IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRY STRICKLER,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
PETERBILT MOTORS	:	
COMPANY, et al.,	:	**No. 04-3628**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **April 11, 2005**

Plaintiff Terry Strickler brings this action against Defendants Peterbilt Motors Company ("Peterbilt"), Cummins, Inc., and Eaton Corporation for damages arising from alleged defects in a tractor he purchased from Peterbilt. Presently before the Court is Peterbilt's motion for partial summary judgment on Plaintiff's claims for incidental and consequential damages, breach of implied warranties, and attorneys' fees.[1] For the reasons set forth below, Peterbilt's motion is granted.

I. BACKGROUND

The following facts are undisputed. Plaintiff is the owner and operator of Top Shelf Enterprises, an independent trucking business. (Dep. of Terry Strickler at 7-9.) On December 1, 2003, Plaintiff started to "think about" looking for a new tractor for his business. (*Id.* at 15.) He initially contacted three dealerships: Hunter Keystone Peterbilt, Richmond Peterbilt, and Truck Enterprises. (*Id.* at 15-18.) After comparing prices and negotiating for additional features, such as

[1] As Plaintiff has stipulated that his claim for attorneys' fees is not permissible, this claim is dismissed as to Peterbilt. (*See* Pl.'s Mem. of Law in Opp'n to Def. Peterbilt's Mot. for Partial Summ. J. at 8 [hereinafter "Pl.'s Mem."].)

an improved warranty on "injectors in the motor," Plaintiff decided to purchase his new tractor from Hunter Keystone Peterbilt. (*Id.* at 17-18, 21.)

On December 17, 2003, Plaintiff reviewed and signed a tractor Warranty Agreement, which was explained to him by a Hunter Keystone Peterbilt sales representative. (*Id.* at 19.) The Warranty Agreement limits Plaintiff's remedy against Peterbilt to "the repair or replacement of defective materials of workmanship," and also includes the following:

> **WARRANTY DISCLAIMER AND LIMITATIONS OF LIABILITY**
>
> **Except for the above warranty, Peterbilt Motors Company and the selling Peterbilt dealer make no other warranties, express or implied, and make NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**
>
> It is agreed that Peterbilt Motors Company and the selling Peterbilt Dealer shall not be liable for incidental or consequential damages, including, but not limited to: loss of income; damage to vehicle, attachments, trailers and cargo; towing expenses; attorney's fees and any liability you may have in respect to any other person.

(Pl.'s Mem. Ex. B (Peterbilt Motors Company Warranty Agreement).)

Two weeks later, on December 31, 2003, Plaintiff took possession of the tractor and signed a Sales Invoice. (Strickler Dep. at 20-21; Pl.'s Mem. Ex. A (Whole Goods Sales Invoice).) The Sales Invoice states that Hunter Keystone Peterbilt and Peterbilt will make no warranties, express or implied, except in the case of a new vehicle or chassis. (Pl.'s Mem. Ex. A.) In turn, new vehicles and chassis are referred to in the next sentence of the Sales Invoice, which states that the only warranty applicable to a new vehicle or chassis is "the printed new vehicle warranty delivered to purchaser with such vehicle or chassis and hereby made a part hereof as though fully set forth herein." (*Id.*)

Plaintiff claims that he experienced numerous problems with his tractor within the warranty

period. Among other things, he alleges that he complained about various defects in and/or problems with the headlights, the engine, the temperature gauge, the transmission, the speedometer, the throttle, the clutch, the turn signals, and the shock absorbers. (Am. Compl. ¶ 14.) Indeed, beginning in January 2004, Hunter Keystone Peterbilt completed various repairs to Plaintiff's vehicle that were paid for under the Warranty Agreement. (Strickler Dep. at 37; Pl.'s Mem. Ex. C (Warranty Repair Invoices).) According to Plaintiff, though, the tractor continues to exhibit defects which remain uncorrected to this day. (Am. Compl. ¶ 15.)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c) (2004); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Anderson*, 477 U.S. at 248. To meet this burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on mere allegations, conclusory or vague statements, or general denials in the pleadings. *Celotex*, 477 U.S. at 324. In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp*., 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the

evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

According to Plaintiff, the defects in the tractor at issue constitute a breach of Defendants' express and implied warranties. (Am. Compl. ¶¶ 20-24.) Plaintiff therefore seeks to recover not only the contract price of the vehicle, but also incidental and consequential damages. (*Id.* ¶ 24.) Defendant Peterbilt has moved for partial summary judgment, contending that the Warranty Agreement signed by Plaintiff: (1) disclaims Peterbilt's liability for incidental and consequential damages; and (2) disclaims Peterbilt's implied warranties, including all implied warranties of merchantability and fitness for a particular purpose. The Court agrees and, accordingly, grants Peterbilt's motion.

A. The Binding Effect of the Warranty Agreement

As a threshold matter, Plaintiff contends thatthe Sales Invoice, rather than the Warranty Agreement, is the controlling document for warranty terms between himself and Peterbilt. Plaintiff bases this contention on purportedly inconsistent language between the two documents, suggesting that the Warranty Agreement's limitations on liability conflict with the Sales Invoice's statement that there are no warranties, express or implied, "*except* in the case of a new vehicle or chassis." (Pl.'s Mem. Ex. A (emphasis added).) In light of this alleged conflict, Plaintiff concludes that the Sales Invoice, signed approximately two weeks after the Warranty Agreement, supersedes the Warranty Agreement and renders it moot. (*Id.* at 5-8.)

This argument is untenable, however, simply because the Sales Invoice and the Warranty

Agreement are not inconsistent. The Sales Invoice indicates that, while a new vehicle or chassis may indeed have a warranty, that warranty may *only* consist of "the printed new vehicle warranty delivered to purchaser with such vehicle or chassis and hereby made a part hereof as though fully set forth herein." (*Id.* Ex. A.) Plaintiff does not dispute that he received and reviewed such a printed new vehicle warranty, i.e., the Warranty Agreement signed on December 17, 2003. (Strickler Dep. at 19.) Thus, far from conflicting with the Warranty Agreement, the Sales Invoice explicitly refers to it, incorporates it, and states that it is the only warranty available to Plaintiff. As Plaintiff concedes that the Sales Invoice represents the final contract between the parties (Pl.'s Mem. at 6), the Warranty Agreement is binding on Plaintiff as a part of that contract. *See Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir. 2003) ("The seller's terms may include documents or provisions incorporated by reference into the main agreement.").

Similarly without merit is Plaintiff's argument that he is not bound by the Warranty Agreement because he declined to approve an "as is" clause in the Sales Invoice. (Pl.'s Mem. at 6-7.) The Sales Invoice contains an optional "as is" clause which states that: "This motor vehicle is sold as is *without* any *warranty* either express or implied. The purchaser will bear the *entire expense* of repairing or correcting any defects that presently exist or may occur in the vehicle." (*Id.* Ex. A.) Plaintiff clearly did not agree to this provision, as he did not sign in the signature box directly below the clause. (*Id.*) Plaintiff's decision not to accept the "as is" clause, however, merely signifies that Plaintiff did not agree to purchase the tractor without any warranty at all. This is entirely consistent with Plaintiff's approval of the Warranty Agreement, under which Plaintiff does indeed receive a warranty – an express warranty for "the repair or replacement of defective materials of workmanship." (*Id.* Ex. B.) Plaintiff's rejection of the "as is" clause cannot be construed as a

rejection of a limited warranty such as this one.

Therefore, the Warranty Agreement binds Plaintiff and governs his potential recovery from Peterbilt.

B. Incidental and Consequential Damages

The Warranty Agreement states that Peterbilt shall not be liable to Plaintiff for incidental or consequential damages, such as loss of income. (*Id.*) Under Pennsylvania law, "consequential damages may be limited or excluded unless the exclusion or limitation is unconscionable or causes the essential purpose of the warranty to fail." *Kruger v. Subaru of Am., Inc.*, 996 F. Supp. 451, 458 (E.D. Pa. 1998) (citations omitted); *see also* 13 PA. CONS. STAT. § 2719 (2005). A limitation or exclusion is unconscionable where: (1) one of the parties to the contract lacked a meaningful choice about whether to accept the provision; and (2) the provision unreasonably favors the other party to the contract. *See Worldwide Underwriters Ins. Co. v. Brady*, 973 F.2d 192, 196 (3d Cir. 1992) (*citing Koval v. Liberty Mut. Ins. Co.*, 531 A.2d 487, 491 (Pa. Super. Ct. 1987)). A limitation causes a warranty's essential purpose to fail "where it deprives either party of the substantial value of the bargain." *Hornberger v. Gen. Motors Corp.*, 929 F. Supp. 884, 890 (E.D. Pa. 1996) (quotation omitted).

Peterbilt's disclaimer of liability for incidental and consequential damages is neither unconscionable nor causes Plaintiff's warranty to fail in achieving its essential purpose. First, the record indicates that Plaintiff was a sophisticated party who possessed a meaningful choice about whether to accept the disclaimer. Plaintiff is a self-employed businessman who was able to successfully negotiate with Hunter Keystone Peterbilt for several additional features for his tractor, including improved warranty coverage on "injectors in the motor." (Strickler Dep. at 8, 17-18.) This

suggests that Plaintiff understands warranties and is experienced in negotiating contracts. *See, e.g.*, *Jim Dan, Inc. v. O.M. Scott & Sons Co.*, 785 F. Supp. 1196, 1201 (E.D. Pa. 1992) (finding limitation of liability clause conscionable where plaintiff was an experienced businessman). Second, even assuming that Plaintiff lacked a meaningful choice with regard to this particular disclaimer, it does not unreasonably favor Peterbilt. The clause does not eliminate all of Plaintiff's remedies, but merely limits the scope of those remedies. Courts have held that such limitations do not unreasonably favor sellers in the automobile industry, in light of "the latent nature of automobile defects [and] the differences in use and how cars might be driven." *Hornberger*, 929 F. Supp. at 892. Finally, the limitation does not deprive Plaintiff of the substantial value of his warranty, which still guarantees that Peterbilt will repair or replace defective parts free of charge. (Pl.'s Mem. Ex. B); *see Kruger*, 996 F. Supp. at 458 (holding that disclaimer of consequential damages did not cause warranty to fail in essential purpose, which was to provide free repair or replacement of defective components).

Accordingly, Plaintiff's claim against Peterbilt for incidental and consequential damages is dismissed.

C. Disclaimer of Implied Warranties

The Warranty Agreement also states that Peterbilt makes no implied warranties, including the implied warranties of merchantability and fitness for a particular purpose. (Pl.'s Mem. Ex. B.) Implied warranties of merchantability and fitness for a particular purpose arise by operation of law. *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1105 (3d Cir. 1992). These implied warranties, however, may be disclaimed by the seller so long as the disclaimer is in writing and conspicuous. 13 PA. CONS. STAT. § 2316(b) (2005). Conspicuousness, which is a question of law

for the court, is measured by whether "a reasonable person against whom the modification or exclusion is to operate ought to have noticed it." *Hornberger*, 929 F. Supp. at 889 (quotation and citation omitted). In determining whether a reasonable person should have noticed an implied warranty disclaimer, courts may consider: (1) the placement of the disclaimer in the document; (2) the size of the disclaimer's print; and (3) whether the disclaimer was highlighted or called to the reader's attention by being in a different type, style or color. *Id.*; *see also Calabria, D.D.S. v. Newmar Corp.*, Civ. A. No. 98-4026, 1999 WL 98574, at *1, 1999 U.S. Dist. LEXIS 1933, at *4 (E.D. Pa. Feb. 26, 1999).

In this case, Peterbilt's disclaimer of its implied warranties is in writing and sufficiently conspicuous. The clause, which appears on the first page of the Warranty Agreement, is in bold type, is capitalized, and is set apart from the surrounding text. (Pl.'s Mem. Ex. B.) The Court therefore holds that a reasonable person should have noticed this clause and that, as such, Peterbilt's implied warranties have been properly disclaimed. *See, e.g.*, *Calabria*, 1999 WL 98574, at *2 (holding disclaimer of implied warranty sufficiently conspicuous where set off in bold and block capital letters); *St. Paul Mercury Ins. Co. v. ADT Sec. Sys., Inc.*, Civ. A. No. 96-7526, 1997 WL 535184, at *3, 1997 U.S. Dist. LEXIS, at *8 (E.D. Pa. Aug. 5, 1997) (same).

Accordingly, Plaintiff's claim against Peterbilt for breach of implied warranties is dismissed.

IV. CONCLUSION

For the reasons stated above, Peterbilt's motion for partial summary judgment is granted. An appropriate Order follows.

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PETERBILT MOTORS	:	
COMPANY, et al.,	:	**No. 04-3628**
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ORDER

AND NOW, this **11th** day of **April, 2005**, upon consideration of Defendant Peterbilt Motors Company's Motion for Partial Summary Judgment, Plaintiff's response thereto, and for the foregoing reasons, it is hereby **ORDERED** that Peterbilt Motors Company's Motion (Document No. 17) is **GRANTED**.

BY THE COURT:

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Berle M. Schiller, J.