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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MGM EQUIPMENT LEASING COMPANY, LLC, et al., Plaintiffs, Appellants, and Respondents, v. VERMEER MANUFACTURING COMPANY, Defendant, Appellant and Respondent; VERMEER PACIFIC, LLC, Defendant and Respondent.	B239253 (consolidated with B240954 & B242000) (Los Angeles County Super. Ct. No. BC403095 c/w BC409424)
RDO EQUIPMENT CO., Plaintiff and Respondent, v. MGM EQUIPMENT LEASING COMPANY, LLC, et al. Defendants and Appellants.	B239253 (consolidated with B240954 & B242000) (Los Angeles County Super. Ct. No. BC409424 c/w BC403095)

APPEAL from judgments of the Superior Court of Los Angeles County. Kevin C. Brazile, Judge. Affirmed in part; reversed in part.

The Altman Law Group, Bryan C. Altman, Michael T. Smith and Joel E. Elkins for Plaintiffs, Appellants and Respondents MGM Equipment Leasing Company, LLC, et al.

Bowman and Brooke LLP, Anthony S. Thomas and Robert S. Robinson for Defendant, Appellant and Respondent Vermeer Manufacturing Company.

Robert F. Schauer for Defendant and Respondent Vermeer Pacific, LLC and Plaintiff and Respondent RDO Equipment Co.

Plaintiff brought an action for breach of contract, breach of warranty and various torts arising out of its purchase of a machine for use in mining gypsum. The defendants are the manufacturer and seller of the machine. A third party sued the plaintiff for the unpaid balance on the loan plaintiff used to purchase the machine. The trial court dismissed by way of summary adjudication and nonsuit all of plaintiff's claims against defendants except for its cause of action for breach of express warranty against the manufacturer. The jury returned a verdict for plaintiff on that cause of action and on the third party's suit for payment of the balance due on the purchase contract. The trial court granted the third party's motion for judgment notwithstanding the verdict. The court denied plaintiff's motion for attorney fees and granted the motion for attorney fees by the third party claimant.

We affirm the judgment in favor of the plaintiff against the manufacturer for breach of express warranty, but we reduce the award of damages. We otherwise affirm the judgment in favor of the manufacturer, as well as the order denying the plaintiff attorney fees against the manufacturer.

We affirm the judgment for the seller in all respects.

We reverse the judgment and the order granting judgment notwithstanding the verdict in favor of the third party against the plaintiff on the note and security agreement, and we direct the court on remand to grant the third party's motion for new trial.

FACTS AND PROCEEDINGS BELOW

The plaintiff in this action, MGM Equipment Leasing Company (MGM), owns and operates a gypsum mine in Blythe, California known as the Standard Mine.

Defendant Vermeer Manufacturing Company (VMC) produces the Vermeer T1255 All-Terrain Leveler (the Leveler) for use in mining gypsum.

Defendant Vermeer Pacific (VP) sold the Leveler to MGM and instructed MGM's employees on the machine's use and maintenance.

MGM alleged that the Leveler did not produce the amount of gypsum promised by VMC and VP and that defendants breached their warranties on the machine and intentionally or negligently misrepresented the production capabilities of the machine when used at the Standard Mine.

MGM sought damages consisting of the out-of-pocket expenses it incurred in repairing the Leveler, the diminution in value of its business caused by the Leveler's defects, consequential damages including lost profits and increased costs, punitive damages and attorney fees.

RDO Equipment Company (RDO), which held MGM's promissory note on the Leveler, sued MGM for damages for breach of the note, enforcement of the security agreement and related relief. MGM cross-complained against RDO for breach of contract, breach of warranties, various torts and rescission.

The trial court granted judgment to VMC and VP on all of MGM's causes of action except the cause of action for breach of express warranty against VMC.[1] A jury returned verdicts in favor of MGM on that cause of action, against RDO on its suit for payment under the promissory note and against VP on its cross-complaint for the cost of repairs to the machine. The trial court granted RDO's motion for judgment notwithstanding the verdict. It denied MGM's motion for attorney fees and granted RDO's.

MGM and VMC appeal.

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[1] MGM does not challenge the judgment for VP on the cause of action for breach of express warranty.

DISCUSSION

I. MGM'S APPEAL

A. MGM v. VMC

1. Grounds For Nonsuit

After the presentation of evidence the trial court granted VMC's motion for nonsuit on MGM's causes of action for intentional and negligent misrepresentation, breach of implied warranty and unfair business practices.

A motion for nonsuit tests the legal sufficiency of a plaintiff's evidence, operating, in effect, as a demurrer to the evidence. The motion lies when the plaintiff's evidence, taken as true and construed most strongly in favor of the plaintiff, is not sufficient to entitle the plaintiff to relief under any applicable theory. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214-1215.)

"'A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] "In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give 'to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor.'" [Citation.] A mere "scintilla of evidence" does not create a conflict for the jury's resolution; "there must be substantial evidence to create the necessary conflict." . . .'." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc* (2002) 95 Cal.App.4th 709, 717.)

Because a nonsuit deprives the plaintiff of the right to have a claim determined by a jury, California courts traditionally have taken a very restrictive view of the circumstances under which a nonsuit motion is properly granted (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838.) Nonetheless, in a proper case the court has the duty to forestall the cost and delay of further proceedings by granting a defendant's motion for nonsuit. (*O'Keefe v. South End Rowing Club* (1966) 64 Cal.2d 729, 746.)

Where, as here, a nonsuit is granted after the plaintiff's presentation of evidence, it will be upheld only when no evidence of sufficient substantiality exists to support a verdict for plaintiff. (*Carson v. Facilities Development Co., supra,* 36 Cal.3d at pp. 838-839.) In making that determination the court may not weigh the evidence or judge the credibility of witnesses and must accept as true all evidence favorable to the plaintiff. (*Ibid.*)

2. Nonsuit For VMC On MGM's Causes Of Action For Fraud and Negligent Misrepresentation[2]

The gist of MGM's suit is that the defendants intentionally or negligently misrepresented the amount of gypsum the Leveler would produce from the Standard Mine.

MGM argues that the "production estimates are attributable to VMC." (Initial capitals, bold and underlining omitted.) That is, MGM contends that certain production estimates conveyed to MGM by an employee of VP are attributable to VMC, which was their ultimate source. We are not persuaded.

In support of this argument, MGM cites eight pages of the reporter's transcript. The transcribed testimony reflects the following facts: Mike Selvaggio of VP called Dean Whitten of VMC and "asked for production rates or estimates in gypsum" for the Leveler. It is unclear whether at that time Whitten knew that the request pertained to MGM, but we will assume that he did. Whitten told Selvaggio that Selvaggio could generate those rates himself with software created by VMC and using the "defaults" in the program. Whitten testified that at that time he did not know that VMC had received rock samples from the Standard Mine, and MGM cites no evidence to the contrary. Selvaggio told Whitten that he needed the estimates over the phone because he did not have his computer with him. So Whitten gave Selvaggio the requested estimates, using the defaults in the software, which were derived from a different mine.

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[2] We separately consider the trial court's order granting VP's motion for summary adjudication on these misrepresentation causes of action. (See discussion *post,* at p. 10.)

The cited evidence is not sufficient to create a disputed issue of material fact as to whether the (allegedly) misleading production estimates are attributable to VMC. The cited evidence shows that Whitten gave Selvaggio exactly what Selvaggio asked for, and the cited evidence has no tendency to show that Whitten had any reason to believe that the estimates would be presented in a misleading manner to MGM. We therefore reject MGM's contention that VP's (allegedly) misleading production estimates are attributable to VMC. That is a sufficient basis to affirm the nonsuit in favor of VMC on the fraud and negligent misrepresentation causes of action. We consequently need not address MGM's other arguments concerning those causes of action, because if the allegedly misleading statements are not attributable to VMC, then VMC cannot be held liable for fraud or negligent misrepresentation on the basis of those statements.

3. Nonsuit For VMC On MGM's Cause Of Action For Breach Of Implied Warranty.

MGM's complaint alleged that defendants breached the implied warranty of fitness (Cal. U. Com. Code, §§ 2314, et seq.) because the Leveler did not produce according to the promises and specifications provided by defendants and defendants did not and could not provide proper maintenance for the Leveler.

The court granted VMC's motion for nonsuit on MGM's cause of action for breach of implied warranty on the ground that by agreeing to VMC's express limited warranty MGM waived the implied warranty as a matter of law. MGM argues that the court thereby erred. We are not persuaded.

VMC's limited warranty on the Leveler appears on the second page of a document called Industrial Equipment Registration (IER) signed by MGM's representative several weeks after he signed the purchase order for the machine. The warranty contains the following provision.

> "**EXCLUSIONS OF WARRANTIES: EXCEPT FOR THE WARRANTIES EXPRESSLY AND SPECIFICALLY MADE HEREIN, VERMEER MAKES NO OTHER WARRANTIES, AND ANY POSSIBLE LIABILITY OF VERMEER HEREINUNDER IS IN LIEU OF ALL OTHER**

WARRANTIES, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. . . . NO PERSON IS AUTHORIZED TO GIVE ANY OTHER WARRANTY, OR TO ASSUME ANY ADDITIONAL OBLIGATION ON VERMEER'S BEHALF."

The limited warranty further states: "**NO DEALER WARRANTY:** The selling dealer makes no warranty of its own and the dealer has no authority to make any representation or promise on behalf of Vermeer or to modify the terms or limitations of this warranty in any way."

MGM first argues that the waivers of implied warranties are invalid because they were procured by fraud, namely, the same alleged misrepresentations underlying the fraud and negligent misrepresentation claims. We have already concluded that the trial court properly granted nonsuit on those claims as to VMC, so we reject that basis for invalidating the implied warranty waivers. In addition, MGM never explains how it relied on the production estimates in signing the IER or was otherwise defrauded into signing the IER, which was executed more than one week after the purchase order.

Second, MGM argues that the implied warranty waivers are ineffective because they took place after the sale and "were never made part of the bargain." (Bold omitted.) The parties disagree about when the sale took place (the signing of the purchase order or the transfer of title), but even if we assume, with MGM, that MGM executed the IER post-sale, MGM's argument is still not persuasive. The argument is based on *Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, but that case involved an implied warranty waiver on a document that was "not shown to" or even "delivered to" the buyer "at any time." (*Id.* at p. 19.) Here, the IER was delivered to MGM and signed by Mike Galam, an MGM officer. In addition, although the case law appears to support the reasonable proposition that an implied warranty waiver cannot be *unilaterally* imposed postsale, by statute the parties to a sales transaction can agree to modify the sales contract without new consideration. (Cal. U. Com. Code, § 2209, subd. (1).) That is what the parties did when VMC offered the IER and MGM accepted it (as evidenced by Galam's

signature)—they modified the original sales contract by excluding implied warranties but including the express warranty stated in the IER. Moreover, the modification did include consideration for the implied warranty waivers. The consideration was the express warranty.[3]

Third, MGM argues that the implied warranty waivers were insufficiently conspicuous and also conflicted with the express warranties. Again, we are not persuaded. The implied warranty waivers were in boldface and block capitals, on the second page of a two-page document that contained almost no other text that was emphasized in that manner. As for the putative conflict between the implied warranty waivers and the express warranties, MGM litigated its express warranty claim to judgment and prevailed, and MGM does not identify any way in which its litigation of the express warranty claim was curtailed by the trial court's recognition of the validity of the implied warranty waivers. Thus, insofar as there was any conflict or inconsistency, MGM has not shown that it was of any consequence to MGM's vindication of its express warranty rights, and MGM cites no authority for the proposition that a conflict or inconsistency operates to invalidate the implied warranty waivers in their entirety. We are aware of none.

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[3] MGM also argues that the IER must be invalid in its entirety because the IER itself states that it "must be completely filled out (in English), signed and returned within 10 days of the date of delivery," and it was not. We are not persuaded. Given that VMC did not provide the IER to MGM until more than 10 days after delivery of the Leveler, VMC implicitly waived or withdrew that term, and MGM implicitly agreed to that by signing the IER. In addition, VMC raises a point that MGM never addresses and that cuts across all of MGM's attempts to invalidate the IER in its entirety (i.e., it was procured by fraud, it was post-sale, and it was signed more than 10 days after delivery): MGM brought an express warranty claim, on which MGM prevailed at trial, and on this appeal MGM is seeking to preserve the favorable judgment on that claim. But MGM's express warranty claim is based at least in part on the express warranty in the IER. MGM does not explain how the IER could be invalid in its entirety but still serve as the basis for the money judgment in MGM's favor. Given that MGM has prevailed on its express warranty claim based (at least in part) on the IER, MGM is judicially estopped to argue that the IER is invalid in its entirety. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.)

For all of these reasons, we reject MGM's contention that the trial court erred by granting nonsuit on the implied warranty claims.[4]

4. Nonsuit For VMC On MGM's Cause Of Action For Unfair Business Practices

The trial court granted nonsuit to VMC on MGM's cause of action for unfair business practices. MGM argues that because nonsuit was improperly granted on the fraud, negligent misrepresentation, and implied warranty claims, the nonsuit on the unfair business practices claim should be reversed as well. Because we affirm as to the former claims, however, we affirm as to the unfair business practices claim as well.

5. MGM's Entitlement To Consequential Damages Including Lost Profits

The trial court held that MGM's damages against VMC were limited by the provisions of the IER signed by MGM's representative. That form states on the back side: "Vermeer shall not be liable to any person under any circumstances for any incidental or consequential damages (including, but not limited to, loss of profits, out of service time) occurring for any reason at any time." Furthermore, "In no event shall Vermeer's liability exceed the purchase price of the product."

Section 2719, subdivision (3) of the California Uniform Commercial Code states: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." The trial court found that the limitation on lost profits in the IER was not unconscionable and MGM does not dispute this finding on appeal.

6. MGM's Motion For Attorney Fees Against VMC

MGM contends that as the prevailing party on the breach of express warranty cause of action it is entitled to attorney fees from VMC based on Civil Code section 1717, subdivision (a)'s cross-entitlement provision. That section states in relevant part: "In any action on a contract, where the contract specifically provides that

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[4] MGM also argues on the basis of cases involving adhesion contracts between parties of unequal bargaining power that the implied warranty waivers are unenforceable. MGM cites no evidence that VMC had superior bargaining power, however, so those cases are distinguishable.

attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

As the source of its entitlement to attorney fees MGM relies on paragraph 15 of a "Note and Security Agreement" (referred to as "Exhibit A"), a personal "Unlimited Guaranty" (referred to as "Exhibit B") given by Galam for the benefit of the company financing the purchase of the Leveler and a "Corporate Guaranty" (referred to as "Exhibit C") given by Sun Services, Inc. for the benefit of the financing company.

None of these agreements entitles MGM to attorney fees against VMC.

The attorney fees provision in Exhibit A only applies to arbitrations or suits to enforce arbitration. The attorney fees provisions in Exhibits B and C do not apply because neither Galam nor Sun Services was a party to this lawsuit. MGM therefore cannot stand in their shoes to recover attorney fees against VMC under section 1717, which refers to "the *party* who is determined to be the *party* prevailing on the contract." (Italics added.) For the same reason, the attorney fees provisions in Exhibits B and C cannot be "construed together" with VMC's express warranty, which does not contain an attorney fees clause.

B. MGM v. VP

1. Summary Adjudication For VP On MGM's Causes Of Action For Fraud and Negligent Misrepresentation

The trial court granted VP's motion for summary adjudication on MGM's causes of action for intentional and negligent misrepresentation. On appeal, MGM cites evidence introduced *at trial* that might have raised a disputed issue of fact about Selvaggio's knowledge regarding the estimates of the Leveler's gypsum production. That evidence was not, however, introduced in opposition to VP's summary adjudication motion. MGM cites no evidence introduced before the ruling on the motion that would have created a disputed issue of material fact. We accordingly must affirm the order granting the motion.

2. Nonsuit For VP On MGM's Cause Of Action For Breach Of Contract

MGM alleged a cause of action for breach of contract against VP only based on its failure to deliver "the quality of product agreed to between the parties" and "failing to perform the requested repairs and/or replace defective parts as promised." The trial court granted VP's motion for nonsuit. We affirm.

Nothing in the sales contract between MGM and VP makes reference to the quality of the Leveler or to its repairs or replacement parts. MGM confuses an action for breach of a warranty that is part of a contract with a fraudulent or negligent misrepresentation made as an inducement to enter into the contract. (See *Rutherford v. Standard Engineering Corp.* (1948) 88 Cal.App.2d 554, 565.) (We discuss the causes of action against VP for breach of warranty in the next paragraph and for misrepresentation. (See discussion *ante*, at pp. 5-6.)

3. Nonsuit For VP On MGM's Cause Of Action For Breach Of Implied Warranty

The court granted VP's motion for nonsuit on the cause of action for breach of implied warranty for the same reason it granted VMC's motion: that VMC's express limited warranty disclaimed the implied warranty as a matter of law. We affirm the nonsuit for VP for the same reasons we affirm it as to VMC. (See discussion *ante*, pp. 6-9.)

4. Nonsuit For VP On MGM's Cause Of Action For Unfair Business Practices

As with VMC, because we affirm the summary adjudication in favor of VP on the causes of action for fraud, negligent misrepresentation, and breach of implied warranties, we affirm the nonsuit in favor of VP on the cause of action for unfair business practices.

C. RDO v. MGM

1. JNOV to RDO

To finance its purchase of the Leveler, MGM entered into a note and security agreement with General Electric Capital Corporation (GE). After its dispute with VMC and VP arose, MGM quit making payments on the note, and GE assigned the note and security agreement to RDO, which brought suit against MGM for the balance due on the note.

At the trial of RDO's action against MGM, the jury returned a special verdict in favor of MGM. The special verdict form asked the jury to first answer the question: "Did RDO and MGM enter into a contract?" The form instructed the jury that if it answered no to this question "stop here, answer no further questions and have the presiding juror sign and date this form." The jury answered "no" and therefore did not answer the remaining questions on the verdict form which, among other things, asked whether the conditions for MGM's performance occurred, whether MGM breached the contract and, if so, the amount of RDO's damages.

RDO moved for a new trial and for judgment notwithstanding the verdict. The court granted the latter.

The court found as to both motions that "the evidence at trial clearly demonstrated that a contract existed between the parties following the assignment by GE to RDO." The uncontradicted evidence at trial showed that MGM borrowed the purchase price for the Leveler from GE and gave GE a note and security agreement in return. The evidence was also undisputed that GE assigned the note and security agreement to RDO. Furthermore, the jury was instructed as a matter of law that: "RDO was not a party to the original contract. However, it may bring a claim of breach of contract because GE Capital transferred the rights under the contract to RDO." In light of that instruction the jury's answer to the first question on the special verdict form was against the law and the evidence, entitling RDO to a new trial. (Code Civ. Proc., § 657, subd. (6).) We conclude that a new trial rather than JNOV is the proper remedy here because, as we explained above, factual questions regarding breach of the contract and damages remain to be

decided by a trier of fact.[5] "Even though a court, under the evidence presented in a case, might be justified in granting a new trial, it would not necessarily be justified, under the same evidence, in granting a motion for judgment notwithstanding the verdict." (*Palmer v. Agid* (1959) 171 Cal.App.2d 271, 275-276.)

We will therefore reverse the judgment for RDO and direct the trial court on remand to deny RDO's motion for judgment notwithstanding the verdict and to grant its motion for a new trial.

2. Attorney Fees

Because we have reversed the JNOV for RDO on the note and security agreement, RDO is not, as yet, entitled to attorney fees under those agreements. The order for attorney fees is therefore reversed, but RDO may file a new application for an award of attorney fees if RDO prevails upon retrial.

II. VMC'S APPEAL

The jury returned a verdict for MGM in the amount of $1,375,913.89 on its cause of action against VMC for breach of express warranty. VMC contends that the verdict is not supported by substantial evidence. We affirm the judgment as to liability but modify the award of damages.

A. Evidence Of Breach Of Express Warranty

VMC provided MGM with a "limited warranty" contained on the back page of the IER. The first sentence of the warranty states that VMC warrants the Leveler "to be free from defects in material and workmanship, under normal use and service for one (1) full year after initial purchase/retail sale or 1000 operating hours, whichever occurs first."

The evidence showed that from day one the Leveler failed to perform its function of producing gypsum at the Standard Mine and that although VMC made repairs on the machine the same problems kept recurring and new problems developed throughout

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[5] At oral argument, RDO contended that the JNOV was entered in an amount that gave MGM the benefit of the doubt on all issues that might affect the amount of damages, so no new trial is necessary. We have reviewed the record and conclude that it does not support RDO's argument.

the warranty period. (If the Leveler had been a car it would have qualified as a "lemon." Civ. Code, §§ 1793.2, 1793.22.)

The jury could reasonably conclude from the evidence that the Leveler was not only not "free from defects in material and workmanship" but that its defects were so serious they could not be corrected within the warranty period.

B. Evidence Of Damages

The court instructed the jury under CACI 350 that if it found MGM had proved its claim against VMC for breach of express warranty it should award MGM the amount of damages that would "put MGM Equipment Leasing in as good a position as it would have been if [VMC] had performed as promised."[6] This instruction must be read and considered together with other instructions on the breach of express warranty cause of action. (*Daun v. Truax* (1961) 56 Cal.2d 647, 655.) The jury was told that MGM "claims that [VMC] breached the express warranty agreement of this contract by not adequately repairing the [Leveler] as required by the express warranty" and "also claims that [VMC's] breach of the express warranty caused harm to MGM[.]" A further instruction told the jury that MGM "claims damages for costs it incurred to repair and maintain the [Leveler]."

Taken together those instructions told the jury that if it found for MGM on the express warranty claim it should calculate MGM's damages based on the costs of the repairs MGM had to shoulder as a result of VMC's breach.

VMC argues that the jury's award must be reversed for three reasons. (1) VMC's limited warranty explicitly excluded "incidental or consequential damages" such as cost-of-repair damages. (2) The proper measure of damages would be "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted" (U. Cal. Com. Code, § 2714, subd. (2)) but MGM introduced no evidence of this element of damage. And, (3), the

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[6] VMC argues that the court erred in giving this instruction, but it waived any error by affirmatively stating that it did not object to it. (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 857.)

special verdict form told the jury to award damages based on either diminution in value *or* MGM's reasonable costs of repair, but the jury awarded both.[7]

1. Damages based on reasonable cost of repairs

VMC argues that MGM is not entitled to damages based on its cost of repairing the Leveler because VMC's warranty excluded "consequential damages." We are not persuaded.

VMC's argument depends upon the proposition that MGM's repair costs constitute consequential damages, but the authorities that VMC cites do not support that proposition. First, VMC purports to quote a comment to section 2715 of the Commercial Code for the claim that consequential damages include "'recovery of damages for time and money spent in efforts to make goods conform to warranty under which they were sold.'" But no comment to section 2715 of the Commercial Code contains the quoted language. Indeed, we have been unable to find the quotation anywhere in the Commercial Code. Second, VMC contends that the comment to section 2715 cites *Roberts Distrib. Co. v. Kaye-Halbert Corp.* (1954) 126 Cal.App.2d 664 as support for the (purportedly) quoted language. But the Commercial Code cites that case only once, and not in connection with any issue concerning consequential damages. (See Cal. U. Com. Code, § 2316.) Indeed, the phrase "consequential damages" does not appear anywhere in *Roberts Distrib. Co. v. Kaye-Halbert Corp.* Third and finally, VMC cites *Artukovich v. Pacific States etc. Pipe Co.* (1947) 78 Cal.App.2d 1 for the proposition that a "consequential damages disclaimer" bars liability for repair costs. But the contract in that case expressly prohibited recovery of "'charges for labor or expense required to repair defective material or for any consequential damages.'" (*Artukovich*, *supra*, 78 Cal.App.2d at p. 4, italics omitted.) Thus, the contract explicitly excluded recovery of repair costs, and the case says nothing about whether repair costs constitute consequential damages.

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[7] We need not address this issue because, as we explain below, there was insufficient evidence of diminution of value.

For all of the foregoing reasons, we conclude that VMC has failed to support its contention that MGM's repair costs constituted consequential damages.

2. Damages based on diminution of value.

VMC contends and MGM does not dispute that there is no substantial evidence to support an award for diminution in value.[8] Accordingly, we reduce the judgment for MGM on its breach of express warranty cause of action to $453,440, the amount supported by the evidence as cost of repairs. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 535.)

III. SUMMARY OF OUR DECISION

(1) The nonsuits for VMC on MGM's causes of action for fraud and negligent misrepresentation are affirmed.

(2) The nonsuit for VMC on MGM's cause of action for breach of implied warranty is affirmed.

(3) The nonsuit for VMC on MGM's cause of action for unfair business practices is affirmed.

(4) The judgment for MGM against VMC for breach of express warranty is modified to reduce the award of damages to $453,440 and affirmed as modified.

(5) The order denying MGM's motion for attorney fees against VMC is affirmed.

(6) The nonsuit for VP on MGM's cause of action for breach of contract is affirmed.

(7) The summary adjudications for VP on MGM's causes of action for intentional and negligent misrepresentation are affirmed.

(8) The nonsuit for VP on MGM's cause of action for breach of express warranty is affirmed.

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[8] MGM only repeats its argument that it was entitled to damages for lost profits. We have rejected that argument. (See discussion *ante*, at p. 9.)

(9) The nonsuit for VP on MGM's cause of action for breach of implied warranty is affirmed.

(10) The nonsuit for VP on MGM's cause of action for unfair business practices is affirmed.

(11) The judgment and award of attorney fees for RDO against MGM is reversed with directions to grant a new trial.

DISPOSITION

In the suit by MGM against VMC the judgment is affirmed but the award of damages is reduced to $453,440. The order denying MGM's motion for attorney fees against VMC is affirmed.

In the suit by MGM against VP the judgment is affirmed.

In the suit by RDO against MGM the judgment for RDO is reversed and on remand the trial court is directed to deny RDO's motion for judgment notwithstanding the verdict and to grant its motion for a new trial.

Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.