United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued December 12, 2023
Decided December 20, 2023

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-1712

AILEEN ORMSBY, et al., *Plaintiffs-Appellants*,	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
v.	No. 3:19-CV-626-DRL
NEXUS RVS, LLC and DAVID LINT, *Defendants-Appellees*.	Damon R. Leichty, *Judge*.

O R D E R

The issue in this appeal is whether Aileen and George Ormsby may assert various claims as the "buyers" of a recreational vehicle ("RV"). After the Ormsbys expressed interest in a vehicle manufactured by Nexus RVs and paid $3,000 to reserve the right to purchase it, they decided to involve their son's business, Two J's Enterprises, in the sale. Two J's later paid Rowley White LLC, a dealer in Arizona, for the vehicle and thus was listed as the buyer on the bill of sale and the owner on the

certificate of title. Later, when the vehicle did not perform to the Ormsbys' expectations, and Nexus did not agree to rescind the transaction, the Ormsbys and Two J's sued Nexus and one of its sales managers for breach of contract, breach of warranty, and fraud. The district court entered summary judgment for the defendants. We agree with the district court that the record indisputably shows that Two J's was the sole buyer. Only the Ormsbys present arguments on appeal, however, and they cannot escape the conclusion that the claims belong to Two J's alone. We affirm.

In October 2017, George and Aileen Ormsby toured a Nexus factory in Elkhart, Indiana. During the tour, the Ormsbys met with David Lint, a Nexus sales manager, who told them that another customer had returned an RV to Nexus, and that Nexus was in the process of dismantling and reconfiguring the vehicle for resale. According to Aileen, Lint told the Ormsbys that the prior owner had returned the vehicle after owning it for four months because that customer wanted a larger model. The Ormsbys expressed interest in buying the used RV, and Lint offered to have Nexus modify it to their liking. Specifically, according to the Ormsbys, Lint promised that Nexus would install a king-size bed, sofa, and new upholstery, and perform a predelivery inspection.

Lint and the Ormsbys then discussed further details. First, they orally agreed on a purchase price of $175,000. Then, the Ormsbys paid $3,000 to Nexus to reserve the right to purchase it for that amount. As George recalled, the Ormsbys "wanted to hold that unit so no one else could buy it. And as long as all the preconditions discussed with David [Lint] were satisfied, [the Ormsbys] would consider buying that unit." Consistent with that statement, a representative for Nexus testified in a deposition that the $3,000 payment was refundable and did not obligate the Ormsbys to purchase the RV. Aileen characterized the payment similarly: The Ormsbys "put $3,000 down as a down payment so that no one else would come in and buy the RV. [They] knew it was [theirs] now."

But the Ormsbys never paid $172,000 to Nexus in exchange for the RV; for various reasons, both sides enlisted other entities to carry out the sale. Nexus was changing to a wholesale business model and thus was no longer selling directly to consumers, and so it asked Rowley White, an RV dealership in Arizona, to "facilitate a deal." Rowley White initially thought that it would be facilitating a consignment deal, requiring it only to deliver the used RV to the buyer in exchange for a $5,000 transaction fee from Nexus. But after Nexus put $170,000 on Rowley White's credit line, Rowley White realized that this was not going to be a regular consignment deal, and that it needed to sell the RV to get its money back.

The Ormsbys also pulled in another party, for the purpose of paying less in taxes. Their son, Jon Hoevet, owned a pizza company called Two J's Enterprises. Because Two J's was in Oregon, which does not charge a sales tax, the Ormsbys believed that Two J's could purchase the RV without paying any sales tax. The Ormsbys also believed that if Two J's occasionally used the RV for business purposes, then Two J's could deduct some of the cost of the RV from its business taxes. With these tax-saving goals in mind, Aileen wired $174,502 to Two J's.

In December 2017, Two J's wired $174,483 to Rowley White to purchase the RV. The Ormsbys understood that this dollar figure represented the total purchase price of $175,000, minus the $3,000 that the Ormsbys had paid to Nexus, plus the cost to ship the RV from Nexus to Rowley White. The bill of sale, dated January 2018, lists Rowley White as the seller and Two J's as the buyer. Aileen Ormsby, though not employed by Two J's, signed the bill of sale for Two J's after receiving verbal authorization from Hoevet to do so. The certificate of title lists Two J's as the owner and the Ormsbys as security interest holders/lessors. The Ormsbys ultimately took possession of the RV in March 2018, in Nevada, after an RV company there performed a predelivery inspection.[1]

The Ormsbys soon grew frustrated with the RV. According to Aileen, "the RV was riddled with defects," including an inoperable taillight, damaged and broken doors, and electrical system malfunctions. To the Ormsbys, these defects contradicted Lint's representation to them that Nexus would "have it all fixed up" and that "everything would be great." The defects also caused the Ormsbys to believe that Nexus did not perform its own predelivery inspection, as Lint had promised. Aileen contacted the previous owner of the RV and learned that he had returned it to Nexus because it "had so many problems" and "was always in getting fixed." To Aileen, this showed that Lint's alleged assertion that the previous owner returned it to buy a bigger vehicle "was a lie." Finally, the Ormsbys were upset that Lint had not kept his promise to have Nexus install a king-size bed, sofa, and new upholstery, and otherwise restore the vehicle to its original condition.

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[1] For the sake of brevity, we refer to this series of events—the December 2017 transfer of money from Two J's to Rowley White, and the resulting bill of sale and certificate of title, both dated 2018—as the "2018 sale." We refer to the October 2017 meeting between the Ormsbys and Lint at Nexus in Indiana as the "2017 meeting" or the "2017 agreement."

In August 2019, counsel for the Ormsbys sent Nexus a letter stating that "the sales transaction is hereby rescinded and acceptance of the R[V] revoked effective immediately." According to a representative, Nexus "didn't do anything with [the letter]" because Nexus "didn't sell the [vehicle] to the customer."

The Ormsbys and Two J's then sued Lint and Nexus, in the Northern District of Indiana (where the Ormsbys had interacted with Lint), for breach of contract, breach of express and implied warranty, common law fraud, and violation of the Arizona Consumer Fraud Act. The parties stipulated that Arizona law applied to the plaintiffs' claims based on the location of the 2018 sale. The defendants then moved for summary judgment, arguing in relevant part that the claims failed because the Ormsbys did not buy the RV from Nexus.

The district court entered summary judgment against the Ormsbys and Two J's on all claims. As to the Ormsbys, the court first explained that any claim for breach of an implied warranty must be asserted by the buyer and against the seller. This requirement ensures that the court can remedy a breach by returning the parties to their presale positions: The buyer could return the RV and the seller could return the payment. The court ruled that the Ormsbys did not buy the RV during the 2017 meeting because their $3,000 payment to Nexus "was a holding deposit only." Specifically, the Ormsbys' testimony revealed their understanding that they were preserving an *option* to purchase the RV. Nor did the Ormsbys buy the RV at the 2018 sale, the court continued, because the bill of sale identified Two J's as the buyer.

The court then ruled that this conclusion—the Ormsbys were not the buyers of the RV—doomed their remaining warranty and contract claims. An express warranty, like an implied warranty, protects the buyer, the court explained. Similarly, because the Ormsbys never contracted with Nexus to buy the RV, they could not claim a breach of contract based on promises about how the RV would be modified for sale. Finally, the court determined that the Ormsbys' claims of fraud failed because they provided no evidence or argument that they incurred damages in connection with representations about the RV that was sold to Two J's. In sum, the district court concluded that by "structur[ing] a unique deal to avoid taxes," the Ormsbys inadvertently "lost the benefit of rights they might otherwise have enjoyed under the law as traditional buyers or as contracting parties."

On appeal, the Ormsbys primarily contend that a reasonable jury could conclude that they contracted to purchase the RV at the 2017 meeting with Lint, and thus they—not Two J's—are the buyers.[2] We review a grant of summary judgment de novo. *Biggs v. Chi. Bd. of Educ.*, 82 F.4th 554, 559 (7th Cir. 2023). The defendants, as movants, are entitled to summary judgment if they show that there is "no genuine dispute as to any material fact" and that they are "entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A factual dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a material factual dispute exists, we construe all facts and draw all reasonable inferences in a light most favorable to plaintiffs, the nonmoving party. *Biggs*, 82 F.4th at 559.

One factual dispute, the Ormsbys argue, should have prevented the entry of summary judgment for Nexus and Lint: who bought the RV. They concede that only a buyer can maintain claims for breaches of warranty or contract. But they insist that they submitted sufficient evidence that they bought the RV. The Ormsbys point out that they agreed to the $175,000 price in October 2017, and the payment for the RV in December reflected that price offset by the Ormsbys' $3,000 deposit. Who made and received the payment, they say, is a matter of "paperwork" without legal significance.

Although the Ormsbys contracted with Nexus at the 2017 meeting, no reasonable jury could find that the contract was for the purchase of the RV from Nexus. Arizona law, adopting the Uniform Commercial Code, includes a revocation remedy for the "buyer," which it defines as "a person who buys or contracts to buy goods." Ariz. Rev. Stat. §§ 47-2103(A)(1), 47-2608(A); *see Seekings v. Jimmy GMC of Tucson, Inc.*, 638 P.2d 210, 214 (Ariz. 1981). The 2017 agreement with Lint did not confer "buyer" status on the Ormsbys. The terms were clear: In exchange for $3,000, Nexus reserved the RV for sale to the Ormsbys and deducted that amount from the purchase price. *See, e.g.*, *Andrews v.*

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[2] We note two points of confusion about this argument. First, it sidelines Two J's, the party that paid for the allegedly defective RV. We are unsure why Two J's would bow out of the case, but we confirmed with appellants' counsel at oral argument that they did not challenge the judgment against the business. Second, the Ormsbys' argument that they contracted to buy the RV in Indiana seems at odds with their stipulation to Arizona law. *See Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 737 (7th Cir. 2008) ("Indiana's choice of law rule for contract actions calls for applying the law of the forum with the most intimate contacts to the facts," including "the place of contracting" and "the place of contract negotiation").

Blake, 69 P.3d 7, 14–17 (Ariz. 2003) (discussing "option" contracts under Arizona law); *Phipps v. CW Leasing, Inc.*, 923 P.2d 863, 866 (Ariz. Ct. App. 1996) (discussing "right of first refusal" contracts under Arizona law). Aileen testified that they paid $3,000 "so that no one else would come in and buy the RV." She said that they "knew it was [theirs] now," but George's testimony that they would only later "consider buying the unit" shows that the RV was held for them so that it was available if they decided to buy it—which they never did.

The Ormsbys also argue that paying $3,000 was "partial performance" of a contract to buy the RV. They cite *Schade v. Diethrich*, 760 P.2d 1050, 1059 (Ariz. 1988) (en banc), in which the Arizona Supreme Court ruled that a party beginning performance with the knowledge and approval of the other party is "nearly always evidence" that the party beginning performance "regard[s] the contract as consummated and intend[s] to be bound thereby." As just discussed, however, the contract that the Ormsbys consummated at the 2017 meeting and intended to be bound by did not require them to buy the RV.

Moreover, even if there were ambiguity about the nature of the 2017 agreement, the evidence regarding the 2018 sale is not subject to a genuine dispute. The record shows that Two J's, not the Ormsbys, purchased the RV. First and foremost, the bill of sale—including contractual terms such as the price, the description of the RV, and the date of sale—names Two J's as the buyer. Courts should not "alter, revise, modify, extend, rewrite or remake an agreement" but confine themselves to "the construction or interpretation of the one which the parties have made for themselves." *See Goodman v. Newzona Inv. Co.*, 421 P.2d 318, 320 (Ariz. 1966). Naming the Ormsbys as the buyers would require significant deviation from what the parties put in writing. And the Ormsbys never suggest that the bill of sale is erroneous; they concede that Two J's paid for the RV and obtained title. Plus, the Ormsbys conceded at oral argument that they deliberately structured this deal with Two J's as the buyer so that they could get a tax break. It is not possible for the Ormsbys to admit this plan and maintain that they were the buyers as a matter of Arizona law. Therefore, the district court did not engage in impermissible factfinding when it identified Two J's as the buyer, and it properly entered summary judgment for the defendants on the warranty and contract claims.

That leaves only the Ormsbys' fraud claims under the common law and the Arizona Consumer Fraud Act. The district court resolved these claims on the ground that the Ormsbys did not demonstrate any injury from Lint's misrepresentations, though the Ormsbys primarily attack a conclusion the court did not draw—that they

had to be buyers to succeed on these claims. To the extent that they address the issue of injury, the Ormsbys argue that because of Lint's false promises, "they have experienced aggravation and inconvenience from having trips disrupted as well as incurring considerable expenses for [RV] repairs." But the Ormsbys forfeited this argument by failing to raise it until this appeal. *See Walsh v. Alight Sols. LLC*, 44 F.4th 716, 723 (7th Cir. 2022). As the district court noted, the Ormsbys did not respond—with either argument or evidence—to Nexus's assertion in its motion for summary judgment that the misrepresentations did not injure the Ormsbys. *See generally Echols v. Beauty Built Homes, Inc.*, 647 P.2d 629, 631 (Ariz. 1982) ("consequent and proximate injury" required for common-law fraud); *Castle v. Barrett-Jackson Auction Co.*, 276 P.3d 540, 542 (Ariz. Ct. App. 2012) (same for consumer fraud). It is too late now.

AFFIRMED