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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4130-09T1

TRICO EQUIPMENT, INC.,

Plaintiff-Respondent/
Cross-Appellant,

v.

ELLSEE CONSTRUCTION CO., L.L.C.,

Defendant-Appellant/
Cross-Respondent.

Submitted April 23, 2012 - Decided December 19, 2012

Before Judges A. A. Rodríguez and Ashrafi.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2091-08.

Steven D. Janel, attorney appellant/cross-respondent.

Kreiser & Associates, P.C., attorneys for respondent/cross-appellant (Travis L. Kreiser, on the brief).

PER CURIAM

Defendant Ellsee Construction Co., L.L.C., rented heavy construction equipment from plaintiff Trico Equipment, Inc. The equipment failed mechanically while Ellsee was using it. Trico alleged that Ellsee had misused the equipment and later sued for

about $10,000 in repair costs. Ellsee denied liability and filed a counterclaim alleging loss of part of the rental fee and other causes of action. The case was tried for two days without a jury. Dissatisfied with the judge's decision, both sides have appealed the net judgment of $2,059.95 in favor of Trico. We now reverse the judgment and order that both the complaint and the counterclaim be dismissed with no recovery for either party.

Had common law contract and tort law been the only grounds for relief in this dispute between two corporate entities, the case may have settled as a matter of the parties' business decision, and the judgment would likely not have warranted appeals as a matter of sound legal advice. Added to the mix, however, is the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -20. The stakes are higher, the legal issues are more complex, and neither party has accepted the outcome after trial.

I.

The facts are not complicated. Defendant Ellsee needed to demolish two wooden outbuildings on a building lot. On January 18, 2005, it called Trico and requested to rent an excavator, a heavy-duty machine on tracks with a hydraulic arm and a bucket. On one prior occasion, during the spring of 2002, Ellsee had rented equipment from Trico for a period of several months. Ellsee still had a credit account on file with Trico.

Trico processed Ellsee's January 2005 request by means of its computerized record-keeping system, and it arranged for delivery of the machine to Ellsee's job site the next day. Ellsee used the excavator on January 19 and 20, but the machine sprang a hydraulic leak and stopped working on the second day. After retrieving the machine, Trico sent an invoice to Ellsee for rental and related fees totaling $2,066.50. Ellsee paid that amount by credit card.

Trico examined the excavator in its yard and concluded that the leak resulted from damage to a mechanical part and that Ellsee's misuse of the equipment must have caused the damage. Repairs cost Trico $9,961.10. Trico issued another invoice to Ellsee for the repair costs. Ellsee refused to pay the second invoice.

In January 2008, Trico sued Ellsee based on its rental contract. Ellsee counterclaimed against Trico, alleging breach of contract, common law fraud, negligent misrepresentation, and violation of the CFA. Five witnesses testified at the bench trial in 2009, all current or former employees of one party or the other. No experts testified.

Trico contended its standard contract terms placed responsibility on the renter if the equipment was damaged during its use. But Trico did not have a written contract to establish

the terms of the rental agreement. Although its computerized system was designed to generate such a contract, and a contract number was assigned and appeared on other documents, Trico was never able to find a copy of its standard rental contract for the transaction. Instead, it relied on the other documents it had maintained pertinent to the January 2005 rental, and also on its standard practices in the rental of equipment, the documents generated at the time of its 2002 rental of equipment to Ellsee, and practices and customs in the equipment rental industry.

Trico presented testimony by its vice-president and general manager, Steven Scattolini. He testified that Trico received the request from Ellsee and had a computer record of information that should have automatically printed a contract on Trico's standard form. The pertinent information was electronically communicated to a carrier that would transport the requested equipment to the job site. Scattolini testified about Trico's standard contract terms pertaining to damage to the equipment itself while in the possession of a renter and the alternatives available to the renter in obtaining insurance coverage. He testified that Trico's contract form (Exhibit P-29 at the trial) had not changed between 2002 and the time of trial. Reciting the exclusion language contained in the waiver of damages provisions of the form contract, paragraph 25 on the reverse

side, he testified that the waiver provisions only applied to catastrophic damage to the equipment and not to lesser mechanical failures, or to damage that was caused by the customer's misuse of the equipment.[1]

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[1] Preprinted paragraph 25 on the back of Trico's standard rental contract (Exhibit P-29) stated in relevant part:

> **CUSTOMER DAMAGE WAIVER.** INSURANCE POLICIES USUALLY COVER YOU FOR LIABILITY TO THIRD PARTIES FOR ANY DAMAGES OR INJURY CAUSED WHILE YOU ARE USING RENTED EQUIPMENT, BUT PROBABLY DO NOT COVER YOU FOR LOSS OR DAMAGE TO THE RENTED EQUIPMENT ITSELF. SHOULD COMPLETE DESTRUCTION OF A PIECE OF TRICO RENTAL'S EQUIPMENT OCCUR WHILE IN YOUR CARE, CUSTODY AND CONTROL, YOUR EXPENSES COULD RANGE FROM $2,500.00 TO $250,000 DEPENDING UPON THE VALUE OF THE UNIT RENTED. TO MINIMIZE AND CONTROL YOUR COSTS, WE ARE OFFERING OUR **CUSTOMER DAMAGE WAIVER.** THIS PROGRAM PROVIDES THAT TRICO RENTALS WILL WAIVE ITS RIGHTS TO RECOVER FROM YOU THE LOSS RESULTING FROM DIRECT DAMAGE TO OR LOSS OF RENTED EQUIPMENT DUE TO THEFT, COLLISION, UPSET, FIRE, WINDSTORM, RIOT, CIVIL COMMOTION, VANDALISM AND MALICIOUS MISCHIEF AND OTHER SIMILAR TYPE LOSSES. THE ABOVE LOSSES ARE COVERED SUBJECT TO A 25% OF TOTAL VALUE DEDUCTIBLE PER OCCURRENCE. THIS EXCLUDES DAMAGE DUE TO CUSTOMER NEGLECT OR MISUSE. . . .
>
> THE COST OF THE CUSTOMER DAMAGE WAIVER IS TEN [sic] PERCENT OF THE RENTAL RATE CHARGED FOR USE OF OUR EQUIPMENT. . . .
>
> [Emphasis added.]

Paragraph 5 on the back of the form provided that the renter would be responsible for payment of repair costs if "damage, malfunction or unfitness" of the rented equipment "results from abusive handling or reckless or negligent use by or other fault" of the renter.

On the same day that the machine was delivered to the job site, Trico had faxed to Ellsee another of its standard forms, an Insurance Certificate Request (Exhibit P-9). In addition to designating the equipment Ellsee was renting and its value, the document provided notice to the renter of the need to obtain insurance coverage for liability to third parties and for physical damage to the equipment itself. The faxed form included the following statement: "If Physical Damage coverage is not provided by you, the rental will be surcharged 14% of the rental fee in the form of a Physical Damage Waiver."[2]

Scattolini explained to the judge that the phrase "physical damage waiver" meant that Trico would waive a claim against the renter for catastrophic damage to the equipment in exchange for the fourteen percent surcharge and in accordance with the terms stated on the reverse side of its standard contract form. Scattolini also reviewed for the court the prior 2002 rental contracts between Trico and Ellsee that contained allegedly identical terms.

The documents in evidence also showed that on the morning of January 19, 2005, the excavator had arrived at Ellsee's job

[2] The fourteen percent referenced is different from the last-quoted sentence of Paragraph 25 from the standard contract form, which designates a ten percent surcharge. Our record does not explain the discrepancy.

site at 10:45, and not first thing in the morning as Ellsee had requested. Trico's foreman, Blake McClaren, testified that Trico inspected and photographed all equipment before it was turned over to the renter for use. In this case, the driver who transported the excavator had called and reported a minor leak in the equipment that he had detected when driving it onto the trailer bed for transport. McClaren personally went to Ellsee's job site to inspect the equipment. He quickly repaired the leak, which was not significant, and he thoroughly photographed and inspected the excavator, including by operating it. The machine had no mechanical defect or other damage when it was turned over to Ellsee. The photographs McClaren took that morning were admitted in evidence, as well as Trico's standard Rental and Delivery Inspection Form (Exhibit P-12), which had check marks indicating that the equipment was in good working order and not damaged at the time of delivery. Ellsee signed the delivery and inspection form and received a copy.

The final witness for Trico was Andrew Volponi, who had been a vice-president of Trico and a supervisor of the service department in 2005. He testified about the mechanical fault he

found in the machine after it was returned to Trico's yard and the cost of its repair.[3]

On behalf of defendant Ellsee, Joanne Seefelt Elliott, the manager of the business, testified that the company had been formed in 1994 to renovate and resell homes and to build modular homes. She was in charge of the office and her husband, Charles Elliott, did the construction work on site. She testified that she never received a copy of a contract for the January 2005 rental of the excavator, as she had for the rental of equipment from Trico on the previous occasion in 2002. She also acknowledged that when equipment was delivered to a job site, her husband would not read its accompanying paperwork but would put it in his truck and bring it to the office at a later time. She said he had not brought to the office a contract for the January 2005 rental.

Seefelt also testified that, in 2002, Trico had issued several rental contracts for the equipment Ellsee had rented at that time for a period of several months. Later in 2002, Trico refunded to Ellsee a surcharge it had collected for the damage waiver clause because Ellsee had its own insurance coverage at

[3] Because no issue has been raised on appeal about the cause of the hydraulic leak, either before or after Ellsee used the equipment, or about the expenses of repair, our narrative will not include the disputed technical testimony about the mechanical defect, its alleged cause, or the necessary repairs.

that time. Ellsee had returned the 2002 equipment with damage to a tire and had paid the repair cost of several hundred dollars because Ellsee acknowledged responsibility for causing the tire damage.

In January 2005, Seefelt received Trico's Insurance Certificate Request by fax on the date the excavator was delivered to the job site. She understood the document to state that Trico would provide insurance coverage for damage to the equipment in exchange for a fourteen percent surcharge. She decided to accept that alternative and not to obtain Ellsee's own inland marine insurance coverage for the excavator because the surcharge would cost less for the short rental term.

Charles Elliott testified that the excavator was delivered late to the job site on January 19, 2005. He claimed that inspection and photographing of the equipment could not have lasted more than ten minutes because it was important that he start working immediately. He said he did not recall McClaren being at the job site at the time the machine was delivered or inspected. He also said he did not receive a rental contract.

Elliott explained the demolition work for which he needed the excavator and said that Trico was aware of the nature of the job. He testified that he worked until about 5:00 on the first day with no problems. On the second day, he used the excavator

to continue the work, but he had to stop when the machine began leaking hydraulic oil. He called Trico to pick up the machine. He denied having done anything to cause the mechanical failure.

In his decision after the parties' presentations, the trial judge found that all the witnesses "were credible. . . . they are very believable, decent, hard-working people." The judge concluded that the prior relationship between the parties from 2002 "has no continuing . . . effect whatsoever. . . . [I]t is [not] binding in any way with regard to what happened in 2005."

The judge resolved in favor of Trico the factual dispute about the cause of the machine's failure. He found that Trico had proved the machine was in good working order when delivered to Ellsee and that "Mr. Elliott did something with that equipment, that's the only answer to it, that caused damage to it. . . . [T]he fault for the damage lies at the hands of the defendant [Ellsee]."

Discussing the "insurance aspect" of the dispute, the judge found that a written rental contract did not exist. The judge then stated: "[B]ecause we are dealing with a contract, there is a consumer fraud issue here. I think there is a violation of the Consumer Fraud Act. It was entirely unintended. There's no intent involved here."

The judge then reviewed the damage claims by each party and concluded that, on the counterclaim, Ellsee had proven consumer fraud losses calculated as the fees it paid of $2,066.50 less $750 for its use of the excavator for one full day.[4] After making the subtraction, the judge trebled the resulting figure as consumer fraud damages of $3,945.[5] Subsequently, the judge added attorney's fees payable to Ellsee under the CFA of $5,542, which was one-third of the amount Ellsee requested in its post-trial submission.

On Trico's claim, the judge found that Ellsee was liable for the repair costs of the excavator, $9,961.50, plus pre-judgment interest of $1,585.45. Adding the last two figures, and then subtracting from their sum the total of the court's award to Ellsee, the judge entered a net judgment in favor of Trico for $2,059.95. Both sides appealed.

II.

The scope of appellate review is limited following a bench trial. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65

[4] Because of our conclusions in this appeal, we need not address Trico's argument that the rental rate as shown on its invoice was $1,500 for the one full day that Ellsee used the excavator and that it did not charge a fee for the second day when the excavator developed a leak and could not be used.

[5] The figures the judge stated were not exact and were adjusted after trial. We recite the figures contained in the final judgment entered on March 1, 2010.

N.J. 474, 484 (1974). We defer to the trial court and may not disturb its factual findings so long as "there is sufficient credible evidence in the record to support the findings." Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 397 (2009); accord State v. Adams, 194 N.J. 186, 203 (2008); State v. Chun, 194 N.J. 54, 88-89, cert. denied, 555 U.S. 825, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008).

Here, Ellsee has expediently not challenged the trial court's finding of fact that its use of the machine caused the malfunction, although that issue was closely contested at the trial. Nor has Ellsee challenged the trial court's finding that Trico had no intent to mislead it by failing to provide a copy of a rental contract. Rather, Ellsee argues on appeal that Trico committed a violation of the CFA simply by its failure to provide a copy of a written rental agreement, and that the CFA violation is a complete defense to Trico's claim against Ellsee for the repair costs. See Scibek v. Longette, 339 N.J. Super. 72, 80-82 (App. Div. 2001); Huffmaster v. Robinson, 221 N.J. Super. 315, 322 (Law Div. 1987).

In reviewing the trial court's application of the CFA to the facts it found, we owe no deference to "a question of statutory interpretation, which is a purely legal issue." In re Petition for Referendum on City of Trenton Ordinance 09-02, 201

N.J. 349, 358 (2010); see also Wyzykowski v. Rizas, 132 N.J. 509, 518 (1993) (interpretation of an ordinance is a question of law). On appeal, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Here, we conclude that the trial court erred in its interpretation and application of the CFA to the facts it found but for reasons different from those argued by Ellsee.

The CFA prohibits "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation . . . ." N.J.S.A. 56:8-2. The New Jersey Supreme Court has identified three general categories of consumer fraud violations — affirmative misrepresentations, knowing omissions, and regulatory violations. Allen v. V & A Bros., Inc., 208 N.J. 114, 131 (2011); Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 556 (2009); Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994)).

Here, the trial court did not state which of the three types of CFA violation it found Trico had committed. It stated only in general terms that a CFA violation had occurred but that Trico had no unlawful intent in committing the violation.

Where an affirmative misrepresentation is alleged, a consumer fraud violation does not require proof of intent to mislead. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 605 (1997); Vagias v. Woodmont Properties, LLC, 384 N.J. Super. 129, 133 (App. Div. 2006); Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 598 (App. Div. 1990), aff'd o.b., 124 N.J. 520 (1991). At the trial, Ellsee argued that Trico had affirmatively misrepresented the scope of coverage for physical damage to the equipment in exchange for a surcharge on the rental fee. It argued that the fine print of paragraph 25, quoted in footnote one in this opinion, contrasts sharply with the description of the alternatives available to the customer contained in Trico's Insurance Certificate Request. Ellsee claimed that the general language of the latter form misled it into believing it was paying the surcharge in exchange for insurance that would cover damage to the equipment. Although we agree that the language of Trico's Insurance Certificate Request did not alert the customer to the limitations of its Customer Damage Waiver as contained in paragraph 25 of the contract form, Ellsee did not prove an affirmative misrepresentation by Trico in either of those documents.

To the extent the language of the Insurance Certificate Request may have been deceptive, or at least misleading, Trico's

use of that document must be placed in the second category of consumer fraud violations, a knowing omission of material information relevant to the transaction. To prove a violation of the CFA by means of a knowing omission, Ellsee had to prove knowing conduct by Trico with intent to deceive Ellsee. Bosland, supra, 197 N.J. at 556; Cox, supra, 138 N.J. at 18. Here, the trial judge found that Trico did not intend to mislead Ellsee. Implicit in that finding was that Trico did not intentionally fail to generate and provide a copy of its standard rental contract to Ellsee. Some unknown "glitch" in the system had caused the failure to print a written contract and its detailed provisions explaining the limitations of the insurance coverage Trico would provide.

Because those facts were found by the trial judge and are sustainable on the evidence presented, we conclude that Ellsee did not prove a CFA violation by means of a knowing omission of material information.

In its argument on appeal, Ellsee relies on the third category of consumer fraud violations, an alleged regulatory violation by Trico in failing to provide a written contract to Ellsee for the lease transaction. In response, Trico argues that the trial court's finding that it lacked intent to deceive also applies to an absence of intent to violate a regulatory

provision. A business entity, however, is strictly liable under the CFA for violating a regulation that applies to the disputed transaction. See Allen, supra, 208 N.J. at 133; Cox, supra, 138 N.J. at 18-19.

Nevertheless, in this case, Trico was not strictly liable because Ellsee failed to prove that a statute or CFA regulation was violated by Trico's failure to provide a copy of written rental contract to Ellsee. Neither party has directed us to any statute or regulation that can be interpreted as a requirement of a written contract for the rental transaction at issue in this case and that also designates a CFA violation.

Ellsee relies on N.J.S.A. 56:8-2.22, a part of the CFA, which states in relevant part:

> Copy of transaction or contract; provision to consumer
>
> It shall be an unlawful practice for a person in connection with a sale of merchandise to require or request the consumer to sign any document as evidence or acknowledgment of the sales transaction, of the existence of the sales contract, or of the discharge by the person of any obligation to the consumer specified in or arising out of the transaction or contract, unless he shall at the same time provide the consumer with a full and accurate copy of the document so presented for signature . . . . .

By its express language, this statute requires that a copy of any document evidencing a contract and signed by the consumer be

provided to the consumer. It does not require that a written contract be created. In this case, the only documents signed by Ellsee were the 2002 credit application and the January 19, 2005 Rental and Delivery Inspection Form, and Trico provided a copy of each of those documents to Ellsee. Since the court found that no standard rental contract was created or preserved, and since Ellsee did not sign any such non-existent document, a copy could not have been provided to Ellsee in compliance with the quoted statute. The statute upon which Ellsee relies to prove a CFA violation does not apply to the facts of this case.

In a footnote in its brief, Ellsee also cites the statute of frauds, N.J.S.A. 12A:2A-201, contained in New Jersey's Uniform Commercial Code (UCC) provisions applicable to leases. While that statute may affect Trico's ability to enforce alleged contract provisions that are not in writing, it does not designate a CFA violation. If deviations from the requirements of the UCC were to be automatically designated as CFA violations, the UCC would be subsumed by the CFA, and the CFA's enhanced remedies of treble damages and shifting of attorney's fees would apply to many if not virtually all UCC disputes.

We conclude that Ellsee failed to prove a violation of the CFA. Having reached that conclusion, we need not address additional issues argued on appeal concerning whether Ellsee

proved an "ascertainable loss" in accordance with N.J.S.A. 56:8-19 and the case law interpreting that element of a CFA cause of action. See, e.g., Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 473 (1988). Nor do we need to address Ellsee's argument that the CFA violation also constituted a complete defense to Trico's claim for reimbursement of the repair costs of the machine. See Scibek, supra, 339 N.J. Super. at 80-82; Huffmaster, supra, 221 N.J. Super. at 322. Finally, we need not address the parties' competing arguments about the propriety of the award of partial attorney's fees to Ellsee.

The trial court should not have awarded any money damages or attorney's fees to Ellsee on its counterclaim alleging a CFA violation. The case should have been decided as purely a contract case.

The interpretation and construction of a contract are matters of law for the court subject to plenary review on appeal. Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474 (App. Div. 2009); Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 375 (App. Div.), certif. denied, 196 N.J. 601 (2008); Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 190 (App. Div.), certif. denied, 196 N.J. 85 (2008); Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). "[U]nless the meaning is both

unclear and dependent on conflicting testimony[,]" the court interprets the terms of a contract as a matter of law. Celanese Ltd. v. Essex Cty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009). "In construing contracts the court must, if possible, ascertain and give effect to the mutual intention of the parties." Moses v. Edward H. Ellis, Inc., 4 N.J. 315, 322 (1950) (citing Fletcher v. Interstate Chem. Co., 94 N.J.L. 332 (Sup. Ct. 1920)).

In this case, the parties had an oral contract for the rental of the excavator. The dispute concerned who bore the risk of damage to the equipment. Trico claimed that Ellsee bore the risk. Ellsee claimed that it paid a fourteen percent surcharge, $210 added to the $1500 rental fee, to purchase the Physical Damage Waiver referenced in the Insurance Certificate Request it had received from Trico.

Although the contract was not created as an integrated written document, a number of documents pertinent to the transaction provided evidence of some terms of the contract. See N.J.S.A. 12A:2A-204 (evidence of formation of lease contract with some indefinite terms). The relevant documents were the 2002 application for credit with Trico signed by Joanne Seefelt (Exhibit P-5), the Rental Delivery and Inspection Form signed by Charles Elliott (Exhibit P-9), the faxed Insurance Certificate

Request received and read by Joanne Seefelt at Ellsee's office (Exhibit P-12), and Trico's first rental invoice (Exhibit P-16) dated January 24, 2005, received and honored by Joanne Seefelt when she paid the $2,066.50 fees charged for the rental.

Evidence of agreed terms of the parties' contract did not include Trico's standard rental form that was never generated as a contract for this transaction (Exhibit P-29). Thus, the Customer Damage Waiver of paragraph 25 and its exclusionary language on which Trico relied was not a term of the parties' contract. Nor did the 2002 contracts and other documents that Trico placed in evidence prove the terms of the January 2005 rental contract. The trial court was certainly correct that the rental contracts and other documents that pertained to a single previous transaction almost three years earlier did not establish a course of dealing that supplied missing terms of the 2005 contract. Cf. N.J.S.A. 12A:2A-207 (UCC provision addressing "course of performance" as an aid in interpretation of lease contracts). Finally, Trico did not prove any relevant custom or practice in the equipment rental industry that applied to the transaction in dispute.

Seefelt read the Insurance Certificate Request form and understood that it pertained to insurance coverage for the benefit of the renter. The document urged that the renter

obtain its own insurance, followed by reference to the surcharge as an alternative. As we previously quoted, the document stated: "If Physical Damage coverage is not provided by you, the rental will be surcharged 14% of the rental fee in the form of a Physical Damage Waiver." Another part of the same document stated: "A loss occasioned by damage to the equipment does not release you from the obligation to pay the amounts due under your contract." Seefelt understood these statements as referring to insurance coverage provided by Trico for damage to the equipment at a cost to the renter.

"[W]here an ambiguity exists in the contract allowing at least two reasonable alternative interpretations, the writing is strictly construed against the drafter." Driscoll Const. Co. v. N.J. Dept. of Transp., 371 N.J. Super. 304, 318 (App. Div. 2004); accord Moses, supra, 4 N.J. at 322. Here, Seefelt's understanding of the form she received by fax was reasonable, and Trico had drafted the document. Thus, the parties' contract included a physical damage waiver for which Ellsee paid $210 and which barred Trico from making a claim against Ellsee for damage to the excavator.

Since the contract terms were that Trico waived a claim for damage to the equipment, Trico's alternative argument from the common law of bailment and liability for damage to the property

of another does not apply in this case. In sum, Trico was not entitled to recover from Ellsee $9,961.50 plus pre-judgment interest as the expense of repairing the excavator.

Each party having failed to prove entitlement to recovery of damages from the other party, both Trico's complaint and Ellsee's counterclaim should have been dismissed. We reverse the judgment entered by the trial court. Upon application of either party, the trial court shall enter judgment dismissing both the complaint and the counterclaim with prejudice and with no costs.

Reversed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION