IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JAYDEN JOHNSON,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 20-1192-KGG
	)	
ABRAHAM PETERS,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM & ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

Now before the Court is Plaintiff's Motion for Partial Summary Judgment wherein Plaintiff asks the Court to grant partial summary judgment in favor of Plaintiff against Defendant as to liability for breach of contract/warranty. (Doc. 28.) This would, according to Plaintiff, leave for trial the determination of (i) Plaintiff's fraud claim, (ii) the amount of damages incurred by Plaintiff, and (iii) punitive damages. (*Id*.) For the reasons set forth below, Plaintiff's motion is **DENIED**.

FACTUAL BACKGROUND

In his motion, Plaintiff provides the following introduction to the facts of this case:

> [i]n February 2020, [Plaintiff] contacted Defendant regarding the sale of a 2007 Peterbilt 379 truck (the 'Truck') that Defendant advertised as having a 'completely rebuilt motor.' After Defendant made

> additional representations about the condition of the Truck and promised to furnish documentation in support thereof, [Plaintiff] agreed to purchase the Truck from the Defendant. Shortly thereafter, it became apparent that Defendant had falsely misrepresented the condition of the Truck to [Plaintiff] in order to induce the sale. [Plaintiff] filed this lawsuit seeking relief for Defendant's breach of contract/warranty and fraudulent misrepresentations.

(Doc. 28, at 1-2.)

For purposes of this Order, however, the following facts are uncontested.[1] Defendant's son is Billy Peters, who works for Defendant. Billy Peters' phone number is 620-510-2323. Defendant uses Billy Peters' Facebook account to market and sell trucks for sale by Defendant. Defendant's phone number is 620-640-0320.[2]

The following statements from conversations between Plaintiff and Defendant are also uncontested. Plaintiff explained to Defendant that Plaintiff was going to use the truck at issue for the commercial transportation of livestock. Defendant told Johnson that the truck's engine had recently been rebuilt when, in fact, the truck's engine had not been rebuilt. Defendant told Johnson that the truck had less than 150,000 miles on the rebuilt engine. Plaintiff asked Defendant for

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[1] After Defendant failed to respond to Plaintiff's discovery requests, the Court granted Plaintiff's Motion to Compel (Doc. 19) and ordered, in part, that Plaintiff's Requests for Admission be "deemed admitted." (Doc. 23, at 2; *see also* Doc. 28-2 (Requests for Admissions that were deemed admitted).)

[2] This is the phone number that appeared in the Facebook advertisement for the truck at issue, which was posted by Defendant's son, Billy Peters. (*See* Doc. 28, at 2.)

the paperwork on the rebuilt engine and Defendant promised he would get Plaintiff that paperwork.

While the facts in the two preceding paragraphs are uncontested as a result of Defendant's failure to respond to Plaintiff's Requests for Admissions, several key facts remain at issue. For instance, the Requests for Admissions do not establish ***when*** the summarized conversations occurred. To the contrary, whether these conversations occurred prior to the sale of the truck or after the sale had been finalized remains squarely at issue between the parties. (*See* Doc. 38, at 6 wherein Defendant contends that the statements "all occurred … after the Plaintiff agreed to purchase of the truck and wired $58,000.")

Further, Defendant has never admitted, nor has it properly been established by Plaintiff, that the specific advertisement for the truck at issue was run by Defendant. Rather, the Requests for Admission only establish that Defendant did generally use his son's Facebook account to market and sell trucks, while not establishing that Defendant ran the advertisement for this specific truck. (*See* Doc. 28-2, at 6.)

LEGAL STANDARD

The rules applicable to summary judgment are well-established and are only briefly outlined here. Federal Rule of Civil Procedure 56(c) directs the entry of summary judgment in favor of a party who "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Fed.R.Civ.P. 56(c). A fact is "material" when it is essential to the claim, and issues of fact are "genuine" if the proffered evidence permits a reasonable jury to decide the issue in either party's favor. ***Haynes v. Level 3 Commc'ns, LLC***, 456 F.3d 1215, 1219 (10th Cir. 2006).

When presented with a motion for summary judgment, the Court must decide "whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). If so, the Court cannot grant summary judgment. ***Prenalta Corp. v. Colo. Interstate Gas Co.***, 944 F.2d 677, 684 (10th Cir. 1991).

The initial burden of proof rests with the movant, who must show the lack of evidence on an essential element of the claim. ***Thom v. Bristol-Myers Squibb Co.***, 353 F.3d 848, 851 (10th Cir. 2003) (citing ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23, 325 (1986)). If the initial burden is carried by the movant, the responding may not simply rest on its pleading but must instead set forth specific facts that would be admissible in the event of trial from which a rational trier of fact could find for the nonmovant. *Id*. (citing Fed.R.Civ.P. 56(e).)

Such facts must be clearly identified through affidavits, deposition transcripts, or incorporated exhibits; conclusory allegations alone will not survive a motion for summary judgment. ***Mitchell v. City of Moore***, 218 F.3d 1190, 1197 (10th Cir. 2000) (citing ***Adler v. Wal-Mart Stores, Inc.***, 144 F.3d 664, 671 (10th Cir. 1998)). All evidence and reasonable inferences will be viewed by the Court in the light most favorable to the party opposing summary judgment. ***LifeWise***

Master Funding v. Telebank, 374 F.3d 917, 927 (10th Cir. 2004). The Court will not "evaluate the credibility of witnesses in deciding a motion for summary judgment." ***Seamons v. Snow***, 206 F.3d 1021, 1026 (10th Cir.2000); ***Zia Trust Co. ex rel. Causey v. Montoya***, 597 F.3d 1150, n.2 (10th Cir. 2010).

ANALYSIS

A. Elements of Cause of Action for Breach of Contract/Warranty.

The elements for a claim for breach of contract under Kansas law are:

> (1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach.

Lawson v. Spirit Aerosystems, Inc., No. 18-1100-EFM, 2021 WL 1516448, at *10 (D. Kan. April 16, 2021) (quoting ***Madison, Inc. v. W. Plains Reg'l Hosp.***, 17-1121-EFM-GLR, 2018 WL 928822, at *4 (D. Kan. 2018) (citation omitted)). Plaintiff bears the burden of proof for each of the elements of his claim. ***Van Brunt v. Jackson***, 212 Kan. 621, 512 P.2d 517, 520 (1973).

Under Kansas law, the seller creates an express warranty in the following circumstances:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

K.S.A. § 84-2-313(1)(a), (b).[3] An express warranty may be created without the use of formal words such as "warrant" or "guarantee." ***Brown v. Monsanto Co.***, ___ F. Supp. 3d ___, Case No. 19-1228-EFM-JPO, 2020 WL 1904022, at *2 (D. Kan. April 17, 2020) (citing K.S.A. § 84-2-313(2)). An express warranty may be created even without a specific intent by the seller to make a warranty. *Id*.

Even so, "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." *Id.* Further, "for there to be an express warranty there must be an explicit statement, written or oral, by the party to be bound **prior to or contemporaneous with the execution of the contract**." *Id*. (citing ***Corral v. Rollins Protective Servs. Co.***, 240 Kan. 678, 732 P.2d 1260, 1266 (1987) (emphasis in ***Brown***). In other words, this statement must be "'part of the basis of

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[3] Courts frequently dismiss either the breach of contract claim or the breach of warranty claim when filed contemporaneously because the claims are considered duplicative or redundant. ***Genesis Health Clubs, Inc. v. LED Solar & Light Co.***, 639 Fed.Appx. 550, 554 (10th Cir. 2016) (citing ***Lohmann & Rauscher, Inc. v. YKK (U.S.A.) Inc.***, 477 F.Supp.2d 1147, 1153 (D.Kan.2007) (granting summary judgment on a breach-of-contract claim that was redundant of warranty claims); ***Spectro Alloys Corp. v. Fire Brick Engineers Co.***, 52 F.Supp.3d 918, 930 (D. Minn. 2014) (granting summary judgment when the contractual obligations were "reflected in the warranty claims")). *See also* ***Suhr v. Aqua Haven, LLC***, 11-1165-EFM, 2013 WL 3778928, at *5 (D. Kan. July 18, 2013) (granting summary judgment when plaintiffs "failed to establish that their breach of contract claims are factually distinct from their breach of warranty claims … .") (citation omitted).

the bargain … .'" *Id*. (citing K.S.A. § 84-2-313(1)(a) - (c) and ***Corral***, 732 P.2d at 1266).

Simply stated, Plaintiff has failed to establish that any of the statements made by Defendant were the "basis" of the parties' agreement or that they were made prior to or contemporaneously with the agreement. It is established that Plaintiff told Defendant he was going to use the truck for commercial livestock transportation. It is also established that Defendant told Plaintiff that the truck's engine had recently been rebuilt when it had not been rebuilt and that the truck had less than 150,000 miles on the rebuilt engine. As stated above, however, Plaintiff has only established ***that*** the statements occurred, ***not when*** they occurred. (*See* Doc. 28-2, at 6-7; *see also* Doc. 38, at 6.) Because it is disputed whether the statements were exchanged before the contract was finalized, contemporaneously with the finalization of the contract, or after the contract was finalized, summary judgment is inappropriate and Plaintiff's motion is **DENIED**.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Partial Summary Judgment (Doc. 28) is **DENIED**.

IT IS SO ORDERED.

Dated at Wichita, Kansas, on this 12th day of May, 2021.

s/ KENNETH G. GALE
KENNETH G. GALE
United States Magistrate Judge