Limited One-Year Warranty

Firebrand warrants to the purchaser that the tires which he has purchased will be free from defects in materials and workmanship for a period of one year from the date of purchase. This warranty will be honored by any authorized Firebrand dealer. Firebrand will repair or replace any such defective tire. In no event, however, will Firebrand be liable for actual or consequential damages, purchaser's sole remedy being limited to repair or replacement of any defective tire.

There are no express warranties, whether oral or written, other than in this document. The IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE are hereby LIMITED to a period of ONE YEAR from the date of purchase.

In March 2012 McCarty's van swerved off the road when the left front tire blew out. Evidence indicates that the tire failed when pierced by a large piece of metal lying in the road. The van, which had a value of $25,000, was totally destroyed. McCarty was injured and required hospitalization for several weeks. His total medical and hospital bills were approximately $100,000. Because of McCarty's absence, the business could not continue and subsequently it failed. An expert is prepared to testify that his business had a fair market value of $150,000. McCarty has brought suit against Firebrand and the retailer. Analyze McCarty's rights against Firebrand and the dealer based on both breach of warranty and tort theories.

Caceci v. Di Canio Construction Corp.

Court of Appeals of New York
72 N.Y.2d 521, 526 N.E.2d 266 (1988)

Bellacosa, J.:

As another building block in our common-law judicial process, this court recognizes the "Housing Merchant" warranty, imposing by legal implication a contractual liability on a homebuilder for skillful performance and quality of a newly constructed home the defendant builder contracted for and sold to plaintiffs. The doctrine that the buyer must beware (caveat emptor) may not be invoked in these circumstances by the appellant-defendant builder-seller against the plaintiffs purchasers, whose affirmed award of damages after a nonjury trial should also be upheld by our court.

On November 29, 1976, plaintiffs Mary and Thomas Caceci entered into a contract with defendant Di Canio Construction Corp. for the sale and conveyance of a parcel of land in Suffolk County on which a one-family ranch home was to be constructed by the defendant builder. The contract price was $55,000. DiCanio guaranteed "for one year from title closing, the plumbing, heating, and electrical work, roof and basement walls against seepage and defective workmanship," but added that "[liability] under this guarantee shall be limited to replacement or repair of any defects or defective parts." The contract also provided that the dwelling "shall be constructed in accordance with the requirements as to materials and workmanship of the Municipality . . . with the requirements of the lending institution which shall make the mortgage

loan [and] with the approved plans and specifications." Paragraph (24) concluded: "It is further agreed that none of the terms hereof except those specifically made to survive title closing shall survive such title closing."

On October 14, 1977, title closed. Four years later in December 1981, Mary Caceci noticed a dip in the kitchen floor. The condition was brought to defendant's attention and an attempt to repair the house was made by jacking up the basement ceiling and inserting shims to close the gap. The area was spackled over and sealed. These repairs did not solve the problem and the floor soon began to dip again. In November 1982, defendant made another attempt to repair the house, while assuring plaintiff that the cracks and dips were the result of a normal settling process. Unconvinced, plaintiffs hired a firm experienced in structural and concrete repairs to do test borings and analysis of soil samples. The results showed the cause of the sinking foundation was its placement on top of soil composed of deteriorating tree trunks, wood and other biodegradable materials. The repair work to cure the problem, which took seven months, included digging up the entire slab foundation, removing the wood and tree trunks, and pouring a new foundation.

In May 1983, plaintiffs commenced this action, alleging six causes of action. A nonjury trial was held and, prior to the close of proof, the court dismissed three causes of action based on fraud and negligent repair. The claims which went to verdict were based on breach of contract (rejected), negligent construction (upheld) and breach of implied warranty of workmanlike construction (upheld). The trial court noted that photographs and testimony established that defendant, in pouring the original concrete footing and slab, became aware of the substances in the soil and thus breached duties in negligence and in implied warranty. A judgment of $57,466, representing the reasonable cost of correcting defendant's slipshod performance, was entered in plaintiffs' favor together with costs and interest from December 1981.

The Appellate Division affirmed solely on the implied warranty theory, confirming that there was sufficient evidence from which the trier of fact could infer that defendant knew the house was being erected on poor soil.

We, too, affirm, holding that there is an implied term in the express contract between the builder-vendor and purchasers that the house to be constructed would be done in a skillful manner free from material defects. Contrary to the view expressed by the lower courts in this case, however, the builder-seller's knowledge of the defect, however relevant in a fraud claim, is not decisive under this implied contractual warranty theory. Further, the contract's standard merger clause is of no legal effect in these circumstances of an implied warranty with respect to latent defects. Plaintiffs' claim based on a breach of implied warranty could only arise at closing of title when the builder-vendor conveyed a house which suffered from latent material defects. To hold, in a case such as this, that the closing itself, the very act which triggers the claim, also served to extinguish it is self-contradictory, illusory and against public policy. Finally, the contention that Real Property Law §251 prohibits this "Housing Merchant" warranty by legal implication also is not persuasive, since that statute is expressly limited to deeds of conveyance and has no application to contracts for the construction and sale of new homes.

Traditionally, the doctrine that the buyer must beware (caveat emptor) governed the sale of personal property and real property. The rationale for

the judicially created doctrine was an outgrowth of the 19th century political philosophy of laissez-faire; namely, that a "buyer deserved whatever he got if he relied on his own inspection of the merchandise and did not extract an express warranty from the seller" (Roberts, The Case of the Unwary Home Buyer: The Housing Merchant Did It, 52 Cornell L.Q. 835, 836-837). Thus, the law treated express warranty or negligence or fraud as providing a purchaser of chattel or of real property with a surfeit of remedies.

As the industrial revolution roared into the era of mass produced goods, the law governing the sale of personal property started to relax the rigid results of the caveat emptor rule, culminating in the recognition of an implied warranty of merchantability (see, Uniform Sales Act §15, 1 ULA; UCC §§2-314, 2-315). This change in attitude as to chattels had little effect upon sales of real property, because prior to World War II there was no corresponding marketing or production transformation in the home construction industry. The post-World War II boom in housing, however, produced a building industry revolution and a growing awareness of the relative helplessness of would-be homeowners in the face of poor or deficient quality.

Since law usually reflects society's conflicts and developments, it started to catch up to the changes in home building and purchasing practices by bringing fresh and sharp scrutiny to the doctrine of caveat emptor in these circumstances. One commentator even pointed to the irony of a system of law which "[offered] greater protection to the purchaser of a seventy-nine cent dog leash than it [did] to the purchaser of a 40,000-dollar house" (Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property, 53 Geo. L.J. 633 [1965]; see also, Roberts, The Case of the Unwary House Buyer: The Housing Merchant Did It, 52 Cornell L.Q. 835 [1967]; Bearman, Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule, 14 Vand. L Rev 541 [1961]).

To harmonize the legal inconsistency and to soften the harsh effect of the caveat emptor doctrine, many jurisdictions recognized an implied warranty of skillful construction in connection with the sale of newly constructed houses. In fact, English courts, the originators of the caveat emptor rule, were the first to qualify it with the recognition of the implied warranty theory (Miller v. Cannon Hill Estates, [1931] 2 KB 113). Likewise, lower courts of our State have over the last three decades recognized and joined the legal trend. This case presents the first opportunity, however, for this court to address the continued appropriateness of the caveat emptor doctrine in these circumstances.

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The justification in cases which have relaxed the doctrine of caveat emptor with respect to homes contracted for sale prior to construction is that the two parties involved in the purchase of such a home generally do not bargain as equals in relation to potential latent defects from faulty performance. When a buyer signs a contract prior to construction of a house, inspection of premises is an impossibility, especially and obviously with respect to latent defects. Thus, the purchaser has no meaningful choice but to rely on the builder-vendor to deliver what was bargained for—a house reasonably fit for the purpose for which it was intended. The builder-vendor, on the other hand, maintains a superior position and is the only one who can prevent the occurrence of major

defects. We hold that responsibility and liability in cases such as the instant one should, as a matter of sound contract principles, policy and fairness, be placed on the party best able to prevent and bear the loss.

Defendant argues that departure from the rule of caveat emptor involves far-reaching policy considerations and, therefore, the decision to supplant it or modify it in these circumstances with an implied contractual warranty of skillful construction must be left to the Legislature. The court's role is not so limited. Defendant fails to appreciate that we are presented with what was in the first instance a court-made rule. Moreover, significant growth in many diverse areas of the law has emerged from this court's application of the common-law process to developing, changing and even outdated doctrines.

The mid-19th century well-established principle that the original seller of goods was not liable for damages caused by defects in the product with respect to anyone except the immediate purchaser or one in privity to that purchaser (see, Winterbottom v. Wright, 10 Mees & W 109, 152 Eng Rep 402 [1842]), evolved into an almost grudging exception that a seller could be liable to a third person for negligence in the preparation and sale of an article "imminently dangerous" to human safety (Thomas v. Winchester, 6 NY 397, 408 [1852]). Then, Judge Cardozo, in MacPherson v. Buick Motor Co. (217 NY 382), significantly extended the class of inherently dangerous articles to anything which becomes dangerous because it was negligently made. The underlying rationale for the extension of the court-made rule was that the manufacturer, by placing a product on the market, assumed responsibility to the ultimate purchaser and user.

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Chief Judge Cardozo's preeminent work The Nature of Judicial Process captures our role best: "If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors" (Cardozo, Nature of Judicial Process, at 152; see also, at 109-110, 150-152). These cases and these views are especially apt in the area of contractual relations where it has long been the law in New York that courts will imply a covenant of good faith where the implied terms are consistent with other mutually agreed upon terms (Wood v. Duff-Gordon, 222 NY 88; see also, Park W. Mgt. Corp. v. Mitchell, 47 N.Y.2d 316, 325). Here, the implication that the builder must construct a house free from material defects and in a skillful manner is wholly consistent with the express terms of the contract and with the reasonable expectation of the purchasers. Common sense dictates that the purchasers were entitled to expect, without necessarily expressly stating the obvious in this contract, that the house being purchased was to be a habitable place. The law ought to fulfill that commonsense expectation.

Defendant's claims with respect to the sufficiency of the evidence, to the exclusion of expert witness proof and to the measure of damages, have been reviewed and are without merit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Bellacosa, J. Judges Simons, Kaye, Alexander, Titone and Hancock, Jr., concur; Chief Judge Wachtler taking no part.

Notes and Questions

1. *Implied warranties of quality in new home sales.* A clear majority of jurisdictions has recognized an implied warranty of quality in the sale of a new home by a builder-vendor. See Alisa M. Levin, Condo Developers and Fiduciary Duties: An Unlikely Pairing? 24 Loy. Consumer L. Rev. 197, 236 n.134 (2011). The warranty may be called an implied warranty of skillful construction, as in *Caceci,* or by a variety of other names including warranty of habitability, workmanlike performance, or merchantability. For example, the New Jersey Supreme Court held that an implied warranty of "reasonable workmanship and habitability" attaches to the sale of a new home by the builder-vendor in McDonald v. Mianecki, 398 A.2d 1283, 1292-1293 (N.J. 1979). The *McDonald* court observed that "[c]learly every builder-vendor holds himself out, expressly or impliedly, as having the expertise necessary to construct a livable dwelling. It is equally as obvious that almost every buyer acts upon these representations and expects that the new house he is buying, whether already constructed or not yet built, will be suitable for use as a home. Otherwise, there would be no sale." Id.

2. *Habitability versus skillful construction.* The *Caceci* court states that the builder-vendor must construct a house "free from material defect and in a skillful manner." As the law concerning the implied warranty of quality has developed, it has become clear that it may have two separable components — a warranty of habitability and a warranty of skillful or sound construction — though the courts have not been consistent or clear in recognizing the distinction. See Albrecht v. Clifford, 767 N.E.2d 42 (Mass. 2002) (reviewing development of the law and noting that courts have blurred the distinction between the implied warranties of habitability and good workmanship, using different labels for similar concepts). Professor Timothy Davis concludes that the difference between the implied warranty of skillful construction and the implied warranty of habitability is that the former warranty focuses on the manner in which the work is performed while the latter reflects the "end result" expectation that the home will not have any major defects which render it unsuitable for habitation. Timothy Davis, The Illusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework, 72 Neb. L. Rev. 981, 1013-1020 (1993). Thus, Professor Davis concludes that the implied warranty of skillful or workmanlike performance may include defects that do not render the house uninhabitable. In the *McDonald* case noted above, the New Jersey Supreme Court held that the implied warranty of habitability would extend to potable water in circumstances where the builder was obligated to construct a well to provide water for a house not serviced by a public water system. 398 A.2d at 1293-1294. By contrast, in Aronsohn v. Mandara, 484 A.2d 675 (N.J. 1984), the New Jersey Supreme Court held that a patio which was added to a preexisting home would not come within the implied warranty of habitability because it did not fall within the scope of necessities to make a home suitable for living; however, the court did hold that a builder could be held liable for breach of an implied warranty that the patio would be constructed in a good quality manner. Do you agree that courts should imply a warranty of skillful construction in addition to a warranty of habitability? If so, what would the implied warranty of skillful construction include?

3. *Legislative action.* Some states have enacted legislation providing for implied warranties of quality in the sale of new homes. See Jeff Sovern, Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof, 1993 Wis. L. Rev. 13, 22-23 (listing states that have adopted statutes providing an implied warranty of quality for new homes). For example, within weeks after the *Caceci* decision was rendered, the New York legislature enacted a housing merchant warranty law, New York Gen. Bus. §§777-777b (McKinney 1996). See Amy L. McDaniel, Note, The New York Housing Merchant Warranty Statute: Analysis and Proposals, 75 Cornell L. Rev. 754 (1990). The New York law creates three types of warranties: a one-year warranty of skillful construction; a two-year warranty on major systems such as plumbing, electrical, and heating and cooling; and a six-year warranty on latent, material defects. The statute also eliminates any "privity" requirement that would limit the warranty to initial purchasers. Notably, however, the law also has the effect of protecting the builder by narrowing the scope of the implied warranty through its definition of the terms "skillful" and "material defect," and by excluding from its scope any obvious defects. Id. at 767-774. The New York Court of Appeals has ruled that the statutory enactment codifies and supplants the *Caceci* implied housing merchant warranty. Fumarelli v. Marsam Development, Inc., 703 N.E.2d 251 (N.Y. 1998).

4. *Effectiveness of disclaimers.* Can the builder-vendor contractually modify or "disclaim" the implied warranty of habitability? The prevailing view is that the implied warranty of habitability may be modified or disclaimed. Many courts, however, view disclaimers with suspicion and will refuse to enforce a disclaimer unless it is clear, unambiguous, and reflects both parties' expectations. E.g., McGuire v. Ryland Group, Inc., 497 F. Supp. 2d 1356 (M.D. Fla. 2007). But see Albrecht v. Clifford, 767 N.E. 2d 42, 47 (Mass. 2002) (holding that warranty cannot be waived or disclaimed "because to permit the disclaimer of a warranty protecting a purchaser from the consequences of latent defects would defeat the very purpose of the warranty"). A related question is what effect a disclaimer will have on the seller's duty to disclose. Compare Mackintosh v. Jack Matthews & Co., 855 P.2d 549 (Nev. 1993) ("as is" disclaimer ineffective when seller had duty to disclose information not accessible to diligent buyer), with Richey v. Patrick, 904 P.2d 798 (Wyo. 1995) ("as is" clause barred claim for nondisclosure by purchaser who failed to exercise right to conduct expert inspections). The New York legislation cited above permits exclusion or modification of the implied warranty if the seller provides a written warranty that complies with certain requirements as to form, but it also provides that a disclaimer is void as against public policy if it attempts to disclaim compliance with applicable building codes or if it permits the home to be unsafe. Should builder-vendors be able to disclaim the implied warranty of habitability? Is the sale of a new home analogous to the sale of goods, where sellers are allowed to disclaim implied warranties under UCC §2-316? Can you imagine circumstances in which both buyer and seller might wish to have an effective disclaimer?

5. *Implied warranties and commercial buildings.* Should the courts imply a warranty of habitability in the sale of commercial rather than residential real estate? The courts are divided. Compare, e.g., Conklin v. Hurley, 428 So. 2d

654 (Fla. 1983) (developer of waterfront building lots not liable to investors for breach of implied warranty of habitability), with Tusch Enterprises v. Coffin, 740 P.2d 1022 (Idaho 1987) (investor could recover from vendor of three duplexes for breach of the implied warranty of habitability). See Frona M. Powell & Jane P. Mallor, The Case for an Implied Warranty of Quality in Sales of Commercial Real Estate, 68 Wash. U.L.Q. 305 (1990). Do you think the implied warranty of habitability should apply to sale of commercial property? Why? Could a useful distinction be drawn between residential property held for investment purposes and purely commercial property, such as an office building, implying a warranty in the first situation but not the second?