Claim No: 388802

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Norton v. Leon's Furniture Ltd., 2012 NSSM 21

BETWEEN:

ANN-NOREEN NORTON

Claimant

- and -

LEON'S FURNITURE LTD.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on May 8, 2012

Decision rendered on May 14, 2012

APPEARANCES

For the Claimant	self-represented
For the Defendant	Tammy Bishop general manager for Dartmouth store

BY THE COURT:

[1] This is a claim arising out of the sale by the Defendant to the Claimant of a Frigidaire washing machine. The Claimant contends that the machine was defective from the outset, and that it eventually failed completely despite a service call that had pronounced it in working order. The Defendant says that the machine is beyond the one-year manufacturer's warranty, and that since the Claimant had declined to purchase an extended warranty at the outset, she is simply out of remedies.

[2] The facts are fairly straightforward. The machine was bought in September 2010 for $999.00 plus HST, for a total of $1,148.85. It came with a standard one-year manufacturer's warranty. The Claimant declined to pay extra for an extended warranty.

[3] After using it for a few weeks, the Claimant began to be concerned that the spin cycle did not appear to be removing as much water as it should, and certainly not as much as she had been used to with her previous machine. Because she had to be out of the province for an extended time, the Claimant did not get around to reporting this concern to Leon's until January 2011. Leon's sent out a serviceman from Appliance Maritimes. According to the Claimant, this individual ran the machine through some cycles, but without putting any clothes in it. She was concerned that perhaps he should have run it with clothes, but figured that he was the expert and deferred to his judgment. He said that the machine was working fine.

[4] A few weeks later, the Claimant noticed a small amount of water on her laundry room floor. She called a plumber, who checked to see if all of the hoses were snug. He could not find any obvious problem.

[5] The Claimant says that she dropped into Leon's again in March 2011 to report that she did not think the machine was working properly. Someone promised to get back to her. No one did. Leon's apparently has no record of this complaint, and the Claimant does not recall specifically who she spoke to, but I find that the Claimant is totally credible and I accept her version without hesitation.

[6] The Claimant continued to use the machine, though not entirely happily. Again she had to be out of the province for extended times, so the machine was not used as intensively as it might have been.

[7] In February 2012, there was a major flood caused by the machine. There is evidence that water escaped from the tub (i.e. not just from the hoses or the connection at the back of the machine) and into the mechanical and electrical workings of the machine. From there it leaked onto her floor, where it caused significant damage by working its way down through to the ceiling below. The machine has not been used since and may be irreparable.

[8] The Claimant contacted the Defendant and was told that she was out of luck because her warranty had expired.

[9] The Claimant wants a refund, and brought this claim seeking the cost of the machine plus the cost that she incurred for the technician that responded to

her call after the flood, and who charged her $129.95 to investigate and determine the problem.

[10] At the hearing, the Claimant testified that the extensive water damage is being repaired under a home insurance claim; however, she will have to pay the $500.00 deductible. I ruled at the hearing that I could not include this $500.00 in her claim against Leon's because it had not received any notice of such a claim in advance of the hearing.

[11] The Defendant bases its defence on the fact that it observed the terms of the manufacturer's warranty. When called about a problem, it sent out a service person who did not find a problem. The one year has expired, and it says that the Claimant is simply beyond the warranty period.

[12] The Claimant says that she did report the problem within the warranty period, not once but twice. Even so, she claims that she has rights under the Nova Scotia *Consumer Protection Act* that are not limited by the one-year warranty.

Discussion

[13] The Defendant's position is, to an extent, understandable. It is basically a middleman between the customer and the manufacturer.

[14] Historically, sellers of goods have always been responsible to buyers for the quality of what they sell, because (among other things) they stand in a direct contractual relationship. Where sophisticated equipment such as machinery is being sold, it is the manufacturer and rarely the seller that has the expertise to

repair it, or the extensive inventory to replace it if it cannot be fixed. Most modern buyers expect that a manufacturer will stand by its goods. From a legal point of view, however, the customer is not in a contractual relationship with the manufacturer and so the concept of a manufacturer's warranty was developed to create a legal relationship between the customer and the manufacturer. I dare say that it is now expected that most items we buy will come with a warranty.

[15] Leon's is essentially saying that the manufacturer's warranty replaces its obligations as a seller. It is also saying that its own obligations (if any) should be limited to the terms of the Frigidaire warranty - namely one year.

[16] A reading of the *Consumer Protection Act* shows that Leon's is wrong in its legal position.

[17] That Act is specifically addressed to professional sellers of goods, like Leon's. it begins by stating:

> 2 (n) "seller" means a person who is in the business of selling goods or services to buyers and includes his agent, but does not include a person or class of persons to whom this Act is by the regulations declared not to apply;

[18] It goes on to provide the following:

> **Implied conditions or warranties**
>
> 26 (1) In this Section and Section 27, "consumer sale" means a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use .....

(2) In this Section and Section 27, "purchaser" means a person who buys or agrees to buy goods or services.

(3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:

.....

(f) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, a condition that the goods shall be of merchantable quality, provided that, if the purchaser has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

.....

(j) a condition that the goods shall be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale.

.....

28 (1) Any written term or acknowledgment, whether part of a contract of sale or not, that purports to negative or vary any of the conditions or warranties set out in this Act or states that the provisions of this Act or the regulations do not apply or that a benefit or remedy under this Act or the regulations is not available, or that in any way limits or abrogates, or in effect limits, modifies, or abrogates, a benefit or remedy under this Act or the regulations, or that in any way limits, modifies or abrogates any liability of the seller including any limitation, modification or abrogation of damages for breach of any of the conditions or warranties set out in this Act or the regulations, is void.

.....

[19] What this all means is that a seller implicitly warrants that consumer goods are “merchantable” and free of any hidden defects, and “durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale.” It also means that any effort to exclude or limit the seller’s responsibility under these sections is void.

[20] In other words, the seller warrants that the goods will be merchantable and durable, and nothing in the contract of sale nor the manufacturer's warranty limits or necessarily delineates that responsibility.

[21] There is some judicial precedent interpreting these sections. In *Ron MacGillivray Chev Geo Olds Ltd. v. Munroe* (1994) 134 N.S.R. (2d) 186, the Supreme Court of Nova Scotia heard an appeal from a Small Claims Adjudicator who had held a car dealership responsible for the cost of repairing some defects in a vehicle that manifested after the manufacturer's warranty had expired. The Adjudicator held the dealership responsible. The Supreme Court dismissed the appeal and approved of the reasoning that had applied the provisions of the *Consumer Protection Act.* The judge went on to say:

> 14 I find that the findings made by the Adjudicator were reasonable in the circumstances and that this interpretation of the Consumer Protection Act was appropriate. I agree that in order to hold the manufacturer liable such a finding would have to be based either on contractual liability, tort liability or statutory liability. In light of the fact that the contractual warranty had expired there would be no contractual liability in the manufacturer. I also find that the Consumer Protection Act is not intended to cover parties other than an actual seller and therefore liability could not be found against the manufacturer under that Act. Because the Adjudicator did not find that the manufacturer was negligent in the manufacture of the transmission there could be no finding based on tort liability.

[22] In my view, the machine in question was not merchantable or durable, within the meaning of the Act. It was not working properly from the get go, and eventually failed completely. It is not enough for Leon's to say that they sent out a serviceman, and that they would have continued to do so if they were aware of the problem. It appears that someone dropped the ball, in terms of noting the Claimant's second complaint, and the Claimant should not suffer for that. It is

also completely unacceptable for Leon's to suggest that the expiry of the warranty marked the end of their responsibility. The term "durable for a reasonable time" is a more flexible concept that depends on the facts. Here, by any measure, a washing machine should last a lot longer than one year.

[23] Sellers may have an incentive to take this position - that the consumer is out of luck at the end of the manufacturer's warranty - because they are in the business of selling extended warranties. I am not saying that extended warranties are inherently bad or useless, but the implicit message that consumers have no recourse after the expiry of the original warranty, is simply wrong. The *Consumer Protection Act* says otherwise. In this case, the seller (Leon's) is liable on its implied warranties. The Claimant has satisfied me that the machine is worthless, and that she should receive a full refund plus her consequential damages as originally claimed. It is reasonable for Leon's to ask that it be permitted to take back the faulty machine, if it wishes, otherwise the Claimant is free to dispose of it as she wishes.

[24] The Claimant shall accordingly have judgment for $1,370.27, comprised of the cost of machine ($1,148.85), the cost of the service call ($129.95) and her costs of filing this claim ($91.47).

Eric K. Slone, Adjudicator