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| JACOBSEN DIAMOND CENTER, LLC, d/b/a ELITE DIAMOND CENTER, DIAMOND BY AMANDA JEWELRY, LLC d/b/a ELITE DIAMOND CENTER, and GEORGE FAHMY,<br><br>Plaintiffs,<br><br>vs.<br><br>ADT SECURITY SERVICES INC., HONEYWELL INTERNATIONAL, INC., TELULAR CORP., UNITED WIRELESS HOLDINGS, INC., a/k/a MOBITEX TECHNOLOGY, INC., LACKA SAFE CORP., a/k/a ORIGINAL SAFE & VAULT, EDAX REALTY CORP., JOSEPH WHITE CO.,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION: BERGEN COUNTY<br><br>DOCKET NO.: **BER-L-1177-12**<br><br>Civil Action<br><br>**OPINION** |

**Argued: May 23, 2014**
**Decided: June 3, 2014**
**Honorable Robert C. Wilson, J.S.C.**

Elliott Malone, Esq. (Law Offices of Elliot Malone) on behalf of the Plaintiffs, Jacobsen Diamond Center d/b/a Elite Diamond Center, Diamond by Amanda Jewelry and George Fahmy

Aaron K. Kirland, Esq. (Shook, Hardy &Bacon L.L.P.) on behalf of the Defendant Tyco Integrated Security LLC, f/k/a ADT Security Services Inc. (hereafter "Tyco")

Patrick F.X. Fitzpatrick, Esq. (McElroy, Deutsch, Mulvaney & Carpenter, LLP) on behalf of Defendant Lacka Safe Corp. (hereafter "Lacka")

## INTRODUCTION

THIS MATTER comes before the Court pursuant to a motion brought by Tyco seeking summary judgment on all claims except the breach of contract claim and limiting all recoverable damages on their breach of contract claim to $1,000.00. Plaintiffs made a cross-motion seeking

partial summary judgment against Tyco as to liability for violations of the Consumer Fraud Act. Defendant Lacka also filed a motion seeking summary judgment. Plaintiffs made a cross-motion seeking partial summary judgment against Lacka as to liability for violations of the Consumer Fraud Act.

## FACTUAL BACKGROUND

Plaintiff Elite Diamond is a jewelry store owned soley by George Fahmy which opened sometime in November of 2006 and permanently closed on February 4, 2011. Mr. Fahmy has been in the jewelry business for approximately thirty years. In September 2006 Tyco told Elite Diamond that it was going to make Elite Diamond a state of the art security monitoring system. Before installing the security system on September 8, 2006, Tyco provided Elite Diamond with a commercial sales proposal/agreements for the CCTV and security alarms system. The contracts were one page documents on 8 ½ x 14 inch paper with writing on the front and back. Mr. Fahmy signed some of the contracts but contends that he did not sign any agreements related to replacing the Velocita two-way radio and the alarm equipment. Mr. Fahmy does admit that he did not read any of the contracts before signing them as he found the contracts to be "unreadable", however, Mr. Fahmy never informed anyone from Tyco that he could not read the contracts.

The contracts contained an itemized lists of the equipment that Elite Diamond purchased. The contracts contain a provision stating:

> Customer acknowledges that: (a) ADT has explained the full range of protection, equipment, and services available to Customer; (b) additional protection over and above that provided herein is available and may be obtained from ADT at an additional cost to the Customer; and (c) Customer desires and has contracted for only the equipment and services itemized on this Agreement.

Above Mr. Fahmy's signature, the contract stated: **"ATTENTION IS DIRECTED TO THE WARRANTY, LIMIT OF LIABILITY AND OTHER CONDITIONS ON THE REVERSE SIDE."** (emphasis in original contract). The contracts also noted that, in exchange for a low-monthly monitoring fee that was not based on the value of Plaintiff's inventory, the limit to recoverable damages is $1,000:

> **IT IS UNDERSTOOD...THAT THE AMOUNT PAYABLE TO ADT HEREUNDER ARE BASED UPON THE VALUE OF THE SERVICES AND THE SCOPE OF LIABILITY AS HEREIN SET FORTH AND ARE UNRELATED TO THE VALUE OF THE CUSTOMER'S PROPERTY...THAT IF ADT SHOULD BE FOUND LIABLE FOR LOSS, DAMAGE OR INJURY DUE TO A FAILURE OF SERVICE OR EQUIPMENT IN ANY RESPECT, ITS LIABIILTY SHALL BE LIMITED TO A SUM EQUAL TO 10% OF THE ANNUAL SERVICE CHARGE OR $1,000, WHICHEVER IS GREATER, AS THE AGREED UPON DAMAGES AND NOT AS A PENALTY, AS THE EXCLUSIVE REMEDY, AND THAT THE PROVISIONS OF THIS PARAGRAPH SHALL APPLY IF LOSS, DAMAGE OR INJURY, IRRESPECTIVE OF CAUSE OR ORIGIN, RESULTS DIRECTLY OR INDIRECTLY TO PERSON OR PROPERTY FROM PERFORMANCE OR NONPERFORMANCE OF OBLIGATIONS IMPOSED BY THIS CONTRACT OR FROM NEGLIGENCE, ACTIVE OR OTHERWISE, STRICT LIABILITY, VIOLATION OF ANY APPLICABLE CONSUMER PROTECTION LAW OR ANY OTHER ALLEGED FAULT ON THE PART OF ADT ITS AGENTS OR EMPLOYEES.** (emphasis in original contract)

The contacts also provided the Plaintiffs with the option of having Tyco assume a greater amount of liability:

> **IF THE CONSUMER DESIRES ADT TO ASSUME A GREATER LIABILITY, ADT SHALL AMEND THIS AGREEMENT BY ATTACHING A RIDER SETTING FORTH THE AMOUNT OF ADDITIONAL LIABILITY AND THE ADDITIONAL AMOUNT PAYABLE BY THE CUSTOMER FOR THE ASSUMPTION BY ADT OF SUCH GREATER LIABILITY PROVIDED, HOWEVER, THAT SUCH RIDER AND ADDITIONAL OBLIGATION SHALL IN NO WAY BE INTERPRETED TO HOLD ADT AS AN INSURER.** (emphasis in original contract).

After the security system was installed on or about November 1, 2006, Plaintiffs purchased eleven safes from Defendant Lacka. Nine of the eleven safes were new safes and two were used safes. Lacka delivered and installed all of the safes by November 2, 2006. Six of the safes were installed in jewelry display islands, two safes in work stations, and three safes installed against a common wall. Lacka left all of the safes on 4" x 4" wooden planks. Plaintiffs allege that Lacka informed Mr. Fahmy that all of the safes should be left on the wooden planks. Plaintiffs contend that Lacka represented to the Plaintiffs that the safes purchased were the most secure safes available. Plaintiff George Fahmy, the owner of Elite Diamond, never sought to insure his jewelry because: (1) he stated it was not a common practice to insure jewelry inventory; (2) he decided instead to purchase an ADT security system; and (3) although he never inquired into the cost it was his belief that the insurance would be too costly.

Approximately three years after Tyco installed the security system, on May 28, 2009 Elite Diamond encountered its first incident of theft. A thief grabbed three valuable rings from Elite Diamond's countertop and fled. Mr. Fahmy and another store employee were present for the theft. Mr. Fahmy admittedly voluntarily ran out of the store after the thief but was never closer than eight to ten feet. Following this theft, on June 4, 2009 Tyco discovered that the DVR had not been recording since May 14, 2009 and therefore no video of the May 28, 2009 incident could be retrieved.

Months later on "Superbowl Sunday" which was February 7, 2010, unknown individuals broke into the Lens Crafters store adjacent to Elite Diamond. The burglars cut through the shared wall of the neighboring Lens Crafters store and removed a safe from Elite Diamond's premises. Because the safes were against the shared wall, the burglars did not enter the jewelry store and therefore the alarm system was not triggered. On February 9, 2010 Lacka delivered a pallet jack

to jack up the safes that were located on top of wooden pallets and helped Mr. Fahmy move the remaining two safes that were against the common wall into the center of the store. After relocating the safes, Mr. Fahmy kept the wooden 4" x 4" pallet blocks under the safes, so that they could be easily relocated if necessary.

Following the 2010 burglary, in April of 2010 Honeywell International Inc. (hereafter "Honeywell") notified Tyco that Velocity Wireless, which was the wireless provider for the two-way radio at Elite Diamond, would be decreasing their coverage. Tyco thereafter informed Elite Diamond that because Velocity Wireless was decreasing their coverage, the two-way radio would cease to function at some unknown point in the future. Tyco presented Elite Diamond with a proposal to install an AlarmNet-I Network Interface to replace the existing two-way radio, however, Plaintiffs refused to pay for the replacement radio because Mr. Fahmy had already paid for the old equipment in the original contract. On October 14, 2010 Tyco replaced the two-way radio with a one-way Telular TG7 backup radio at no cost to the Plaintiffs.

On February 6, 2011, almost an exact year from the prior burglary, which was again "Superbowl Sunday", unknown individuals again burglarized Elite Diamond. The hurglars pried open Elite Diamond's back door, entered the utility closet and disabled the security system. Unbeknownst to the Plaintiffs, the rear door of Elite Diamond was set on a delayed response. The burglars were provided an opportunity to spend an inordinate amount of time in the jewelry store without their presence being detected. The intruders moved two safes from the showroom into the restrooms where they were able to breach the safes using electronic cutting tools and steal the claimed high-value merchandise located inside.

As a result of the burglaries, Plaintiffs commenced this action on February 6, 2012 asserting numerous causes of action rooted in both tort and contract.

## RULE OF LAW

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under N.J.S.A. § 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on N.J.S.A. § 4:37-2(b) or N.J.S.A. § 4:40-1, or a judgment notwithstanding the verdict under N.J.S.A. § 4:40-2. Id at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of N.J.S.A. § 4:46-2." Id. at 540.

## DECISION

### A. Defendant Tyco's Summary Judgment Motion

#### a. Plaintiff's Breach of Contract Claims

The Court has determined that a valid contract existed between the Plaintiffs and Defendant Tyco and as such Defendant Tyco's liability for breach of contract claims is limited to $1,000. The Plaintiffs do not constitute ordinary consumers but are rather categorized as merchants. Elite Diamond is a sophisticated commercial entity that cannot in retrospect state that they had an unequal bargaining power. See Abel Holding Co., Inc. v. Am. Dist. Tel. Co., 138 N.J.Super. 137 (Ch. Div. 1975) aff'd, 147 N.J. Super. 263 (App. Div. 1977) (clause limiting

the liability of seller of fire alarm system was not unconscionable nor the product of unequal bargaining strength on the part of the amusement pier owner because, among other things, the owner was not prevented from bargaining for an agreement different from which it signed, was obviously unconcerned with the seller's contractual obligations other than to furnish the alarm system, never sought a better bargain, and apparently was satisfied with being paid by its insurance carrier if there was a fire). Plaintiffs insist that the contracts with Tyco are contracts of adhesion because the contract is a preprinted form with little opportunity for negotiation. To support this argument, the Plaintiffs contend that Mr. Fahmy was not afforded an opportunity to negotiate the terms of the contracts and therefore any ambiguities should be construed against Tyco. The Court finds no merit to this contention. The terms of the contracts with Tyco were clearly written in ordinary language and emphasized to draw attention to specific provisions which limit recovery and disclaim warranties. The Plaintiffs have not proffered any evidence to indicate unequal bargaining power, other than the fact that Mr. Fahmy was a sole owner of Elite Diamond. The Plaintiff Mr. Fahmy was an experienced jewelry dealer claiming an inventory of $10,000,000.00 having been stolen. There has been no showing that the Plaintiffs were precluded from negotiating a more favorable contract. Therefore, as a matter of law, the contracts between the Plaintiffs and Tyco are valid and enforceable.

Plaintiffs assert claims against Tyco for breach of contract, breach of express and implied warranties and negligent supervision. Plaintiffs maintain that as a result of Tyco's breach of contractual obligations the Plaintiffs suffered a loss in excess of $10,000,000.00. However, as stated previously the contract contained the following provision: "that if ADT should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its

liability shall be limited to a sum equal to 10% of the annual service charge or $1,000, whichever is greater...".

New Jersey courts have routinely enforced limitation of damages clauses. Foont-Freedenfeld Corp. v. Electro-Protective Corp., 314 A.2d 69, 71 (App. Div. 1973),aff'd o.b.,64 N.J. 197, 314 A.2d 68 (1974) (enforcing alarm service contract's $ 50 damages limitation). Courts in this State have recognized that, without the freedom to prudently allocate risk, the alarm service industry would collapse because the cost of service would become prohibitive and business would evaporate. *See, e.g.,* Synnex Corp. v. ADT Sec. Serv., Inc., 928 A.2d 37 (App. Div. 2007); Tessler and Son, Inc. v. Sonitrol Sec. Sys., 497 A.2d 530, 533-34 (N.J. Super. Ct. App. Div. 1985). In. Abel Holding Co., the court held that ADT's service contract which limited damages to $250 was enforceable. In reaching that conclusion, the court embarked on a thorough analysis of limitation of damages clauses and came to the conclusion that the clause was not invalid on the basis that it is against public policy. Id.138 N.J. Super. at 154.

Therefore, in conformity with New Jersey precedent, this Court has determined that Tyco's limitation of damages clause is enforceable. As such, the Plaintiffs recovery against Tyco is limited to $1,000 for any breach of contract claims.

b. Plaintiff's Negligence Claims

Plaintiffs allege claims for gross negligence and willful and wanton misconduct contending that the security systems did not detect three incidents of theft because Tyco failed to properly perform its contractual obligations. Additionally, Plaintiffs declare that Tyco's employees failed to properly perform Tyco's contractual obligations. Such claims fail because under New Jersey law unfulfilled contractual promises do not give rise to tort claims unless the breaching party owes an independent duty imposed by law. Saltiel v. GSI Consultants, Inc., 170

N.J. 297, 316-17 (2002); New Mea Construction Corp. v. Harper, 203 N.J. Super. 486, 493-94 (1985); Int'l Minerals & Mining Corp. v. Citicorp North America, Inc., 736 F.Supp. 587, 597 (D.N.J. 1990).

In this transaction, there is no discernable duty that would hold Tyco liable for gross negligence, negligent supervision or willful and wanton misconduct. The installation and monitoring of the security system were obligations that arose exclusively under the parties' contract. Any liability related to those services is at most a breach of contract claim, not an action in tort.

Furthermore, Plaintiffs brought a claim for negligent infliction of emotional distress alleging that Mr. Fahmy suffered severe emotional distress as a result of the incidents at Elite Diamond. New Jersey recognizes negligent infliction of emotional distress in only very limited circumstances. The first circumstance is if a plaintiff can demonstrate that the defendant's negligent conduct placed the plaintiff in reasonable fear of immediate personal injury, which gave rise to emotional distress that resulted in a substantial bodily injury or sickness. See Falzone v. Bush, 45 N.J. 559, 569 (1965). The other circumstance in which New Jersey recognizes such a cause of action is when the defendant's negligence caused the death of, or serious physical injury to another; the plaintiff shared a marital or intimate, familial relationship with the injured person; the plaintiff had a sensory and contemporaneous observation of the death or injury at the scene of the accident; and the plaintiff suffered severe emotional distress. Portee v. Jaffee, 84 N.J. 88, 101 (1988).

Plaintiffs allegations that Tyco's failure to properly install and monitor the alarm system does not meet either standard for asserting a negligent infliction of emotional distress claim. During the first incident in 2009 when the thief grabbed the rings and instantly fled the store, Mr.

Fahmy was admittedly never closer than eight feet. Moreover, Mr. Fahmy chose to run after the thief under his own volition. During the subsequent burglaries Mr. Fahmy was not on the premises and therefore could not have been placed in a reasonable fear of immediate personal injury. The Plaintiffs have failed to establish a prima facie case for negligent infliction of emotional distress, and as such any claim fails as a matter of law.

c. Plaintiff's Fraud Claims

Plaintiffs allege that Tyco made material misrepresentations concerning the "state of the art" security system which would meet UL and UL AA Two-Way security system standards. In other words, Plaintiffs contend that Tyco committed fraud in failing to perform what it contracted for. Fraud consists of a "material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment." Jewish Ctr. Of Sussex Cnty. v. Whale, 86 N.J. 619, 432 (1981). Fraud cannot be predicated upon statements that are promissory in nature at the time they are made and that relate to future actions. Anderson v. Modica, 4 N.J. 383, 391-92 (1950). Fraud therefore cannot be predicated upon the mere non-performance of a promise. Id. Plaintiffs' fraud claims are premised in part on what Tyco allegedly promised and failed to deliver. The Plaintiffs' contentions that Tyco made material misrepresentations by referring to the system as state of the art fail as a matter of law. Characterizing something as state of the art constitutes opinion or sales talk, which cannot support a fraud claim. Rodio v. Smith, 123 N.J. 345, 587 (1991) (find that the phrase "you're in good hands with Allstate" was nothing more than puffery). As a matter of law, the Plaintiffs have been unable to demonstrate any evidence of a material misrepresentation to support their claims of fraud.

d. Plaintiffs' Consumer Fraud Act Claims

The Consumer Fraud Act "prohibits . . . the 'act, use, or employment by any person any unconscionable commercial practice, deception, fraud . . . in connection with the sale or advertisement of any merchandise or real estate." Lee v. First Union Nat'l Bank, 199 N.J. 257 (2009) (quoting N.J.S.A. 56:8-2). The statute defines merchandise as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly, to the public for sale." N.J.S.A. 56:8-1. Where a consumer has suffered an "ascertainable loss of monies or property, real or personal" the individual is entitled to treble damages, costs and attorney's fees. N.J.S.A. 56:8-19.

Plaintiffs assert that Tyco violated the Consumer Fraud Act (hereafter "CFA") because the security system failed to properly perform during the three incidents, that Tyco replaced the backup radio with an inferior model and finally because Tyco promised Plaintiffs that they would receive a state of the art system. This states nothing more than failed contractual expectations, which does not give rise to an actionable Consumer Fraud claim. See e.g. Barry v. New Jersey Highway Authority, 245 N.J. Super. 302 (Ch. Div. 1990). Tyco's alleged violations of the CFA are rooted in the provisions memorialized in the parties contract. Plaintiffs claim is nothing more than an unmet contractual expectation. New Jersey courts routinely bar attempts to assert CFA claims for contractual disputes. Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994)("a breach of warranty, or any breach of contract, is not per se unfair or unconscionable and a breach of warranty alone does not violate a consumer protection statute").

Furthermore, not just any erroneous statement rises to the level of a misrepresentation barred by the CFA. The affirmative misrepresentation has to be one material to the transaction, which is a statement of fact, found to be false, made to induce the buyer to make the purchase.

Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504 (1996), modified on other grounds, 148 N.J. 582 (1997). As discussed previously, Tyco's representation that the system was state of the art does not constitute a material representation.

As such, the Plaintiffs have been unable to establish a prima facie case for a CFA violation. Plaintiffs CFA causes of action therefore, must be dismissed with prejudice. The Court notes that the Plaintiffs had filed a cross-motion against Tyco for partial summary judgment on their CFA claim. Based upon the foregoing, Plaintiffs' cross-motion is denied.

**B. Defendant Lacka's Motion for Summary Judgment**

a. Plaintiff's Fraud Claims

Plaintiffs assert both common law fraud and CFA claims against Lacka. Plaintiffs' claims are premised on the allegation that Lacka materially misrepresented the quality of the safes and did not properly install the safes. As discussed previously, to state a claim under the CFA, a plaintiff must allege each of three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss. New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003). Additionally to state a claim under a theory of common law fraud a plaintiff must show "material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment." Jewish Ctr. Of Sussex Cnty., 86 N.J. at 432.

Lacka contends that the CFA and common law fraud claims are subsumed by the Products Liability Act (hereafter "PLA"). A PLA action is "any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim." Sinclair

v. Merck &Co., Inc., 195 N.J. 51, 62 (2008) (citing N.J.S.A. 2A:58C-2(b)(3)(internal citations omitted)). While Lacka fervently argues that the PLA is the exclusive remedy in this case, the Court does not agree. The PLA governs product liability actions for harm suffered as a result of a manufacturing, design or warning defect. The Plaintiff does not allege that the safes themselves were defective, nor do the Plaintiffs allege that the safes caused their economic harm. Rather, Plaintiffs' contention is that because of the material misrepresentations made by Lacka and improper installation of the safes made them readily movable and consequently stolen. Lacka's argument that the PLA applies is without merit as there has been no allegation of products liability. A genuine question of material fact exists whether the verbal representations made by Lacka constitute fraud and whether those representations compound to an unconscionable business practice under the CFA. Therefore, summary judgment is inappropriate for these causes of action.

Likewise, Plaintiffs cross-motion for summary judgment on the issue of liability under the CFA must be denied. Plaintiffs have not met their burden by showing that no genuine issues of material fact exist with respect to the CFA. The allegations that Plaintiffs argue compose the unconscionable business practice are hotly contested by Lacka. These claims must be adjudicated at trial.

b. Plaintiffs' Negligence Claims

Plaintiffs allege that Lacka's conduct rises to the level of willful and wanton conduct and gross negligence. Lacka again argues that the PLA subsumes any negligence claims, however, as previously discussed this argument has been denied by the Court. In the alternative, Lacka maintains that Mr. Fahmy and Mr. Lacka have had a continuing relationship for twenty years and that representations made by Lacka were nothing more than friendly advice. That determination

is not for this Court to make on a summary judgment motion. Lacka may upon completion of Plaintiffs case move the Court pursuant to R. 4:37-2(b) for an involuntary dismissal.

Plaintiffs also allege that Lacka's negligence resulted in severe emotional distress to Mr. Fahmy, making Lacka liable under the theory of negligent infliction of emotional distress. Mr. Fahmy states that after the second burglary in 2011 he began to suffer from symptoms including arthritis, headaches, blurry vision, pressure, joint inflammation, difficulty walking, pain and difficulty sleeping. Mr. Fahmy admits that he did not seek a diagnosis from a medical doctor hut has had sessions with a Clinieal Social Worker. Mr. Fahmy also states that he has been diagnosed with various aliments including Lyme disease, Parkinson's disease and rheumatoid arthritis. As previously mentioned, the Plaintiffs have been unable to establish the requisite elements for a negligent infliction of emotional distress claim as set forth in Falzone or Portee. Mr. Fahmy was not on the premises during the last two burglaries. The only theft in which Mr. Fahmy was physical present was in 2009 when Mr. Fahmy admitted he voluntarily chased the thief but never came closer than eight feet to the Plaintiff. Plaintiffs claim under negligent infliction of emotional distress fails as a matter of law and is therefore dismissed with prejudice.

c. Plaintiffs' Breach of Implied and Express Warranty Claims

In this case, the Plaintiffs allege that Lacka provided warranties to the Plaintiffs relative to the safes and that the Plaintiffs relied upon these warranties when they decided to purchase the safes. The Court notes that unlike co-Defendant Tyco, Lacka never had a contract with Plaintiffs. Therefore, there was no written disclaimer for any warranties. An implied warranty of fitness for a particular purpose is governed by N.J.S.A. 12A:2-315 which finds that every contract for the sale of goods entered into by "a merchant with respect to goods of that kind" includes an implied warranty that the goods "are fit for the ordinary purposes for which such

goods are used." See Herbstman v. Eastman Kodak Co., 68 N.J. 1, 8, 342 A.2d 181 (1975). These implied warranties are to be construed liberally. As a counterbalance, to the liberal construction of implied warranties, manufacturers are able to limit their liability through disclaimers, except for personal injuries. N.J.S.A. 12A:2-316. Further, the U.C.C. allows parties to modify or limit damages by agreement. N.J.S.A. 12A:2-719. The Plaintiffs contention is that the safes delivered and installed by Lacka were not "fit for the ordinary purpose for which such goods are used." Lacka has been unable to defeat that argument. There was no contract between the parties so no disclaimer exists that would limit Lacka's liability. A genuine issue exists as to whether Lacka's safes breached the implied warranty of fitness for a particular purpose.

To succeed on a cause of action for breach of an express warranty the Plaintiffs must show that Lacka made an affirmation, promise or description about the property; that this affirmation, promise or description became part of the basis of the bargain for the product; and that the product ultimately did not conform to the affirmation, promise or description. Alloway v. Gen. Marine Indus., 149 N.J. 620 (1997). Plaintiffs' Complaint alleges that Lacka breached its express warranty because Plaintiffs relied upon the express warranties of Lacka that the safes purchased were suitable for use for their intended purpose and the safes did not live up to those expectations. A genuine issue of material fact exists as to whether Lacka made various affirmations about the quality of the safes to the Plaintiffs. Therefore, Lacka cannot succeed on summary judgment grounds on this cause of action, however, as previously noted Lacka may bring a motion for an involuntary dismissal on these causes of action at the time of trial.

## CONCLUSION

Based on the foregoing, Plaintiffs cross-motions against both Tyco and Lacka are DENIED. Tyco's motion for summary judgment is GRANTED IN PART, Tyco's liability for breach of contract claims is limited to $1,000. All additional claims against Tyco are hereby dismissed with prejudice. Lacka's motion for summary judgment is GRANTED IN PART. Plaintiffs' negligent infliction of emotional distress claim against Lacka is hereby dismissed with prejudice. Any additional claims that Plaintiffs asserted against Lacka contain genuine issues of material fact and will be adjudicated at trial.

**HON. ROBERT C. WILSON**