[Cite as *Heisler v. Mallard Mechanical Co., L.L.C.*, 2010-Ohio-5549.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

John D. Heisler et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 09AP-1143 (M.C. No. 2009 CVI 010506)
Mallard Mechanical Co., LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 16, 2010

John D. Heisler and Carol A. Heisler, pro se.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶1} Plaintiffs-appellants, John D. Heisler and Carol A. Heisler (collectively "appellants"), appeal from a judgment of the Franklin County Municipal Court dismissing their complaint alleging a cause of action for breach of contract and violations of the Ohio Consumer Sales Practices Act ("CSPA"). For the reasons that follow, we affirm that judgment.

{¶2} This matter is before us for review for the third time. The dispute originally arose in January 2003 as a result of a contract entered into between appellants and Mallard Mechanical Co., LLC, d.b.a. Mallard Heating, Cooling & Air Duct Cleaning ("Mallard" individually), and its president, Lawrence T. Titus ("Titus" individually or

collectively "appellees"). Pursuant to that contract, appellees installed a new furnace in appellants' home. After the work was completed, appellants believed the furnace had not been properly installed. Appellants were unable to resolve their issues with appellees and subsequently filed a complaint against Titus, in the small claims division of the Franklin County Municipal Court, seeking $3,000 in damages.

{¶3} A magistrate heard evidence and issued a decision on October 25, 2005, concluding appellants had failed to establish the right to recover monetary damages. The magistrate noted that Titus had generally performed in a workmanlike manner and had been willing to make the necessary modifications to bring the furnace system into compliance, but appellants had denied him the opportunity to do so. The magistrate's decision entered judgment in favor of Titus, but also stated the complaint was "dismissed without prejudice."

{¶4} On November 8, 2005, appellants filed objections to the decision. The objections were assigned to Franklin County Municipal Court Judge Paul M. Herbert. On December 8, 2005, Judge Herbert overruled the objections and adopted the findings and conclusions of the magistrate. The entry further indicated that the decision was a final appealable order. On December 9, 2005, Franklin County Municipal Court Judge Teresa Liston signed a standard form judgment entry stating the dismissal was "without prejudice."

{¶5} Appellants did not appeal these judgments. However, on March 2, 2006, appellants filed a new lawsuit in Franklin County Municipal Court against both Mallard and Titus alleging the same facts which had formed the basis of their previous complaint. This new complaint alleged violations of the Ohio Home Solicitation Sales Act and the

CSPA, along with a cause of action for negligence. Appellees filed a motion for summary judgment asserting res judicata, expiration of the statute of limitations, and lack of subject-matter jurisdiction, arguing that, despite the magistrate's use of the words "without prejudice," the matter had already been decided on its merits and appellants had failed to appeal the trial court's decision. The trial court subsequently granted the motion for summary judgment on May 24, 2006 and appellants filed a timely appeal.

{¶6} In a decision issued on March 15, 2007, we held that the magistrate's decision had addressed the merits of the case because the magistrate concluded appellants had failed to meet their burden of proving they were entitled to monetary damages. We further found Judge Herbert's entry adopting the magistrate's decision could not have intended to adopt the portion of the decision dismissing the complaint without prejudice, since inclusion of the final appealable order language would have then been pointless. We went on to find that appellants' subsequently filed complaint was barred by claim preclusion. See *Heisler v. Mallard Mechanical Co., L.L.C.*, 170 Ohio App.3d 430, 2007-Ohio-1169.

{¶7} On September 27, 2007, appellants filed a motion for contempt against Titus under the original case. Judge Herbert presided over a hearing on the motion and overruled the motion on December 21, 2007. Appellants appealed that decision. In our second opinion, issued on May 22, 2008, we affirmed the decision of the municipal court, which had refused to sustain the motion, finding it was without jurisdiction to enter a finding of contempt because the original lawsuit had been dismissed. However, within our May 22, 2008 decision, we also noted that, with respect to the 2005 lawsuit, the municipal court had "ultimately adopted the magistrate’s report and decision, including its

recommendation that the case be dismissed without prejudice." *Heisler v. Titus*, 10th Dist. No. 08AP-57, 2008-Ohio-2464, ¶3.

{¶8} As a result of the "dismissed without prejudice" language in our May 22, 2008 decision, appellants concluded we had overruled our previous determination that the original complaint had been dismissed with prejudice. Therefore, appellants filed a new complaint in the small claims division of the Franklin County Municipal Court on March 11, 2009, reasserting their breach of contract claim against appellees and adding a new claim asserting violations of the CSPA, alleging new violations were committed within the past two years.

{¶9} A hearing was held on May 18, 2009 before Magistrate Dennis R. Kimball. On October 13, 2009, Magistrate Kimball issued a decision which included findings of fact and conclusions of law. The magistrate ultimately determined appellants could no longer litigate the dispute at issue. Specifically, Magistrate Kimball found that our second opinion did not expressly overrule the finding set forth in the first opinion, which determined Judge Herbert's December 8, 2005 dismissal was a final adjudication on the merits and therefore, was a dismissal with prejudice. Instead, the magistrate found that the reference in the May 22, 2008 opinion indicating the 2005 complaint had been dismissed "without prejudice" was not essential to the holding in the second case and therefore was merely superfluous dicta.

{¶10} In addition, with respect to appellants' claim that appellees' conduct after the issuance of our first opinion constituted new actions giving rise to a new contract, the magistrate found appellants' rejection of any new offers to correct the problems served to prevent the formation of a new contract, as well as any basis for recovery under a breach

of contract claim. Furthermore, as to appellants' second claim alleging new violations of the CSPA that occurred after we determined the 2005 complaint had been dismissed with prejudice, the magistrate concluded that because our holding in our first opinion terminated the litigation in this dispute, appellants had no further responsibility to the plaintiffs and thus appellants were without a basis for recovery under the CSPA.

{¶11} Consequently, the magistrate filed a decision dismissing the March 2009 complaint. On October 14, 2009, prior to the expiration of the time period for filing objections, Judge Pollitt adopted the magistrate's decision. Appellants filed objections to the magistrate's decision on October 26, 2009. On November 11, 2009, Franklin County Municipal Court Judge James E. Green overruled appellants' objections and adopted the decision of the magistrate. This timely appeal followed in which appellants assert three assignments of error for our review:

> 1. THE TRIAL COURT ERRED IN AFFIRMING THE MAGISTRATE'S DECISION WHICH HELD THAT THE APPEALS COURT'S REFERENCE IN THE MAY 22, 2008 DECISION TO THE DISMISSAL IN THE FIRST CASE BEING "WITHOUT PREJUDICE" WAS SUPERFLUOUS DICTUM WHICH HAD NO LEGAL EFFECT.
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> 2. THE TRIAL COURT ERRED IN AFFIRMING THE MAGISTRATE'S DECISION WHICH HELD THAT APPELLANTS' COMPLAINT STATES NO BASIS FOR RECOVERY UNDER BREACH OF CONTRACT.
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> 3. THE TRIAL COURT ERRED IN AFFIRMING THE MAGISTRATE'S DECISION WHICH HELD THAT APPELLANTS' COMPLAINT STATES NO BASIS FOR RECOVERY UNDER THE OHIO CONSUMER SALES PRACTICES ACT.

{¶12} In their first assignment of error, appellants argue the trial court erred in finding the "without prejudice" language contained within our May 22, 2008 decision in

reference to the December 8, 2005 dismissal of the complaint to be superfluous dicta which had no legal effect on our earlier decision of March 15, 2007, in which we determined the original complaint filed in 2005 had been adjudicated on the merits and dismissed with prejudice.

{¶13} " 'Dicta' is defined as 'expressions in court's opinions which go beyond the facts before court and therefore are * * * not binding in subsequent cases as legal precedent.' " *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶85, (Sweeney, J., dissenting) quoting Black's Law Dictionary (6th ed.1990) 454. See also *Sobczak v. Ohio Dept. of Transp.*, 10th Dist. No. 09AP-388, 2010-Ohio-3324. "Dicta includes statements made by a court in an opinion that are not necessary for the resolution of the issues." *Gissiner v. Cincinnati*, 1st Dist. No. C-070536, 2008-Ohio-3161, ¶15, citing *Katz v. Enzer* (1985), 29 Ohio App.3d 118; and *Levy Overall Mfg. Co. v. Crown Overall Mfg. Co*. (1916), 24 Ohio C.A. 556. "Dicta is not authoritative, and, by definition, cannot be the binding law of the case." *Gissiner* at ¶15, citing *Episcopal School of Cincinnati v. Levin*, 117 Ohio St.3d 412, 2008-Ohio-939. " '[A] dictum is by definition no part of the doctrine of the decision[.]' " *Easter v. Complete Gen. Constr. Co*., 10th Dist. No. 06AP-763, 2007-Ohio-1297, ¶34, quoting Lile, William M. et al., Brief Making and the Use of Law Books (3d ed.1914) 307.

{¶14} We find the trial court properly determined the reference in our second decision, issued May 22, 2008, which stated: "The [municipal] court ultimately adopted the magistrate's report and decision, including its recommendation that the case be dismissed without prejudice" is superfluous dicta that has no legal effect. Our May 22, 2008 decision did not analyze the issue of whether the dismissal of the original complaint

filed in 2005 was with or without prejudice. Instead, in our May 22, 2008 decision, we simply decided the issue of whether or not the trial court had jurisdiction to issue a contempt order out of an action that had been dismissed. This determination was not dependent upon whether the previous action was dismissed with or without prejudice. Instead, this determination was only dependent upon the fact that the previous action had, in fact, been dismissed. Whether it was dismissed with or without prejudice was irrelevant to our determination and therefore unnecessary to the resolution of the issue before us. Thus, the "without prejudice" reference is not binding to the case and did not alter our earlier decision of March 15, 2007, in which we found the 2005 complaint had been dismissed with prejudice. Accordingly, we overrule appellants' first assignment of error.

{¶15} In their second assignment of error, appellants assert the trial court erred in finding there is no basis for recovery under a breach of contract claim. Because appellants submit that our May 22, 2008 decision "revived" the issue of the dismissal of the original 2005 complaint and allegedly determined that the complaint had been dismissed without prejudice, appellants argue they are permitted to re-file their lawsuit for breach of contract, so long as it complies with the applicable statute of limitations.

{¶16} However, because we have determined that our May 22, 2008 decision did not alter our March 15, 2007 decision finding that the complaint was dismissed with prejudice, we reject this argument, as appellants cannot re-litigate this same issue since there has been an adjudication on the merits and a dismissal with prejudice. Following the dismissal with prejudice, appellees had no obligation to appellants to make any repairs, absent a new agreement.

{¶17} Even if we were to assume that appellants are asserting a new breach of contract action based upon conduct which occurred after the issuance of our March 15, 2007 decision in which we determined the 2005 complaint had been dismissed with prejudice, appellants' argument still fails.

{¶18} " 'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' " *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16, quoting *Perlmuter Printing Co. v. Strome, Inc*. (N.D.Ohio 1976), 436 F.Supp. 409, 414. See also *Minster Farmers Coop. Exch. Co. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, ¶28. "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." Id. at ¶28, citing *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369.

{¶19} Here, appellants allege that following our March 15, 2007 decision, they made several attempts to get appellees to make repairs and modifications related to the furnace installation. After several communications from appellants' attorney, Titus responded, indicating he would pay up to $200 for another company to make limited modifications, but denied responsibility for several other corrections. Appellants rejected this offer and subsequently filed their contempt motion.

{¶20} This conduct does not constitute the formation of a new contract which was then subsequently breached. Although the parties were free to enter into a new contract following the dismissal on the merits of the 2005 complaint, that did not occur. While

appellees may have made a new offer to appellants to make certain repairs, that offer was undisputedly rejected by appellants. Clearly there was no "acceptance" of this "offer" and there was no "meeting of the minds."

{¶21} For these reasons, appellants' second assignment of error is overruled.

{¶22} Finally, in their third assignment of error, appellants contend the trial court erred in finding there was no basis for recovery under the CSPA. Appellants argue appellees violated the CSPA within the last two years and point to appellees' letter of September 5, 2007, as well as testimony provided during the contempt hearing, as proof of their position.

{¶23} " 'The Consumer Sales Practices Act, R.C. Chapter 1345, prohibits suppliers from committing either unfair or deceptive consumer sales practices or unconscionable acts or practices as catalogued in R.C. 1345.02 and 1345.03. In general, the CSPA defines 'unfair or deceptive consumer sales practices' as those that mislead consumers about the nature of the product they are receiving, while 'unconscionable acts or practices' relate to a supplier manipulating a consumer's understanding of the nature of the transaction at issue.' " *Hanna v. Groom*, 10th Dist. No. 07AP-502, 2008-Ohio-765, ¶33, quoting *Johnson v. Microsoft Corp*., 106 Ohio St.3d 278, 2005-Ohio-4985, ¶24. (Footnote omitted.) See, also, *Bungard v. Ohio Dept. of Job & Family Servs*., 10th Dist. No. 07AP-447, 2007-Ohio-6280, ¶11.

{¶24} Specifically, appellants argue Titus' letter, in which appellees offered to pay up to $200 for another licensed company to do the repair work originally involving Mallard and cited by the city inspector, improperly limited the corrections to only a few items and falsely claimed that Mallard was not responsible for the remaining work. Titus' testimony

at the contempt hearing also reflected appellees' assertion that they were not responsible for all of the repairs listed by the city inspector. Appellants submit appellees are responsible for all the work and assert that this letter constitutes a solicitation to enter into a new agreement and therefore contained false and deceptive statements, due to appellees' denial of responsibility. Appellants further assert this solicitation is unconscionable, due to its one-sidedness. Thus, appellants contend these actions violate the CSPA as set forth in R.C. Chapter 1345.

{¶25} Appellants also argue that the quote obtained by appellees from Buckeye Heating & Cooling was deceptive in that the initial quote did not include all of the necessary modifications and therefore greatly understated the overall cost of the repairs, since it failed to include numerous repairs which were later included in a second quote. Appellants claim this also violates the CSPA.

{¶26} Pursuant to R.C. 1345.01(A), a "[c]onsumer transaction" is defined as "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things."

{¶27} We disagree with appellants' characterization of appellees' September 5, 2007 letter as a "solicitation" in a consumer transaction under the meaning of the CSPA. At that point, even though appellees were no longer obligated to make good on the contract as a result of the dismissal of the lawsuit with prejudice, appellees were still attempting to make a good-faith effort to resolve the issues, due to appellants' repeated demands for repairs. Appellees were not attempting to solicit business or sales from appellants, but instead were attempting to negotiate a resolution for a prior transaction in

which the courts had already found in favor of appellees by affirming the dismissal of the 2005 complaint with prejudice.

{¶28} Furthermore, appellees' denials of responsibility for certain modifications appellants claim are appellees' responsibility do not constitute false or deceptive statements nor unconscionable acts, since at that point, appellees owed no legal responsibility to appellants and their denials of such responsibility were not improper.

{¶29} Based upon the foregoing, we find the trial court did not err in finding the March 2009 complaint stated no basis for recovery under the CSPA. Accordingly, we overrule appellants' third assignment of error.

{¶30} In conclusion, we overrule appellants' first, second, and third assignments of error and affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
