UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Richmond Division

STEVES AND SONS, INC., Plaintiff, v. JELD-WEN, INC., Defendant.	Civil Action No. 3:16-cv-545-REP

JELD-WEN, INC.'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to the Court's February 22, 2018 Order, JELD-WEN, Inc. ("JELD-WEN") submits the following supplemental memorandum in support of its Rule 50(a) motion for judgment as a matter of law on Steves and Sons, Inc. ("Steves") claim that JELD-WEN breached the quality provision of the 2012 Supply Agreement. The evidence presented at trial would not allow "a reasonable jury…a legally sufficient evidentiary basis to find for" Steves as to this breach claim (Fed. R. Civ. P. 50(a)(1)), and accordingly the Court should grant judgment as a matter of law to JELD-WEN.

I. THE JURY HEARD NO EVIDENCE THAT JELD-WEN REFUSED TO REIMBURSE STEVES FOR DEFECTIVE DOORSKINS AS REQUIRED BY THE SUPPLY AGREEMENT

Steves claims that JELD-WEN breached the Supply Agreement by shipping doorskins to Steves that were not "of a quality satisfactory to STEVES meeting JELD-WEN's specifications, fit for the intended purpose, and subject to JELD-WEN's standard written warranty applicable to the Product" (DX0262 at ¶ 8, attached as Exhibit 1), then refusing to reimburse Steves for those doorskins. Steves claims that it suffered $441,458 in damages for these unreimbursed claims

that it submitted from 2015 to 2017. Transcript of Trial Proceedings ("Trial Tr.") at 1199:2-1200:4 (Feb. 7, 2018), attached as Exhibit 2. But as detailed in prior briefs on this subject, and as described additionally here, Steves did not present the jury with any evidence that would allow it to conclude that any of these specific doorskins were defective as defined by the Supply Agreement. Steves has a complete failure of proof as to whether the doorskins for which it claims damages in this case were in fact defective, and the unrebutted evidence proves that JELD-WEN was within its contractual rights to inspect, verify and reject unjustified claims.

As JELD-WEN noted in its prior briefs, Steves employees testified generally that they believed that the doorskins that Steves bought from JELD-WEN had various "quality problems" during the relevant period, and testified that JELD-WEN shipped some doorskins to Steves that were not satisfactory to Steves. But Steves' breach of contract claim is not based upon some unidentified doorskins it received—it is based on the $441,458 worth of returned doorskins that JELD-WEN refused to reimburse from 2015 to 2017. Steves' damages expert, Mr. Avram Tucker, was the only witness to testify regarding these specific doorskins. He testified that, in each of the years 2015, 2016 and 2017, Steves submitted vendor debit memos ("VDMs") for doorskins that it believed were defective and that JELD-WEN was responsible for the defect. *Id.* at 1199:7-14. He admitted that JELD-WEN reimbursed Steves for certain of those VDM claims, but calculated as damages every claim that JELD-WEN had denied. *Id*. at 1199:15-25. Importantly, Mr. Tucker admitted that he was not expressing any opinion as to whether Steves' claims of defects were justified. *Id*. at 1198:20-1199:1 ("Q: And for any of these categories, are you expressing any opinion as to whether or not Steves' claims of defect are justified? A: No. That's not within my area of expertise. . . ."). In fact, neither he, or any other Steves witness, ever explained the nature of specific "defects" contained in the denied VDMs. Steves did not

admit any of these VDMs as exhibits, or provide any other evidence, such as pictures or other descriptions, that would establish that the doorskins are defective as defined by the Supply Agreement.[1] Steves thus suffers a complete failure of proof on its breach of contract claims for these doorskins and JELD-WEN is entitled to judgment as a matter of law on that claim.

To the extent that Steves asserts that JELD-WEN must reimburse Steves for the amounts of every VDM that Steves submitted because any claimed doorskin is not "of a quality satisfactory to Steves," that contention has no basis in the facts or the law. ***First***, Steves' claim fails as a matter of contract interpretation because it ignores the plain language of the Supply Agreement. Paragraph 8 of the Supply Agreement explicitly allows JELD-WEN to inspect and verify any defects before reimbursing Steves. Ex. 1, DX0262 at ¶ 8 ("If JELD-WEN ships Product that do not meet JELD-WEN's Specifications (hereinafter "Defective Product") then JELD-WEN, after notice, inspection and verification of the Defective Product, will be obliged to reimburse Steves for the price of the Defective Product"). Edward Steves, CEO of Steves and chief negotiator of the Supply Agreement on behalf of Steves, confirmed that under this provision, Steves "can't get reimbursement from JELD-WEN unless [Steves] give[s] notice, inspection and verification of the defective product." Trial Tr. at 776:24-777:7 (Feb. 3, 2018), attached as Exhibit 3. This provision, which Steves admits means that JELD-WEN can determine whether product is defective through an inspection and verification process, cannot be squared with any contention that all doorskins returned by Steves are automatically "defective" and that JELD-WEN must reimburse Steves for them.

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[1] Steves introduced two power point presentations of allegedly defective doorskins sold by JELD-WEN. PTX0246 (D. Gartner email transmitting presentation (Nov. 16, 2013)), attached as Exhibit 4; PTX0340 (August 2014 meeting presentation), attached as Exhibit 5. Since Steves compiled these PowerPoints in 2013 and 2014, there is no basis for any jury to conclude that any of the doorskins represented in those pictures were part of denied VDM claims in 2015-2017.

Second, the facts prove that Steves repeatedly returned doorskins that even Steves ***knew*** can and should be used in Steves' doors. As noted in JELD-WEN's prior briefs, Steves' witness Doug Gartner testified that, under Steves' quality guidelines implemented in early 2015, Steves had a policy of submitting for reimbursement entire pallets of doorskins when only the top four skins measured out of tolerance. Trial Tr. at 544:24-545:4 (Feb. 2, 2018), attached as Exhibit 6. He conceded that this means that "it's possible that Steves could make a claim on skins that are actually not of out tolerance because they're towards the bottom of the pallet and they weren't tested." *Id*. at 545:5-9. Similarly, two exhibits introduced during Steves' case-in-chief confirm that, during inspections in 2015 and 2016, JELD-WEN denied claims for doorskins that the Steves inspector ***agreed*** "can and should be used." DX0258, attached as Exhibit 7; *see also* DX0259, attached as Exhibit 8 ("The majority of these skins appear to be useable.") Steves cannot claim breach of contract when JELD-WEN inspected and refused to reimburse for doorskins that Steves itself knows are not defective.

The unrebutted evidence presented at trial also proves that JELD-WEN legitimately utilized the inspection and verification rights provided for in the Supply Agreement to reject claims when 1) the doorskins met JELD-WEN's technical specifications, 2) the defect was caused by Steves, and 3) the claimed "defect" would not prevent Steves from using the doorskin to assemble a door. JELD-WEN employee Stephen Fancher is responsible for JELD-WEN's warranty process and determining whether claims submitted by JELD-WEN's customers should be reimbursed or not. Trial Tr. at 1725:5-18 (Feb. 9, 2018), attached as Exhibit 9. Mr. Fancher explained that JELD-WEN maintains, and provided to Steves, technical specifications that it uses to determine when a doorskin is inherently defective. *See* PTX0357, attached as Exhibit 10 (September 3, 2014 email from S. Fancher to S. Steves, providing doorskin specifications). Mr.

Fancher testified that JELD-WEN used these specifications to assess whether doorskin claims were justified by measuring the claimed doorskins against the specifications. Ex. 9, Trial Tr. at 1825:15-24 (Feb. 9, 2018). If the doorskin did not meet the relevant specification, JELD-WEN paid the claim, if met the specifications, JELD-WEN did not. *Id*. at 1821:17-1822:9.

As to aesthetic defects, Mr. Fancher explained that JELD-WEN's policy is to reimburse customers such as Steves when they receive doorskins with certain aesthetic defects, such as oil spots and blisters because "it's not the customer's fault" *Id*. at 1731:3-11; *see also id*. at 1735:8-14 (JELD-WEN generally reimburses for primer issues). But, generally JELD-WEN does not reimburse for scuff marks or crushing because that is caused by handling, and JELD-WEN does not handle doorskins during manufacturing. *Id*. at 1731:18-1732:8. Instead, these problems are caused by the customers, who move the doorskins during the door assembly process, or when storing them. *Id*. at 1732:9-1733:10. Of course, the Supply Agreement does not require JELD-WEN to reimburse for damage that Steves itself has caused. Ex. 1, DX0262 at ¶ 8 ("JELD-WEN will not be liable for any claim by STEVES for Defective Product caused by STEVES' own negligence").

Finally, Mr. Fancher confirmed that JELD-WEN does not reimburse customers such as Steves when they submit doorskins for reimbursement that are not actually defective and can be used to make a door. This can arise with aesthetic "defects," such as the primer issues that Steves itself admitted that JELD-WEN rightly rejected (*see* Ex. 7, DX0258; Ex. 8, DX0259), or small blemishes that do not interfere with the ability to use the doorskin in door assembly. Ex. 9, Trial Tr. at 1731:12-17 (Feb. 9, 2018).

The record as presented fails to offer the jury a sufficient evidentiary basis to conclude that any of the doorskins included in Steves' breach claim are actually defective as defined by

the Supply Agreement, and in fact proves that many were not. Accordingly, the jury cannot find that JELD-WEN breached the Supply Agreement by refusing to reimburse Steves for the $441,458 of alleged doorskin damages claimed in this case, and JELD-WEN is entitled to judgment as a matter of law as to this portion of Claim 2.

II. STEVES' CLAIM FOR REIMBURSEMENT OF DOORS MANUFACTURED WITH ALLEGEDLY DEFECTIVE DOORSKINS ALSO FAILS

In addition to its breach of contract claim for doorskins, Steves also requests damages based on JELD-WEN's refusal to reimburse Steves for the full cost of doors returned to Steves by its customer REEB, and for other doors purportedly returned to Steves but which Steves never submitted to JELD-WEN for reimbursement. First and foremost, and as detailed in prior briefs, JELD-WEN is entitled to judgment as a matter of law as to this portion of Claim 2 because the Supply Agreement unambiguously provides that "[a]ny additional costs over the price of the Defective Product [doorskins] shall be negotiated by the Parties on a case by case basis." Ex. 1, DX0262 at ¶ 8. Edward Steves confirmed his understanding that "I agree they have the right to not pay us, if that's their position" and acknowledged that JELD-WEN "could refuse in every case." Ex. 3, Trial Tr. at 779:7-13 (Feb. 3, 2018).

As explained in prior briefing, Steves cannot evade this unambiguous provision with an argument that the UCC provision on consequential damages should trump the parties' clear bargain. Delaware law provides that "the effect of provisions of the Uniform Commercial Code may be varied by agreement" (6 Del. C. § 1-302(a)), and that "consequential damages may be limited or excluded unless the limitations or exclusion is unconscionable." (6 Del. C. § 2-719(3)). Unconscionability in restricting consequential damages does not arise where, as here, the parties are sophisticated commercial entities engaged in hands-off negotiations. 6 Del. C. § 2-719(3) ("Limitation of consequential damages for injury to the person in the case of consumer

goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."); *Concord Plaza Assocs., Inc. v. Honeywell, Inc.*, No. 84-128, 1986 WL 9922, at *6-7 (Del. Super. Ct. Aug. 29, 1986) (upholding bargained for limitation on consequential damages because of the "parties' status as commercial entities bargaining at arms' length over a period of several months, the recognized validity of these provisions in commercial contracts, CPA's awareness of the existence and effect of the consequential damages exclusion. . . and the recognition that the purpose of § 2-719(3) was to protect consumers, rather than to readjust the allocation of business risks") (citations omitted).

Steves' claim that it can proceed with this claim because the doors might contain "latent defects" also fails. Plaintiff Steves and Sons, Inc.'s Opposition to JELD-WEN's Motion for Judgment as a Matter of Law ("Opp.") at 27-28, citing *Crowell Corp. v. Himont U.S.A.*, No. 86C-11-125-JEB, 1996 Del. Super. LEXIS 400 (Del. Super. Ct. Sept. 4, 1996); *Viking Yacht Co. v. Composite One LLC*, Nos. 09-3417, 09-3558, 2010 U.S App. LEXIS 13483, at *31-32 (3d Cir. July 1, 2010). Steves claims that JELD-WEN supplied Steves with doorskins with latent defects but supports this claim with only a vague statement by Mr. Gartner that some doorskin defects only arise when they are in the field. Opp. at 28. While this may be true as a general matter, Steves did not provide the jury with any evidence that any of the actual doors for which Steves claims in this case were subject to latent defects. In fact, Mr. Gartner confirmed that many of the categories of defective doorskins presented in the doors returned by REEB and other customers, including bubbles in face/sticking, wavy skins, primer issues, scratches and cracks, could have been seen by Steves in many cases before assembling doors with those doorskins. Ex. 3, Trial Tr. at 570:10-571:7, 572:16-25, 573:21-574:3 (Feb. 3, 2018). Again, Steves has not tried at all to separate out those claims from any allegedly latent defects in its breach claim, and the jury has

no basis to conclude that any of the doors for which Steves claims damages actually involve any latent defects.

Moreover, even if the jury were inclined to misread the Supply Agreement to impose a duty to pay for doors, Steves' door claims further fail for two independent reasons. ***First***, the evidence presented in the trial confirmed that in many cases Steves did not provide JELD-WEN the contractually required notice of and ability to inspect defective doors. *See* Ex. 1, DX0262 at ¶ 8. Mr. Fancher testified that it is JELD-WEN's policy not to reimburse any doorskins if the customer does not make the doorskin available for inspection because "if we cannot see the skin visually and inspect the defect, there's no basis to be able to understand what the problem is." Ex. 9, Trial Tr. at 1728:23-1729:6 (Feb. 9, 2018). He also confirmed that this is the common industry practice and the same procedure he followed when employed by Masonite and CMI. *Id*. at 1729:7-10. Mr. Gartner and Mr. Fancher both confirmed that in the REEB claim, JELD-WEN was not able to inspect many of the doors included in Steves' claim, including all of the claimed doors at the Lebanon plant. Ex. 3, Trial Tr. at 569:9-20, 574:18-575:6 (Feb. 3, 2018); Ex. 9, Trial Tr. at 1749:4-17, 1749:21-1750:2 (Feb. 9, 2018). And, Steves' expert Mr. Tucker also admitted that Steves' did not submit claims for defective doors in 2015 and 2016. Ex. 2, Trial Tr. at 1242:11-15 (Feb. 7, 2018).

Steves' assertion that it was not required to submit any non-REEB doors to JELD-WEN for reimbursement because any such request would be "futile" or "commercially impracticable" has no basis in the facts of this case or the law. Opp. at 26. Steves admits that JELD-WEN did reimburse Steves for the defective doorskins when Steves submitted a claim for a door. Opp. at 26. Steves' argument of "futility" is merely that it disagreed with the amount of reimbursement it might receive, not that JELD-WEN would not reimburse any part of the claim at all. The

situation here is thus unlike *Reserves Dev. LLC v. R.T. Props., LLC*, No. S07C-11-034 RFS, 2011 WL 4639817 (Del Super. Ct. Sept. 22, 2011), where the court found "[t]he record in this case shows that written notice of a default on the infrastructure would not have led to an agreement or compromise." 2011 WL 4639817, at *7.

Second, and as with the doorskin claim, the jury heard no evidence that any of the doorskins used in these doors are actually defective as defined by the Supply Agreement. In terms of the REEB claim, Mr. Fancher testified that JELD-WEN inspected each of the doors that Steves actually made available for inspection. Ex. 9, Trial Tr. at 1750:13-14 (Feb. 9, 2018). During the course of the inspection, JELD-WEN confirmed that 1,793 doorskins on the doors were actually defective and paid for those claims. *Id*. at 1753:8-17, 1781:9-12. But, many more of the doorskins—2,537—were not actually defective. *Id*. These included warped and bowed doorskins that JELD-WEN measured and found to be within its specifications (*id*. at 1757:2-1758:7), delaminated doors that JELD-WEN pulled apart and found were caused by lack of glue or glue wipe off in the assembly process (*id*. at 1759:4-12), and handling damage caused by Steves (*id*. at 1761:3-20), among other issues. Steves has no basis to claim that JELD-WEN breached the Supply Agreement by refusing to reimburse for these doorskins or doors that JELD-WEN inspected pursuant to its rights under the Supply Agreement, and found to be not defective, or that the defect was caused by Steves.

Both Mr. Gartner and Mr. Fancher also confirmed in their testimony that some of defects in the non-REEB doors—doors that Steves has never allowed JELD-WEN to inspect—also may have been caused by Steves. Mr. Gartner testified that in regards to many of the reimbursements requested by Steves, including doors with cracked face, warped/cupped and linear expansion, the defect could have been caused in the door assembly process or during installation by Steves'

customers. Ex. 3, Trial Tr. at 571:25-572:4, 573:5-20 (Feb. 3, 2018). Mr. Fancher further explained that delamination, a defect that Steves claimed in both its REEB claim and for non-REEB doors, could be caused either by the doorskin, or by the way the door is constructed. Ex. 9, Trial Tr. at 1737:5-25 (Feb. 9, 2018). JELD-WEN is actually able to determine, in some cases through a visual inspection and also through a more "scientific" investigation, when the door assembler, not JELD-WEN, caused the delamination. *Id*. at 1738:1-9 (Feb. 9, 2018). Mr. Tucker admitted that Steves has not attempted to exclude any of those non-JELD-WEN defects from its breach claim. Ex. 2, Trial Tr. at 1203:6-15 (Feb. 7, 2018).

CONCLUSION

For the foregoing reasons, JELD-WEN respectfully requests that this Court grant judgment as a matter of law in JELD-WEN's favor due to Steves' failure to present sufficient evidence to sustain a verdict on its quality breach of contract claim.

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Respectfully submitted,

JELD-WEN, Inc.

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I hereby certify that on the 2nd day of March, 2018, I will electronically file a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the registered participants as identified on the NEF to receive electronic service, including:

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