

STATE OF MAINE

BUSINESS AND CONSUMER COURT

Cumberland, ss.

ARUNDEL VALLEY, LLC

Plaintiff

v.

Docket No. BCD-CV-13-15

BRANCH RIVER PLASTICS, INC.

Defendant

**ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL**

Defendant Branch River Plastics, Inc.'s Motion for New Trial, together with Plaintiff Arundel Valley's opposition and Defendant's reply, is before the court. The court elects to decide the Motion without oral argument. *See* M.R. Civ. P. 7(b)(7).

This Order addresses the Defendant's argument in the order they appear in the Motion.

1. *The Issue of Branch River's Disclaimer of Implied Warranties*

Branch River's first argument is that the court should have granted judgment to Branch River based on Branch River's disclaimer of the implied warranties of merchantability and fitness for particular purpose. The evidence at trial included a one-page document purporting to set forth Branch River's express warranty for its products and a disclaimer of the implied warranties of merchantability and fitness for particular purpose.

For several reasons, the court disagrees with Branch River's contention.

First, it was clear from the court's summary judgment ruling that Arundel Valley's implied warranty claims were going to trial. This meant that there were factual issues regarding: whether Branch River's sale of the roof panels was subject to its purported express warranty and disclaimer of implied warranties. Arundel Valley denied that it had ever received Branch River's purported express warranty and disclaimer of implied warranties. This meant

that Branch River had the burden to demonstrate that Arundel Valley's purchase of the Branch River roof panels was in fact subject to the express warranty and the disclaimers of implied warranties. *See S.H. Nevers Corp. v. Husky Hydraulics, Inc.*, 408 A.2d 676, 680-81 (Me. 1979) (manufacturer of equipment failed to prove that plaintiff's purchase through dealer was subject to manufacturer's express warranty and disclaimer of implied warranties). *See also American Aerial Servs. v. Terex USA, LLC*, 39 F. Supp. 3d 95, 106 (D. Me. 2014) ("under Maine law, a limitation or disclaimer of warranty is not effective unless it has been received by the buyer subject to those provisions"). Thus, whether Branch River's disclaimer of implied warranties was valid as to Arundel Valley was, at least in part, a question of fact. The jury could have been duly instructed on the issue, but Branch River did not request any such instructions.

Next, the evidence indicated that Branch River, in the sales documents it issued to House & Son as well as in e-mails to House & Son, described the roof panels as being R-Control, which admittedly they were not. Branch River's mischaracterization of its own product generated another issue as to the validity of its purported disclaimer of the implied warranty of merchantability—does a manufacturer's disclaimer of the implied warranty of merchantability extend to a product sold as something it is not?

Third, the evidence also indicated that Branch River claimed to have "voided" its warranty, and then requested Arundel Valley, Peachey Builders and House & Sun to sign a document "accepting" both the express warranty *and the disclaimer of implied warranties*. Branch River's Motion correctly points out that its voiding of the express warranty did not necessarily void the disclaimer of implied warranties as well. However, Branch River fails to acknowledge that its request for Arundel Valley to "accept" the disclaimer of implied warranties along with the express warranty raises issues regarding the status of the disclaimer of warranty. Did Branch River "void" the disclaimer of implied warranties along with the express

warranty? If not, why was Branch River asking Arundel Valley to “accept” the disclaimer along with the express warranty? The jury could have been instructed to consider these issues, but no such instructions were requested.

Each and every one of these three areas of evidence generated potential jury issues, and the jury could have been instructed in detail. The jury was indeed instructed regarding the law relating to implied warranties, but Branch River requested no jury instructions whatever on disclaimer of warranty issues.

The evidence was sufficient to support a finding against Branch River on the disclaimer of implied warranty issue, on three different grounds. The jury could have decided that Branch River failed to establish that Arundel Valley was on notice of the disclaimer, or that Branch River’s mistaken designation of the roof panels as R-Control established an independent implied warranty of merchantability and/or fitness for particular purpose, or that Branch River rescinded (“voided”) the disclaimer and Arundel Valley never agreed to Branch River’s offer to reinstate it.

Therefore, Branch River was not entitled to judgment on the validity of its purported disclaimer of implied warranties, and its failure to request jury instructions to guide the jury’s decision on whether Arundel Valley’s purchase of the roof panels was subject to the disclaimer does not justify overturning the verdict.

## *2. Testimony of James DiStefano*

Branch River’s second ground for requesting a new trial is its claim to have been “ambush[ed]” by the trial testimony of James DiStefano, an expert witness for Plaintiff—specifically his testimony that he had noted gaps between the pieces of Expanded PolyStyrene (EPS) foam inside the Branch River roof panels. The court does not view the testimony at issue to be grounds for a new trial.

First, Branch River did not object to the testimony. Whether the failure to object was calculated or inadvertent, the “horse was not [entirely] out of the barn,” as Branch River claims, *see* Defendant’s Motion for New Trial at 10 n.14—there are several steps that the court could have taken to cure any problem.

However, no curative steps likely were in order: as Arundel Valley’s Response in Opposition to the Branch River Motion elucidates in detail, Branch River was on notice of the substance of the testimony at issue. The supposedly new opinions and observations to which Branch River objects had been substantially disclosed. As Arundel Valley points out, the trial testimony that Branch River now objects to was, in substance, summarized in a July 2013 letter from Mr. DiStefano that Arundel Valley attached to a motion in limine filed well before trial. In fact, Branch River’s Motion acknowledges that the testimony at issue—about Mr. DiStefano’s third site visit—was so similar to his report of his second site visit that Branch River’s counsel mixed the two up. *See id.* at 10 n.14.

Thus, Branch River has not shown that Mr. DiStefano’s trial testimony furnishes grounds for a new trial.

### *3. The Expert Witness Reports of Messrs. DiStefano and Foard*

Branch River’s next argument is that the court erred in sustaining Arundel Valley’s objection to Branch River’s motion to admit the written reports of two of Arundel’s expert witnesses, James DiStefano and Bo Foard. The reports were used in cross-examining the witnesses, but the reports themselves were excluded as inadmissible hearsay. *See Malenko v. Handrahan*, 2009 ME 96, ¶35, 979 A.2d 1269, 1276. In theory, it could have been argued that the reports were admissible as party admissions, *see* M.R. Civ. P. 801(d) but the argument was not made, and even had it been, their admissibility is doubtful.

Moreover, Branch River was allowed to, and did, use the report extensively in cross-examining Messrs. DiStefano and Foard. Anything in the reports could have been read to the witnesses. Even assuming the reports should have been admitted, Branch River has not demonstrated any prejudice from the court's decision to exclude the reports.

4. *Testimony of Paul Malko*

Branch River moved in limine to exclude the testimony of Paul Malko, and now asks the court to reconsider its denial of that motion and grant a new trial. Mr. Malko's testimony about Branch River's process was relevant and admissible, as the court ruled previously.

5. *Jury Confusion Regarding Causation*

Here Branch River appears to raise, for the first time, an objection to the court's instruction regarding causation and the court's response to a note from the jury regarding how the jury should consider "installation errors." The court's response indicated that the jury could consider the effect of installation errors in determining whether Arundel Valley had proved that any breach of implied warranty by Branch River was the proximate cause of the losses claimed by Arundel Valley. As Branch River points out, the jury soon after returned a verdict in Arundel Valley's favor. Branch River attributes the result to jury confusion, but an equally plausible explanation—one that is consistent with the verdict—is that the jury decided that Branch River's breach, not any installation error, was what made it necessary for the roof to be removed and replaced.

6. *Breach of Warranty of Fitness for Particular Purpose*

Branch River argues that the evidence was insufficient to support the verdict finding it liable for breach of warranty of fitness for particular purpose. Again, the court disagrees. The particular purpose Arundel Valley advanced at trial was that it wanted R-Control SIPS for its roof panels. Perhaps the clearest evidence that Branch River knew of this purpose is that the

price quote and invoices it issued for the roof panels to be installed at Arundel Valley's new facility described the panels, incorrectly, as R-Control. Branch River filed a motion in limine to exclude the price quote and invoices, but the court denied the motion because they are directly relevant to both of Arundel Valley's breach of implied warranty claims.

A separate reason why Branch River is not entitled to a new trial based on the verdict for breach of implied warranty for particular purpose is that the jury also found Branch River liable on the independent claim of breach of implied warranty of merchantability.

7. *Damages*

Lastly, Branch River challenges the sufficiency of the evidence to support the entire damages award to Arundel Valley. It is quite true that Arundel Valley's evidence regarding damages was thin, at least as to some items claimed as damages. On the other hand, there was testimony, mainly from Daniel Patry but from other Plaintiff's witnesses also, sufficient to support the verdict in terms of both causal connection and dollar amount.

Moreover, Branch River made many of the same arguments to the jury that it makes now in its Motion for New Trial. Clearly, substantial issues as to mitigation of damages and avoidable costs were generated and pursued at trial, and Branch River also argued to the jury that Arundel Valley was trying to get an "upgrade" at Branch River's expense. Certainly the evidence did not compel the jury to make the damages award that it did, but the question at hand is whether the evidence was sufficient to support the award. Viewing the totality of the evidence in a light favorable to the verdict, the court concludes that the evidence was sufficient.

For the foregoing reasons, Defendant's Motion for New Trial is denied.

Pursuant to M.R. Civ. P. 79(a), the clerk is directed to incorporate this Order by reference in the docket.

Dated September 10, 2015

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A. M. Horton, Justice

