[Cite as *Singer v. Pacific Internatl. Ltd.*, 2005-Ohio-542.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TERRY SINGER AND	:	
MICHAEL NORRIS, ET AL.	:	JUDGES:
	:	Hon W. Scott Gwin, P.J.
Plaintiff-Appellants	:	Hon. Shelia G. Farmer, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 2004 CA 0013
PACIFIC INTERNATIONAL LIMITED,	:	
ET AL.	:	
	:	
Defendant-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from Muskingum County Common Pleas Court Case No. cc2003-0305
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	FEBRUARY 2, 2005

APPEARANCES:

For Plaintiff-Appellants	For Defendant-Appellee
GARY M. SMITH 0017141	STEPHEN CHAPPELEAR 0012205
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Boggins, J.

{¶1} This is an appeal of a summary judgment ruling in favor of Appellee,

STATEMENT OF THE FACTS AND CASE

{¶2} Appellants, Terry Singer and Michael Singer, are the parents of Heather Lewis, a child afflicted with nocturnal enuresis (nighttime bed wetting) who was being treated for such condition by Dr. Harvey.

{¶3} Appellee maintains a program intended to solve such condition which is sold through sales representatives in the United States and Canada.

{¶4} Appellants received an advertisement as to such program and made contact with Appellee on behalf of Heather.

{¶5} Bigam Sosimhai, (name corrected to John Simhai), a sales agent of Appellee, met with Appellants at their home on July 17, 2002. The purchase agreement for the program which Appellants signed called for a total price of $1,995.00. Appellants issued their check for a down payment of $95.00. Appellants state that the sales agent, Mr. Simhai, advised that Dr. Harvey's treatment was improper and should be discontinued. They further state that the balance of the purchase of the program was to be financed through Beneficial Finance.

{¶6} Appellants then contacted Dr. Harvey and, after his assurances as to his prescribed treatment, called Appellant on July 25, 2002, as to termination of their agreement. This call exceeded the contractual date to rescind of July 23, 2002.

{¶7} Appellants made written contact with Appellee on July 29, 2002 with a return of certain equipment.

{¶8} At such time, Appellee maintained that a contractual obligation existed and returned such equipment.

{¶9} A stop payment was issued by Appellants as to the $95.00 check.

{¶10} Appellants again returned the equipment.

{¶11} Appellants' counsel issued a recision notice to Appellee and to its finance company, M. & L. Acceptance Corporation on August 20, 2002.

{¶12} No further collection attempts were thereafter made.

{¶13} Appellants then filed this action seeking class certification and alleging violations of the Ohio Consumer Sales Practices Act (CSPA), the Ohio Retail Installment Sales Act (RISA), the Ohio Corrupt Practice Act (RICO) and for declaratory judgment. No prayer for damages sustained was included.

{¶14} Appellees then filed a Civ. R. 56 Motion.

{¶15} Appellees state that Appellants failed to comply with Local Rule 9(A)(4) which required a separate statement of specific material facts disputed.

{¶16} The trial court, as stated, sustained Appellees' Motion for Summary Judgment and this timely appeal followed.

{¶17} Appellants raise three Assignments of Error:

ASSIGNMENT OF ERROR

{¶18} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANTS-APPELLEES' MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFFS-APPELLANTS HAVE STANDING TO PURSUE A CLAIM AGAINST DEFENDANTS-APPELLEES.

{¶19} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANTS-APPELLEES' MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFFS-APPELLANTS MAY SEEK RELIEF UNDER BOTH O.R.C. 2923.31 *et seq.* AND O.R.C. §1345.09, *et seq.*

{¶20} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANTS-APPELLEES' MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFFS-APPELLANTS' COMPLAINT DID NOT ASSERT OR DEPEND ON THE EXISTENCE OF DIRECT ACTION TO ENFORCE THE FTC ACT."

{¶21} We are not concerned with the request for class certification but only with the summary judgment decision.

{¶22} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) states, in pertinent part:

{¶23} Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law....A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

{¶24} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280.

{¶25} It is based upon this standard we review appellant=s assignments of error.

{¶26} While Appellant states that the court sustained the Appellees' Civ. R. 56 motion without explanation, such is not entirely accurate. It is correct that the court's reasoning was not expressed in the judgment entry of February 25, 2004, but the court, in its decision of February 12, 2004, which ordered preparation of the subsequent entry stated:

{¶27} "This matter comes before the Court upon defendants' motion for summary judgment. After review of the motion, motion contra, testimony and arguments of counsel the Court makes the following findings and decision:

{¶28} "Plaintiffs purchased on July 17, 2002 pursuant to a home solicitation sale, a program from Pacific International Limited. Eight days later the plaintiffs tried to rescind the contract they entered into with the plaintiffs and were told they couldn't

rescind the contract. On August 1, 2002, the plaintiffs stopped payment on the check given to the defendant. Thereafter, the plaintiffs met with their attorney who sent a certified letter to the defendants stating that he represented the plaintiffs and that the defendants were not to contact the plaintiffs in any way for any purpose and that they were canceling and rescinding the contract under Federal and State law.

{¶29} "After the August 20th letter was sent no further contact was had between the parties until nine months later, when the plaintiffs filed this lawsuit.

{¶30} "The defendants claim that since the contract between the parties was canceled and rescinded by the plaintiffs and that the check had been stopped by the plaintiffs, that this matter has been concluded. Plaintiffs allege various violations of State and Federal law as the basis for their lawsuit.

{¶31} "Upon review of the appropriate statutes and laws this Court finds the plaintiffs effectively rescinded the contract which is the center of this controversy and as a result thereof have no basis for this lawsuit. Therefore the Court hereby grants the defendants' motion for summary judgment."

I, II, III

{¶32} We shall address all three Assignments of Error simultaneously.

{¶33} The First Assignment argues that appellants have standing to pursue their claims even though no out-of-pocket damages occurred because they had stopped payment on their check. The Second is similar in that the assertion is to the effect that relief may be granted under both R.C. 2923.31 et seq. and R.C. 1345.09 et seq. The Third states that the appellants have the right to enforce the FTC regulation.

{¶34} In examining the facts *de novo*, we find that the contract stated:

{¶35} "Sales Made At Homes Or At Certain Other Locations. If this transaction is a door-to-door or home solicitation sale as defined in the Federal Trade Commission Trace Regulation Rule concerning Cooling-Off Period for Sales Made At Homes Or At Certain Other Locations, or state law, YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT."

{¶36} R.C 1345.23(B)(1) and (4) state:

{¶37} "(B) In connection with every home solicitation sale:

{¶38} "(1) The following statement shall appear clearly and conspicuously on the copy of the contract left with the buyer in bold-face type of the minimum size of ten points, in substantially the following form and in immediate proximity to the space reserved in the contract for the signature of the buyer: you, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation for an explanation of this right.'

{¶39} "(4) A home solicitation sales contract which contains the notice of buyer's right to cancel and notice of cancellation in the form and language provided in the federal trade commission's trade regulation rule providing a cooling-off period for door-to-door sales shall be deemed to comply with the requirements of divisions (B)(1), (2), and (3) of this section with respect to the form and language of such notices so long as the federal trade commission language provides at least equal information to the consumer concerning his right to cancel as is required by divisions (B)(1), (2), and (3) of this section."

{¶40} We find that the contract complied in this respect with R.C. 1345.23 and that appellants failed to exercise their right of cancellation within such three-day "cooling off period".

{¶41} Since this time had expired, appellee was correct in notifying appellants that an obligation had occurred.

{¶42} However, we find, as the court found that appellee, Pacific International, had chosen to consider the contract canceled pursuant to the letter from counsel for appellants. The letter instructed appellees to refrain from direct contact with appellants. While appellees did not contact counsel, they took no further action. They were not required to communicate with counsel. The affidavit in support of appellees' motion recited that the contract was canceled.

{¶43} As stated in *Mid-America Acceptance Company vs. Lightle* (1989), 63 Ohio App.3d 590:

{¶44} "'Rescission' is not merely termination of contract but is annulment of contract…".

{¶45} Since no contract existed after appellees election to follow counsel's demand, no application of any remedies under the statutes or common law existed.

{¶46} Therefore, while this Court held in *Ann Ries v. B & J Auction House* (Feb. 21, 1989), Fifth District, App., No. 88-CA-35, that violation of the Consumer Sales Practices Act (CSPA) would not limit a consumer solely to CSPA statutory damages but also, in that case breach of contract, it still requires a violation, which is absent here.

{¶47} Without a violation, we need not address further assertions of any of the three Assignments of Error.

{¶48} This cause is affirmed at Appellant's costs.

By: Boggins, J.

Gwin, P.J. and

Farmer, J. concur _____

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JUDGES

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IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

TERRY SINGER AND MICHAEL NORRIS, ET AL.	:	
Plaintiff-Appellants	:	
-vs-	:	JUDGMENT ENTRY
PACIFIC INTERNATIONAL LIMITED, ET AL.	:	
Defendant-Appellees	:	CASE NO. 2004 CA 0013

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Common Pleas Court is affirmed. Costs assessed to Appellants.

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JUDGES