SHORT FORM ORDER

INDEX No. 09-33184

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RICHARD A. FOGEL, P.C.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 10-18-12
ADJ. DATE 1-23-13
Mot. Seq. # 004 - MG; CASEDISP

---X

MICHEL LANGLAIS,

Plaintiff,

- against -

WEATHER SHIELD MFG., INC.,

Defendant.

---X

BENJAMIN E. CARTER, ESQ.
Attorney for Plaintiff
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RICHARD A. FOGEL, P.C.
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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 17 - 18; Replying Affidavits and supporting papers 21 - 22; Other memoranda of law 16, 19 - 20; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This is an action to recover damages for breach of contract and for declaratory judgment regarding doors and windows installed at the plaintiffs' residence in Water Mill, New York. The plaintiff, who purchased the newly-constructed residence in October 2003, alleges that he has not been reimbursed for the cost of priming, painting, and installation of replacement windows supplied by the defendant manufacturer pursuant to an express twenty-year warranty issued by the defendant covering the subject doors and windows that were purchased by the builder of his home.

The defendant is a manufacturer of doors and windows, including units comprised of individual glass units (IGUs) which consist of two panes of glass with a thin translucent coating of metal, and a slight separation filled with an inert gas. A window or door may contain multiple IGUs separated by wood moldings, resulting in a "traditional" appearance. When the seal between the two panes fails, the thin coating of metal oxidizes resulting in a "cloudy," somewhat opaque appearance. It is undisputed that the subject doors and windows were covered by an express twenty-year warranty when they were originally purchased by the builder, that the plaintiff has experienced a number of failures in IGUs in a number of windows or doors over the years, and that the defendant has supplied replacement items based

on the plaintiff's previous claims. In his complaint, the plaintiff alleges that two of the defendant's representatives promised that the defendant would reimburse the plaintiff for the cost of priming, painting, and installation of the replacement items supplied, that he is entitled to judgments declaring that the defendant is obligated to replace any defective windows in the future, and declaring that the defendant must reimburse the plaintiff for the cost of priming, painting, and installation of any such defective windows in the future. The plaintiff does not allege that the defendant has failed to honor its obligations under the express warranty. Thus, the issue before the Court is the plaintiff's claim for breach of the oral promise for reimbursement allegedly made to him by the defendant's representatives.

The defendant moves for summary judgment dismissing the complaint on the grounds that its twenty-year limited warranty expressly provides that the consumer is responsible for installation and refinishing of any replacement glass. In support of its motion, the defendant submits, among other things, the pleadings, a copy of the subject warranty, and the transcript of the plaintiff's deposition.

At his deposition, the plaintiff testified that he purchased his home from a builder in October 2003 after it had been completed, that he noticed problems with the widows shortly thereafter, and that he immediately researched and became aware of the defendant's warranty. He stated that his initial dealings were with Window City, the local dealer which had sold the windows to the builder of the home, that Window City sent its employees out to inspect the windows in his home on a couple of occasions, and that he had received windows to replace those which were defective. The plaintiff further testified that the Widow City employees told him that, as long as he had problems, it would provide new windows, and that no one ever told him that the defendant would not honor its warranty. He indicated that he had a telephone conversation with one of the defendant's customer service representatives regarding his request for reimbursement of his costs for installing and finishing the replacement windows. However, he did not recall what she said to him, and he did not recall whether he received a response to his e-mails regarding his requests for reimbursement.

The Weather Shield Limited Warranty And Adjustment Policy provides in relevant part:

> **Insulating Glass (Twenty Years)**
>
> Weather Shield warrants that the INSULATING GLASS only, if any, in Weather Shield's products shall be free from failure in the air seal for a period of TWENTY (20) Years from the date of purchase.
>
> Should there be any such failure of the air seal within the warranty period, Weather Shield shall provide either a replacement piece of insulated glass or a sash glazed with insulated glass, at its discretion, delivered to the original point of purchase, or, if it is shipped directly to the customer, normal shipping and handling charges will apply. The consumer will be responsible for installation and replacement of the glass. Weather Shield will not be responsible for repainting, refinishing or similar activities

involved in the installation and replacement of the glass.

* * *

General Provisions

THERE ARE NO OTHER WARRANTIES EXCEPT AS SET FORTH HEREIN. ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ARE LIMITED IN DURATION TO THE PERIOD OF COVERAGE OF THESE EXPRESS WARRANTIES. WEATHER SHIELD SHALL NOT BE LIABLE FOR APPLICABLE TAXES OR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES INCLUDING, BUT NOT LIMITED TO, DAMAGE OR LOSS TO PERSONS OR PROPERTY... NO DISTRIBUTOR, SALESPERSON, DEALER, OR OTHER REPRESENTATIVE OF WEATHER SHIELD HAS THE AUTHORITY TO MAKE WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE OR TO ALTER OR CHANGE THESE WARRANTIES EITHER ORALLY OR IN WRITING. (underlining emphasis omitted)

When the terms of a written contract are clear and unambiguous, the contract should be enforced in accordance with the plain meaning of its terms (*see* ***Greenfield v Philles Records***, 98 NY2d 562, 750 NYS2d 565 [2002]; ***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]; ***Willsey v Gjuraj***, 65 AD3d 1228, 885 NYS2d 528 [2d Dept 2009]). Moreover, an individual who signs or accepts a written contract, absent fraud or other wrongful conduct on the part of the other contracting party, "is conclusively presumed to know its contents and to assent to them ..." (***Metzger v Aetna Ins. Co.***, 227 NY 411, 416 [1920]; *see* ***Gillman v Chase Manhattan Bank***, 73 NY2d 1, 537 NYS2d 787 [1988]; ***Da Silva v Musso***, 53 NY2d 543, 444 NYS2d 50 [1981]; ***Daniel Gale Assoc. v Hillcrest Estates***, 283 AD2d 386, 724 NYS2d 201 [2d Dept 2001]).

A manufacturer is permitted to limit a purchaser's remedies (*see* UCC § 2-719 [3]), and such limiting and exclusive clauses are enforceable unless they fail of their essential purpose (*see* UCC § 2-719 [2]; ***Laidlaw Transp., Inc. v Helena Chemical Co.***, 255 AD2d 869, 680 NYS2d 365 [4th Dept 1998]). The Court finds that the defendant established its prima facie entitlement to summary judgment dismissing the complaint by demonstrating that the plaintiff does not have the right to the reimbursements sought, that there is no evidence to establish the existence of an enforceable contract for reimbursement between the parties, and that there is no allegation that the subject limitations fail of their essential purpose.

In addition, the defendant has established that the plaintiff is not entitled to the relief sought in those causes of action which seek declaratory judgment. Those causes of action do not present a current controversy between the parties. Courts do not issue advisory opinions for the fundamental reason that the giving of such opinions is not the exercise of the judicial function. Thus, the Court may not issue a

judicial decision which can have no immediate effect and may never resolve anything (***Simon v Nortrax N.E., LLC***, 44 AD3d 1027, 845 NYS2d 85 [2d Dept 2007] quoting ***Cuomo v Long Is. Light. Co.***, 71 NY2d 349, 525 NYS2d 828 [1988] and ***New York Pub. Interest Research Group v Carey***, 42 NY2d 527, 399 NYS2d 621 [1977]; *see also* ***Hirschfeld v Hogan***, 60 AD3d 728, 874 NYS2d 585 [2d Dept 2009]).

The Court notes that the defendant has established its entitlement to summary judgment dismissing the plaintiff's fourth cause of action, even if it is most liberally read to assert a claim of breach of the implied warranty of merchantability in addition to a request for declaratory relief. New York courts require privity of contract in order to state a claim for breach of implied warranty (*see* ***Jaffee Assoc. v Bilsco Auto Serv.***, 58 NY2d 993, 461 NYS2d 1007 [1983]; ***Arthur Glick Leasing, Inc. v William J. Petzold, Inc.***, 51 AD3d 1114, 858 NYS2d 405 [3d Dept 2008]; ***Adirondack Combustion Techs., Inc. v Unicontrol, Inc.*** 17 AD3d 825, 793 NYS2d 576 [3d Dept 2005]; ***Miller v. General Motors Corp.***, 99 AD2d 454, 471 NYS2d 280 [1st Dept 1984], *affd* 64 NY2d 1081, 489 NYS2d 904 [1985]; ***Hole v General Motors Corp.***, 83 AD2d 715, 442 NYS2d 638 [3d Dept 1981]).“UCC §2-318 does not permit a plaintiff, not in privity, to recover upon the breach of an implied warranty of merchantability unless the claim of the remote user is for personal injuries. A cause of action based upon breach of an implied warranty does not exist where there is no seller-buyer relationship or sales contract between the parties, and the plaintiff is not [an] 'injured person' ” (***Hole v General Motors Corp.***, *id.* at 716). Here, there is no allegation that there is a contract between the plaintiff and the defendant, nor that the plaintiff suffered any personal injuries.

In opposition to the motion, the plaintiff submits his affidavit in which he swears that “[w]hile the defendant has offered to replace the windows themselves, and has replaced some, it refuses to pay the cost of installing these replacement windows and repainting and refinishing,” and that “My attorney advises me that in New York State there is a law that protects me because it requires that a manufacturer of a product be held accountable for its 'merchantability' and that it be fit for the purpose intended.” He states that he never saw the express warranty until after this lawsuit was commenced. The plaintiff further swears that his attorney advises him that, although the law permits a defendant to limit the normal warranties, when a limitation is unconscionable the Court may ignore it or strike it down, and that the subject warranty is unconscionable because he never had any bargaining power because he did not know of its existence.

The plaintiff has failed to raise an issue of fact requiring a trial of this action. The plaintiff's affidavit does not allege facts which support a claim that the subject warranty is unconscionable, nor does he cite any authority for his position that the fact that he is the purchaser of the home, and not the builder, requires a finding that the limitations therein are not enforceable against him.

Accordingly, the defendant's motion for summary judgment is granted.

Dated: 4/1/13

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION