MARKS & WEINBERG, P.C.

Johnston v. McKinney American, Inc.

1999 WL 1016113 (Tex. App. Nov. 10, 1999)

Dr. John P. Johnston and John P. Johnston, Inc. ("Johnston") appealed from a money judgment entered against them in a suit by McKinney on an equipment lease. McKinney sued Johnston for past due rental payments under a lease agreement for computer equipment. Because Johnston was dissatisfied with the equipment, Johnston counter-claimed alleging violations of the Deceptive Trade Practices Act (DPTA), breach of contract, recession of the contract, declaring that the lease was void, and arguing negligent misrepresentation by McKinney. The trial court entered judgment for McKinney in the amount of $1,752.92 for amounts due under the lease and attorneys fees and a take nothing judgment against Johnston on his counter-claim.

Johnston appealed on several issues. One issue on appeal was whether McKinney's conduct constituted an "unconscionable action" as defined by DTPA. The DPTA provides that a consumer may maintain an action where any person's unconscionable or cause of action is a producing cause of the consumer's actual damages. An unconscionable action is one that, to the consumer's detriment, results in a gross disparity between the value the consumer received and the consideration paid. Ms. Johnston, the office manager, testified that Johnston paid $24,177.30 to McKinney, got no benefit and actually lost $33,476.00 in income. She also testified that Johnston spent $2,000.00 for two computer experts to attempt to repair the equipment, and they could not. McKinney presented no evidence to reflect this testimony. The appeals court concluded that Johnston established the requisite gross-disparity as a matter of law.

The Johnstons also appealed the trial court's ruling that the disclaimer in the lease with respect to the Implied Warranty of Merchantability was conspicuous. Because the appeals court found that McKinney did not plead the disclaimer as an affirmative defense, the appeals court then had to determine whether the issue was tried by consent. The only reference to the disclaimer during the trial was in the form of two objections by McKinney to testimony by Ms. Johnston concerning damages. Ms. Johnston was never asked whether she was aware of the disclaimer provision in the lease. McKinney made no argument to the trial court about the disclaimer and filed no amendment. Texas law regarding the doctrine of trial by consent is that consent "should not be applied unless clearly warranted." The appeals court found that the trial court erred in finding the disclaimer banned Johnston's claim for breach of implied warranty of merchantability.

The appeals court then addressed the issue of whether there was a breach of Implied Warranty of Merchantability. First, the court found that the Implied Warranty of Merchantability applies to lease transactions and that common law implies such a warranty. The court further found that the warranty was breached because the computer system was defective. The appeals court concluded that the interests of justice would be served to both parties by a remand of the case for a new trial.

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