

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**MARKAM TRANSPORT, INC,
Plaintiff,**

v.

**Case No. 13-135669-CZ
Hon. James M. Alexander**

**MACK TRUCKS, INC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant’s Motion for Summary Disposition. This is a breach of warranty case. According to its Complaint, in July 2011, Plaintiff purchased a new 2010 Mack Titan Truck from non-party Diesel Truck Sales in Saginaw, Michigan. Plaintiff alleges that the truck has been out of service for repairs a substantial number of times and has suffered from “numerous and consistent defects.” As a result, Plaintiff sued on claims of (1) breach of express warranty; and (2) breach of implied warranty of merchantability.

Defendant now moves for summary disposition under MCR 2.116(C)(10) – claiming that it fully complied with the express warranty’s terms, and Plaintiff’s claim for breach of implied warranty of merchantability is barred by a provision contained in the express warranty. A motion under MCR 2.116(C)(10) tests the factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

1. Express Warranty

Defendant first claims that it is entitled to summary disposition of Plaintiff's express warranty claim because: (1) Defendant fully complied with the express warranty, and (2) Plaintiff cannot establish that the express warranty did not fail of its essential purpose.

In response, in addition to numerous past defects, Plaintiff claims that that one defect in the truck ("engine noise and vibration") still exists and has not yet been repaired – despite Plaintiff's seeking service for the same. In support, Plaintiff attaches a December 26, 2013 repair invoice, which references a "ticking noise in engine" and the Affidavit of Mark Donatiello, Plaintiff's owner. Mr. Donatiello claims that the truck was out of service from December 23, 2013 to January 3, 2014 for repair of this issue, and since the January repair attempt, "the problem has gotten worse."

Both parties rely heavily on *Computer Network, Inc v AM General Corp*, 265 Mich App 309; 696 NW2d 49 (2005) in support of their arguments. In *Computer Network*, a business leased a Hummer vehicle from a dealer for 30 months. Before the lease expired, the business filed suit – claiming that the vehicle had been in the shop some fourteen times and was out of service for 199 days. The business claimed various problems in several different vehicle systems – from engine problems to defective paint.

The vehicle's manufacturer, AM General, offered an express warranty, and the business's principal testified that the warranty repairs were never refused. Despite the manufacturer's repair of the vehicle each time it was presented, Plaintiff argued that the aggregate number of days (some 199) was unreasonable. The Court of Appeals disagreed, concluding:

there was no evidence that the time allotted for the presented repairs was unreasonable under the particular circumstances. There were numerous different repairs to the vehicle over a lengthy period, most of which were not repeat repairs. . . . [The plaintiff] offers no evidence that the time to perform the numerous,

individual repairs was unreasonable for this specific vehicle. . . . Here, the vehicle was always repaired, returned, accepted, and used. Because there was no question of material fact, summary disposition under MCR 2.116(C)(10) was appropriate. *Computer Network*, 265 Mich App at 315.

In our case, there is evidence that a defect still exists (the engine noise) – which makes this case distinguishable from *Computer Network* – where the vehicle was always repaired. This evidence must be construed in the light most favorable to Plaintiff, which precludes summary disposition.

Additionally, the parties dispute the number of repairs that were simply for “routine maintenance” versus those for defects. And it is reasonable to assume that routine service could not serve as the basis for a breach of warranty claim – as the same is expected with the ownership of any vehicle. As a result, this factual dispute also renders summary disposition inappropriate.

2. Implied Warranty

Defendant next argues that Plaintiff cannot prevail on its implied warranty claim because any such warranty is barred by the written terms of the express warranty.

In support, Defendant cites to Michigan’s Uniform Commercial Code, which provides that any modification or exclusion of warranty items is effective provided it is conspicuous and in writing. Specifically, MCL 440.2316(2) provides:

to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion **must be by a writing and conspicuous**. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

“A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it.” *Latimer v William Mueller & Son, Inc*, 149 Mich App 620, 635; 386 NW2d 618 (1986). Whether such language is conspicuous is a question of law for the Court. *Latimer*, 149 Mich App at 636.

The warranty in this case, titled “Bulldog Protection Plan,” provides (emphasis in original):

I hereby certify that I have read and understood the provision of the standard published Mack warranty and the terms and conditions of the extended coverage program stated above, all of which are incorporated herein by reference.

I FURTHER UNDERSTAND THAT THE WARRANTY WHICH I HAVE ELECTED TO PURCHASE IS MADE EXPRESSLY IN LIEU OF ANY OTHER WARRANTIES OR CONDITIONS, EXPRESSED OR IMPLIED, STATUTORY OR OTHERWISE, INCLUDING ANY WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND OF ANY OTHER OBLIGATION OR LIABILITY ON THE PART OF THE MANUFACTURER INCLUDING, WITHOUT LIMITATION OF THE FOREGOING CONSEQUENTIAL AND INCIDENTAL DAMAGES.

Directly below this statement, appears the signature of Defendant’s owner, Mark Donatiello. It is dated July 7, 2011 – the same day that Defendant purchased the vehicle.

In response, Defendant offers minimal substantive analysis why MCL 440.2316(2) doesn’t apply – only citing to a single sentence from *Computer Network* for the proposition that 15 USC 2308 “precludes a supplier that has offered an express warranty from disclaiming or modifying a limited warranty in any respect other than duration.” *Computer Network*, 265 Mich App at 315.

Indeed and consistent *Computer Network*, reading MCL 440.2316(2) and 15 USC 2308 together, the Court finds that, if a supplier or manufacturer provides an express warranty, then it cannot outright disclaim any implied warranty. It may, however, limit the duration of the implied warranty – provided such limitation is “conscionable and is set forth in clear and unmistakable

language and prominently displayed on the face of the warranty” under 15 USC 2308(b) and in “writing and conspicuous” under MCL 440.2316(2). Because the language contained on the warranty in this case provides that any additional warranty is disclaimed, the same runs contrary to 15 USC 2308(b).

Further, Defendant’s argument relies solely on MCL 440.2316, ignores the plain language of 15 USC 2308. As a result, Defendant fails to provide any analysis about the interplay between these two statutes and otherwise fails to establish that it is entitled to summary disposition of Plaintiff’s implied warranty claim.

Additionally, for similar reasons as provided in the Court’s express warranty analysis, the Court finds that there remain several material factual questions in dispute that preclude summary disposition. Specifically, the parties appear to disagree about how many of the repair visits were for routine service and whether a current defect remains.

For all of the foregoing reasons and viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that there are material facts in dispute which preclude judgment as a matter of law. As a result, Defendant’s motion for summary disposition is DENIED.

March 19, 2014 _____
Date

_____/s/ James M. Alexander_____
**Hon. James M. Alexander, Circuit Court Judge
Business Court**