

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

DART PROPERTIES, INC.,

Plaintiff,

vs.

Case No. 2013-2284-CK

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

Defendants Fire & Ice Mechanical, Inc. (“Defendant Fire”) and Family Heating and Cooling, Inc. (“Defendant Family”) have each filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff has filed a response to each motion and requests that the motions be denied.

In addition, Defendant Fire has filed a motion for sanctions as to Plaintiff’s previously dismissed installation claims. Plaintiff has filed a response and requests that the motion be denied.

### *Facts and Procedural History*

In 2005 or 2006, Michael Buffmyer, Plaintiff's Facilities Manager recommended the replacement of 1,500 furnaces in four of Plaintiff's properties. After meeting with one of Defendant National Comfort Products, Inc.'s ("Defendant National") sales representatives, Mr. Markee contacted Defendant Fire and Defendant Family to purchase and install Defendant National's furnaces. Plaintiff's contracts with Defendant Family and Defendant Fire (collectively, "Defendant Contractors") contained a 10 year express warranty on the furnaces' heat exchangers.

In 2011/2012 Plaintiff allegedly discovered that hundreds of the furnaces it had purchased contained defective heat exchangers. As a result, Plaintiff replaced all of the furnaces manufactured by Defendant National.

On June 10, 2013, Plaintiff filed its complaint in this matter asserting claims for, *inter alia*, improper installation against Defendant Contractors. On February 7, 2014, the Court entered its Opinion and Order granting Plaintiff's motion for leave to file an amended complaint.

On February 14, 2014, Plaintiff filed its first amended complaint in this matter. In its amended complaint, Plaintiff alleges the following claims: Breach of Contract and Breach of Express Warranties As to the Heat Exchangers against Defendant National (Count I); Breach of Implied Warranty of Merchantability against Defendant National (Count II); Breach of Implied Warranty of Fitness for a Particular Purpose against Defendant National (Count III); Failure of Warranty to Satisfy its Essential Purpose against Defendant National (Count IV); and Breach of Express Warranty as to Heat Exchangers against Defendant Contractors (Count V). Plaintiff's first amended complaint did not include its previous claims related to the installation.

Defendant Contractors have since each filed a motion for summary disposition as to Count V, the only counts against them. In addition, Defendant Fire seeks sanctions regarding Plaintiff's previously dismissed installation claims.

#### *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).

#### *Arguments and Analysis*

In their motions, Defendant Contractors contend that they did not provide an express warranty on the heat exchangers. Specifically, Defendant Contractors assert that the 10 year warranty on the heat exchangers referenced in their contracts with Plaintiff were the 10 year manufacturer's warranty provided by Defendant National rather than a independent warranty they agreed to provide. In particular, Defendant Contractors contend that the contracts contain a latent ambiguity as to who is providing the warranty.

“In construing [contractual provisions] due regard must be had to the purpose sought to be accomplished by the parties as indicated by the language used, read in the light of the

attendant facts and circumstances. Such intent when ascertained must, if possible, be given effect and must prevail as against the literal meaning of expressions used in the agreement.” *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 200-201; 702 NW2d 106 (2005), quoting *W O Barnes Co, Inc v Folsinski*, 337 Mich 370, 376-377, 60 NW2d 302 (1953). “Further, attendant facts and circumstances explain the context in which the words were used and may reveal the meaning the parties intended. In this respect, the detection of a latent ambiguity unquestionably requires consideration of factors outside the policy itself. *Grosse Pointe, supra*, at 201. “Therefore, extrinsic evidence is admissible to prove the existence of the ambiguity, and, if a latent ambiguity is proven to exist, extrinsic evidence may then be used as an aid in the construction of the contract.” *Id.*

In this case, the contracts between the Plaintiff and the Contractors do not specify whether the 10 year warranties at issue are independent warranties or are the warranties provided by Defendant National. However, Mr. Buffmyer conceded in his deposition that it was his understanding that Defendant National was the providing the 10 year warranty, not the Defendant Contractors. (*See Dep. of Mike Buffmyer, at 212, 224-225.*) Further, Mr. Buffmyer, executed the contracts with Defendant Contractors as its Facilities Manager. Accordingly, Mr. Buffmyer’s testimony, as well as the consistent testimony of Defendant Contractors’ representatives, explains that the only warranty the parties intended to place on the heat exchangers was the manufacturer’s warranty provided by Defendant National. Consequently, the Court is convinced that Defendant Contractors did not provide an express warranty for the heat exchangers at issue in this case. As a result, Plaintiff may not maintain a breach of express warranty claim against Defendant Contractors and Defendant Contractors’ motion must be granted.

With respect to Defendant Fire's request for sanctions as to Plaintiff's previous installation claims, the Court is convinced that sanctions are not appropriate in this matter. The claims at issue were abandoned and the Court did not address the merit of the claim. Further, at the time the claim was filed Plaintiff had not had an opportunity to conduct discovery as to the cause of the problems with the furnaces it had purchased. Indeed, after conducting some discovery it appears that Plaintiff reached the conclusion that the problems were not caused by the installation. As a result, Plaintiff did not include the installation claims in its first amended complaint. In these circumstances, the Court is satisfied that Plaintiff's actions did not rise to a level where sanctions are appropriate. Consequently, Defendant Fire's request for sanctions is denied.

*Conclusion*

Based upon the reasons set forth above, Defendants Fire and Ice Mechanical, Inc.'s and Family Heating and Cooling, Inc.'s motions for summary disposition of Count V of Plaintiff's first amended complaint is GRANTED. Defendant Fire and Ice Mechanical, Inc.'s motion for sanctions as to Plaintiff's installation claims is 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.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: May 30, 2014

JCF/sr

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