purchase a horse from the defendant. Trial Trans. at pg. 4/line 22 to pg. 5/line 4. She wanted a quiet horse to ride on her farm. Id. at pg. 5/lines 3-5. The plaintiff visited the ranch with an advisor, photographed, and rode a number of the Ranch's horses. Id. at pg. 11/lines 4-6. Eventually, the plaintiff decided to purchase a horse known as "Coosas Ginger" for $4,600. Appellant's Brief at 15-16.

The plaintiff executed a Purchase and Sale Agreement on July 2, 2008. Id. at 16. The Agreement contained two clauses which are at issue in this litigation. The first states, "SELLER warrants that he has clear title to said horse. SELLER MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING THE WARRANTIES [sic] OF FITNESS FOR A PARTICULAR PURPOSE except as may be otherwise provided for in this Agreement." Id. at 15 (capitalization in original). The second reads "NO REFUNDS. A 14-day exchange privilege will be made available upon request and based upon return of the Horse in similar condition as when the Horse left Hollis Ranch. Horse must be returned within 14 days of this agreement." Id. at 16 (capitalization in original).

Shortly after she purchased the horse, the plaintiff determined that it was unacceptable and returned the horse to the Ranch. Id. at pg. 5/line 20 to pg. 6/line3; pg. 6/line 12 to pg. 7/line 11. However, she refused to select another horse in exchange. Id. at pg 9/lines 5-6. When the defendant refused to refund her the purchase price, the plaintiff filed suit in the Nashua District Court.

At trial, the plaintiff admitted that she was aware of the no refund clause in the Agreement. Trial Trans. at pg. 9/line 23 to pg. 10/line1. Nevertheless, she

apparently took the position that the phrase "unconditional guarantee," which appears in the Ranch's web site, overrides the disclaimer of warranties and the no refund language in the Purchase and Sale Agreement. Id. at pg. 9/lines 21-23; pg. 10/lines 3-4. The plaintiff also argued that she was terminating the Agreement pursuant a "default clause," which reads "upon material breach of this agreement by one party, the other party may terminate same. . . ." Id. at pg. 10/lines 1-2; Appellant's Brief at 16. The District Court ruled the plaintiff was entitled to return the horse for a full refund and entered judgment in her favor in the amount of $4,600 plus interest and costs.

SUMMARY OF ARGUMENT

The District Court erred in ruling the phrase "unconditional guarantee" created an express warranty which entitled the plaintiff to a refund of the purchase price. The District Court erred in ruling the defendant breached the Agreement because there was no evidence to support such a finding.

ARGUMENT

A. STANDARD OF APPELLATE REVIEW

This case involves the interpretation of a contract and the trial court's application of largely undisputed facts to the law. Both are questions of law. See St. Onge v. McDonald, 154 N.H. 768, 772 (2004) (trial court's application of facts to the law is a question of law); Behrens v. S.P. Construction Co., Inc., 153 N.H. 498, 503 (2006) (contract review presents a question of law). Questions of law are reviewed de novo. Czumak v. N.H. Div. of Develop. Servs., 155 N.H. 368, 373 (2007).

B. THE DISTRICT COURT ERRED WHEN IT RULED THE PLAINTIFF WAS ENTITLED TO A FULL REFUND OF THE PURCHASE PRICE

When interpreting a contract, the "inquiry focuses on the intent of the contracting parties at the time of the agreement." R. Zoppo Co. v. City of Dover, 124 N.H. 666, 671 (1984).

> In the absence of ambiguity, the parties' intent will be determined from the plain meaning of the language used. The words and phrases used by the parties will be assigned their common meaning, and we will ascertain the intended purposes based upon the meaning that would be given to it by a reasonable person.

Greenhalgh v. Presstek, 152 N.H. 695, 698 (2005). A court will not re-write a contract to add language not included by the parties. Centorr-Vacuum Indus. v. Lavoie, 135 N.H. 651, 654 (1992).

1. The Website Does Not Create An Express Warranty Because There Is No Affirmation Of Fact

The District Court erred when it appeared to find the language in the Ranch's website constituted an express warranty which obligated the Ranch to provide a full refund if the horse was returned. This Court has recently held that representations made outside the four corners of a contract can qualify as an express warranty. See Kelleher v. Marvin Cedar & Lumber Co., 152 N.H. 813, 841 (2005) (representation made in a catalog can constitute an express warranty). The party seeking to enforce such a warranty must show it is a "promise or affirmation of fact [which] . . . relate[s] to the goods and become[s] part of the basis of the contractual bargain." Id.

While the seller does not have to use the term "warranty" or "guarantee" to create an actionable express warranty, id., the presence of these terms does not automatically create an express warranty, Humble Nat. Bank v. DCV, Inc., 933

S.W.2d 224, 233 (Tex. App. 1996); Enterprise-Laredo Assoc. v. Hachar's, Inc., 839 S.W.2d 822, 831 (Tex. App. 1992), writ denied, 843 S.W.2d 476 (Tex. 1992). The inquiry, as stated above, focuses on whether there is a representation of fact versus an opinion of value. See Kelleher, 152 N.H. at 841 ("an affirmation of the value of goods or a statement of the seller's opinion or commendation of the goods does not create a warranty").

In Kelleher, for example, this Court held that a catalog which contained a detailed description of the processes used to prevent rot and decay went beyond a mere expression of value or commendation of goods. Id. However, where the phrase "unconditional guarantee" or "fully guaranteed" appears with no precise description of how the guarantee applies, other courts have held that such language is insufficient to create an express warranty. See Little v. Woodall, 224 A.2d 620, 625 (Md. App. 1966) (expression "fully guaranteed" did not create an unconditional guarantee, but merely a promise that the goods would be of ordinary workmanship); Becker v. Harken, Inc., 2007 WL 1412937 at *3 (D.Fla. 2007) (unpublished decision). In Becker, for example, the court held that a pulley system that was advertised to be "unconditionally guaranteed" did not indicate that the product would work forever, and thus did not create an express warranty sufficient to defeat the statute of repose. 2007 WL 1412937 at *3.

Here, the Ranch's website merely stated that the Ranch's horses are "fully supported by our unconditional guarantee." Appellant's Brief at 18. The website further stated that the Ranch works with all of its horses, and is familiar with their characteristics. Id. The website does not create a specific representation of fact

about any of the horses, such as they are all thoroughbred or trained in any particular riding style. More important, the website does not contain any language, whatsoever, to suggest that a horse purchased from the ranch can be returned for a full refund. Therefore, as the website does not create an express warranty which adds to, or overrides the language in the Agreement, the District Court's decision should be reversed.

2. Any Express Warranty Created By The Website Was Effectively Disclaimed By The Purchase And Sale Agreement

Even if the phrase "unconditional guarantee" is construed to be an express warranty, it respectfully submitted that the District Court erred when it apparently concluded that web page survived the disclaimer of warranties clause. A party can disclaim any express warranty by word or conduct. See RSA 382-A:3-316(1) (1994); Fassi v. Auto Wholesalers of Hooksett, 145 N.H. 404, 406 (2000). Language set out in large capital letters that clearly disclaim a warranty is sufficiently conspicuous to accomplish same. See RSA 382-A:1-201(10), see also Dana Commercial Credit Corp. v. Hanscom's Truck Stop, Inc.,141 N.H. 131, 134 (1996); Xerox Corp. v. Hawkes, 124 N.H. 610, 618-9 (1984).

Here, both the no refund and the disclaimer of warranty clauses appear in separate paragraphs set off by capital letters. Under Xerox, this is more than adequate to alert the buyer of its presence. The language clearly told the plaintiff that there were no warranties made concerning the horse except for the warranty of title. Therefore, any alleged warranties made outside the four corners of the Agreement were effectively disclaimed.

3. Even If The Phrase "Unconditional Guarantee" Constitutes An Express Warranty That Was Not Disclaimed, There Was No Basis For The District Court To Conclude The Defendant Breached Same

Finally, even if this Court were to find that the website contained an express warranty which was not disclaimed by the Purchase and Sale Agreement, a judgment for the plaintiff would only be appropriate if the facts alleged at trial showed the defendant breached the Agreement. See West Gate Village Assoc. v. Dubois, 145 N.H. 293, 298 (2000) (breach of contract occurs when there is an unexcused failure by a party to perform a promise that is part of the bargain). It is well settled that parties may limit their rights and remedies by clear contract language. Xerox, 124 N.H. at 617. A court cannot create a contractual right where none previously existed by adding words to an agreement. See Olbres v. Hampton Co-op. Bank, 142 N.H. 227, 233 (1997); see also Northern Heel Corp. v. Comp Industries, Inc., 851 F.2d 456, 466 (1st Cir. 1988) ("we decline to rewrite the agreement between the parties to include a representation which they were mutually content to let slide in the course of their negotiations").

Here, the plain language of the Agreement, Greenhalgh, 152 N.H. at 698, stated the defendant was obligated to take the horse back and offer another animal in exchange, with an appropriate credit, if the horse was returned, in the same condition, within fourteen (14) days of the date of purchase[1]. Appellant's Brief at 16. There is no language in any printed document or web page which suggests the

[1] Interestingly, the plaintiff admitted that she was aware of the return policy before she purchased the horse. Trial Trans. at 6/lines 20-21. Given that the no return clause is led off by the statement "NO REFUNDS," it is incredible for the plaintiff to believe she was entitled to a refund if she returned the horse.

defendant was obligated to refund the purchase price. For the District Court to impose such a remedy, it had to effectively rewrite the Agreement.

The evidence introduced at trial showed the defendant accepted the horse when it was returned and repeatedly offered to exchange the horse for another animal. Trial Trans. at pg. 8/line 1 to pg. 9/line 2. It was the plaintiff, not the defendant, who refused to select another animal. Id. at pg. 9/lines 10-11. As the defendant fully performed its obligations under the agreement when the plaintiff returned the horse by offering her another animal in exchange, the District Court could not have found it breached its obligations under the Agreement.

CONCLUSION

The District Court's decision in this case is legally erroneous in that the defendant was not obligated to refund the plaintiff's money when she returned the horse. The decision should be reversed and judgment should be entered in favor of the defendant.

Respectfully submitted,
RICHARD LASALLE
By His Attorneys,
HAMBLETT & KERRIGAN, PA

DATED: OCTOBER 29, 2009

By:_____

ANDREW J. PIELA, ESQUIRE
NH Bar No.: 10518
146 Main Street
Nashua, N.H. 03060
(603) 883-5501

REQUEST FOR ORAL ARGUMENT

Pursuant to N.H. Supreme Ct. R. 18 (2009), Richard LaSalle respectfully requests that this case be set down for oral argument. Andrew J. Piela, Esquire will conduct the oral argument on behalf of Mr. LaSalle.

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the above **Brief of the Appellant-Richard Lasalle** was forwarded this day, first class mail, postage prepaid, to Marianne E. McCarthy, Pro Se.

DATED: OCTOBER 29, 2009

_____
ANDREW J. PIELA, ESQUIRE