

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

DART PROPERTIES, INC.,

Plaintiff,

vs.

Case No. 2013-2284-CB

NATIONAL COMFORT PRODUCTS, INC.,  
FAMILY HEATING & COOLING, INC., and  
FIRE & ICE MECHANICAL, INC.,

Defendants.

and

NATIONAL COMFORT PRODUCTS, INC.,

Third Party Plaintiff,

vs.

THOMAS AND BETTS CORPORATION, and  
REZNOR CORPORATION,

Third Party Defendants.

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OPINION AND ORDER

Plaintiff Dart Properties II, LLC ("Plaintiff") has filed a motion for partial summary disposition as to its breach of warranty claim against Defendant National Comfort Products, Inc. ("Defendant NCP"). Defendant NCP has filed a response and requests that the motion be denied. Plaintiff has also filed a reply brief in support its motion. Further, Defendant NCP has filed a supplement in support of its response.

## I. Background

From 2006 to 2009, Plaintiff purchased 1,536 HVAC units manufactured by Defendant NCP ("Units"). The Units were purchased for the purpose of being installed in apartments Plaintiff owns and operates. The Units came with multiple warranties, one of which was a warranty for the Units' heat exchangers (collectively "Exchanger Warranties").

In 2011, Plaintiff claimed that some of the Units' heat exchangers had cracks. Defendant NCP allegedly replaced the heat exchangers at issue. In 2012, Plaintiff allegedly found that an additional 152 heat exchangers had cracks or holes. In response, Defendant NCP inspected a couple of the apartment units at issue. Defendant NCP requested to inspect additional apartments, but the request was denied. Based on its inspection, Defendant NCP refused to honor the warranty requests unless Plaintiff agreed to perform certain maintenance. Plaintiff refused Defendant NCP's request and instead replaced all of the Units.

On February 14, 2014, Plaintiff filed its first amended complaint in this matter ("Amended Complaint"). The Amended Complaint includes, *inter alia*, a claim for breach of contract and breach of express warranties as to the heat exchangers against Defendant NCP (Count I), breach of implied warranty of merchantability against Defendant NCP (Count II); breach of implied warranty of fitness for a particular purpose against Defendant NCP (Count III); and failure of warranty to satisfy its essential purpose against Defendant NCP (Count IV).

On December 21, 2015, Plaintiff filed its instant motion for partial summary disposition. On January 4, 2016, Defendant NCP filed its response. On January 8,

2016, Plaintiff filed its reply brief in support of its motion. On January 11, 2016, the Court held a hearing in connection with the motion and took the matter under advisement. On January 15, Defendant NCP filed its supplement to its response.

## II. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Graves v Warner Bros*, 253 Mich App 486, 491; 656 NW2d 195 (2002). Under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* However, the nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under this rule. MCR 2.116(G)(4); *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Wayne County Bd of Com'rs v Wayne County Airport Authority*, 253 Mich App 144, 161; 658 NW2d 804 (2002).

## III. Arguments and Analysis

In its motion, Plaintiff first contends that the Exchanger Warranties failed of their essential purpose when Defendant NCP refused to replace some of the Units in 2012. Specifically, Plaintiff contends that Defendant NCP repudiated the Exchanger Warranties, and that the repudiation constituted a failure of the Exchanger Warranties' essential purpose.

Under MCL 440.2719(1)(a), a seller may limit its warranty(ies) to replacement, return of the goods sold, or repair and replacement of the nonconforming goods or

parts. However, MCL 440.2719(2) provides that "where circumstances cause an exclusive or limited warranty to fail of its essential purpose, remedy may be had as provided in this act." The phrase "remedy may be had as provided in this act" includes incidental and consequential damages. *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105, 115-116; 394 NW2d 17 (1986).

In its response, Defendant NCP first asserts that even if it repudiated the Exchanger Warranties, the Exchanger Warranties had already been voided as a result of Plaintiff's actions. Specifically, Defendant NCP relies on the following portions of the Exchanger Warranties:

[Defendant NCP] will not be responsible for.....damage or repairs required due to faulty installation or improper application by others.....

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If the heat exchanger of the gas furnace should fail because of a manufacturing defect, is in its original installation, has been operated under normal conditions.....[Defendant NCP] will provide, at its option, a new or remanufactured replacement heat exchanger.

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NO WARRANTY WILL BE APPLY IF.....IN THE JUDGEMENT OF THE MANUFACTURER THE HEAT EXCHANGER HAS BEEN SUBJECTED TO MISUSE, NEGLIGENCE.....OR OPERATION CONTRARY TO THE MANUFACTURER'S PRINTED INSTRUCTIONS.

(See Defendant NCP's Exhibit 4.)

With respect to the first two exclusions, the only evidence Defendant NCP has presented is testimony that deficiencies in the installation of some of the Units may have caused the damage to the heat exchangers. (See Defendant NCP's Exhibit 6.) Such equivocal evidence is insufficient to establish that deficient installation was the cause the issues to the heat exchangers in question. Consequently, the Court is convinced

that Defendant NCP has failed to establish that the first two exclusions operated to void the Exchanger Warranties.

Defendant NCP's argument primarily focuses on the third exclusion. In order to establish that the third exclusion operated to void the Exchanger Warranties, Defendant NCP must establish that, in its opinion, the heat exchangers in question had been subjected to misuse, negligent treatment or otherwise used in a manner inconsistent with the instruction manual provided with each of the Units. In this case, Defendant NCP refused to provide coverage under the Exchanger Warranties no later than September 13, 2012, the date on which Plaintiff and Defendant NCP met to discuss whether Defendant NCP would cover the damage to the heat exchangers. (See Plaintiff's Exhibit B to its reply, deposition of Brian Kelly, Defendant NCP's President.) Accordingly, Defendant NCP would have needed to base its decision not to provide coverage based on the information it had at that time in order to make its determination that the Units had been subjected to misuse, negligence or operation contrary to the printed instructions accompanying the Units.

"[W]here a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Burkhardt v. City Nat Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975). Further, "where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion. *JJM Sunrise Auto, LLC v Volkswagen Group of Am, Inc*, 46 Misc 3d 755, 778; 997 NYS2d 270, 288 (2014) adhered to on reargument sub nom. *JJM Sunrise Auto, LLC v Volkswagen Group of Am, Inc*, 49 Misc 3d 1208(A) (2015).

As of September 13, 2012 the only evidence, other than the failure rate of the heat exchangers, was the findings of its previous inspection of four apartment units. Those findings are set forth in the report of Vince Mucciola, Defendant NCP's sales manager ("Report"), as well as his affidavit. (See Defendant NCP's Exhibits 6 and 7.) Specifically, Mr. Mucciola set forth ways in which some of Units' installation did not comply with Defendant NCP's installation guide. (See Defendant NCP's Exhibit 6.) Further, Mr. Mucciola testified that he prepared a PowerPoint presentation setting forth the deficiencies, and that the presentation was shown to Plaintiff's representatives at the September 13, 2012 meeting. (Id.) Further, Mr. Mucciola testified that he requested permission to inspect some of the Units at other complexes, but that his request was denied. (Id.) Moreover, Defendant NCP's president, Brian J. Kelly, testified that Defendant NCP terminated the Exchanger Warranty for each of the Units when Plaintiff refused to cure the deficiencies in installation and maintenance that Mr. Mucciola's inspection has identified. (See Exhibit B to Plaintiff's reply brief.)

In response, Plaintiff asserts that Defendant NCP did not act in good faith and rationally in deciding to terminate the Exchanger Warranty for each of the Units. Specifically, Plaintiff contends that Defendant NCP knew that the heat exchangers had been failing at higher than usual numbers in general, not just at Plaintiff's complexes. In support of its position, Plaintiff relies on a request for replacement submitted by Thomas DiGiacomo, one of Defendant NCP's employees, in which he noted that the heat exchangers were having a higher than usual rate of failure for the age the product. (See Exhibit D to Plaintiff's reply brief.) Moreover, Mr. DiGiacomo testified that he had observed the maintenance and installation of some of the Units, and that in his opinion

the installations and maintenance activities were proper. (See Exhibit C to Plaintiff's reply brief.)

In this case, the parties have presented conflicting evidence with respect to whether the Units were being misused, used in a negligent manner, or use in a manner inconsistent with the printed instructions. When the evidence is view in the light most favorable to either side, the Court is convinced that a genuine issue of material fact exists as to whether Defendant NCP's decision to void the Exchanger Warranties was rational and done in good faith. Consequently, the parties' motion for summary disposition based on Defendant NCP's decision to terminate the Exchanger Warranties must be denied.

#### IV. Conclusion

Based upon the reasons set forth above, Plaintiff's and Defendant National Comfort Products, Inc.'s motions for summary disposition are DENIED. This Opinion and Order does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: MAR 10 2016

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge