

[Cite as *Franciscus, Inc. v. Balunek*, 2014-Ohio-4350.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FRANCISCUS, INC.

C.A. No. 13CA010433

Appellee

v.

GEORGE BALUNEK, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 10CV169302

Appellant

v.

ANTHONY LATINA, et al.

Appellees

DECISION AND JOURNAL ENTRY

Dated: September 30, 2014

BELFANCE, Presiding Judge.

{¶1} George Balunek appeals from the partial award of summary judgment by the Lorain County Court of Common Pleas. For the reasons set forth below, we dismiss part of Mr. Balunek’s appeal and affirm the trial court’s judgment.

I.

{¶2} Mr. Balunek hired Franciscus, Inc. to repair the roof of his home; however, Mr. Balunek was unhappy with the quality of work performed by Franciscus and refused to pay for it. Asserting that Franciscus had failed to comply with the Home Solicitation Sales Act (“HSSA”), Mr. Balunek sent a letter via certified mail informing Franciscus that he wished to cancel his contract with them.

{¶3} Franciscus filed a complaint against Mr. Balunek, alleging breach of contract and unjust enrichment. Mr. Balunek filed counterclaims and a third-party complaint in response, naming Angela Franciscus, an executive at Franciscus, and Anthony Latina, the salesman for Franciscus who had come to his home, as third-party defendants. Following an amended complaint from Franciscus and multiple amended answers, counterclaims, and third-party complaints from Mr. Balunek, Mr. Balunek moved for summary judgment. Franciscus responded with a motion for partial summary judgment, seeking a declaration that the contract at the heart of this case was not governed by the HSSA and the dismissal of Mr. Balunek's claims related to the HSSA. The trial court denied Mr. Balunek's motion and Franciscus' motion in four separate journal entries issued on August 16, 2012.

{¶4} Mr. Balunek moved for the trial court to reconsider its August 16, 2012 orders, and Franciscus moved for the trial court to clarify its orders. The trial court issued a new judgment entry on January 9, 2013, in which it clarified that it had intended to dismiss all claims related to the HSSA. Mr. Balunek appealed, but this Court dismissed the appeal because, although the trial court had indicated it found in favor of Franciscus on its declaratory judgment action, it did not actually issue a declaration. The trial court issued a new journal entry on June 10, 2013, declaring that the HSSA was inapplicable to the transaction, dismissing Mr. Balunek's HSSA claims, and finding that there was no just cause for delay.

{¶5} Mr. Balunek has appealed, raising four assignments of error for our review. For ease of discussion, we address Mr. Balunek's assignments of error together.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DETERMINING THAT BALUNEK'S ISSUANCE OF HIS NOTICE OF

CANCELLATION AND HIS ELECTION OF SUIT FOR DAMAGES EXISTED AS A RECISSION (SIC) RESCISSION [(SIC)] REMEDY, BY FINDING THAT THE HSSA WAS NOT APPLICABLE TO THE BALUNEK CONSUMER TRANSACTION, IN GRANTING A DECLARATORY JUDGMENT THAT THE HSSA DOES NOT APPLY TO THIS CONSUMER TRANSACTION AND IS NOT GOVERNED BY ANY PROVISION OF R.C. 1345.21-[]28, IN FAILING TO GRANT THE CONSUMER'S MOTION FOR SUMMARY JUDGMENT ON THE HSSA, CSPA, AND BREACH OF CONTRACT ISSUES; AND BY ITS FAILURE TO ISSUE JUDGMENT IN FAVOR OF BALUNEK AND CONTRACTORS BONDING AND INSURANCE COMPANY AND AGAINST SUPPLIERS FRANCISCUS, INC. AND ITS AGENT EMPLOYEES, AND IN FAILING TO DECLARE AND ENJOIN THE UNLAWFUL AND DECEPTIVE ACTS AND PRACTICES COMPLAINED OF.

ASSIGNMENT OF ERROR II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO CONSIDER AND DECLARE THAT FRANCISCUS COMMITTED A DECEPTIVE ACT OR PRACTICE IN VIOLATION OF R.C. § 1345.02(A) AND O.A.C. § 109:4-3-10(A) AS IT ASSERTS IN ITS CONTRACT AND ADVERTISES A CLAIM WITHOUT POSSESSING A DOCUMENTED REASONABLE FACTUAL BASIS TO SUBSTANTIATE THE CLAIM OF ITS EXISTENCE SINCE 1991 AND ITS HAVING HAD OVER 15,000 SATISFIED CUSTOMERS SINCE 1991.

ASSIGNMENT OF ERROR III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO FIND AND DECLARE THAT FRANCISCUS COMMITTED A DECEPTIVE ACT OR PRACTICE IN VIOLATION OF R.C. § 1345.02 AND AN UNCONSCIONABLE ACT AND PRACTICE IN VIOLATION OF R.C. § 1345.03 BY ITS INCLUSION OF AN UNLAWFUL WAIVER OF DAMAGES CLAUSE IN ITS CONSUMER CONTRACT WITH MR. BALUNEK.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO CONSIDER, FIND AND DECLARE THAT FRANCISCUS COMMITTED A DECEPTIVE ACT OR PRACTICE IN VIOLATION OF R.C. § 1345.02, OHIO ADM. CODE 109:4-3-05(D)(16), AND THE PRINCIPLES PROHIBITED IN *FISHER V. ZOLDAR: QUEEN CITY ENERGY*, (PIF NO. 10001462) BY ITS BUSINESS PRACTICES IN SELLING ROOFING JOBS TO A CONSUMER BUT NOT TELLING THE CONSUMER THAT IT WILL NOT DIRECTLY DO THE WORK, BUT RATHER WILL SUBCONTRACT THE WORK TO OTHERS FOR PERFORMANCE.

{¶6} Mr. Balunek argues that the trial court should not have awarded summary judgment to Franciscus with respect to the declaratory judgment claim because the contract in this case is subject to the HSSA.

{¶7} We initially clarify the scope of our jurisdiction over this appeal. Mr. Balunek also attempts to challenge the trial court's denial of his motion for summary judgment. However, the trial court's denial of Mr. Balunek's motion for summary judgment was not a final order because it did not determine the action nor affect a substantial right in a special proceeding. *See* R.C. 2505.02(B)(1)-(2). *See also Rootstown Excavating, Inc. v. Smith*, 9th Dist. Summit No. 25457, 2011-Ohio-6415, ¶ 20, citing *Nayman v. Kilbane*, 1 Ohio St.3d 269, 271 (1982) ("Ordinarily, the denial of a motion for summary judgment is not a final, appealable order."). As this Court only has jurisdiction over appeals from final, appealable orders, we are without jurisdiction to consider this portion of Mr. Balunek's appeal. *See Finley & Sons Builders, Inc. v. Cross*, 9th Dist. Summit No. 23738, 2007-Ohio-7037, ¶ 5. *See also* Ohio Constitution, Article IV, Section 3(B)(2). Accordingly, to the extent Mr. Balunek's appeal challenges the denial of his motion for summary judgment, it is dismissed.

{¶8} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Garner v. Robart*, 9th Dist. Summit No. 25427, 2011-Ohio-1519, ¶ 8.

{¶9} Pursuant to Civ.R. 56(C), summary judgment is appropriate when:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing

such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). To succeed on a summary judgment motion, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 293, quoting Civ.R. 56(E).

{¶10} In its June 10, 2013 journal entry, the trial court attempted to enter a final, appealable order on Franciscus' declaratory judgment action. Franciscus had sought "a declaration * * * that the Home[] Solicitation Sales Act as set forth in R.C. § 1345.21 *et seq.* is inapplicable to the transaction by and between [Franciscus] and [Mr. Balunek] and therefore any attempts by [Mr. Balunek] to cancel the Contract pursuant to R.C. § 1345.21 *et seq.* are null and void." (Emphasis sic.). In the June 10, 2013 entry, the trial court made the following declarations:

[T]his Court declares that the Home Solicitation Sales Act is not applicable to this case. * * *

This Court declares that the roof transaction between Plaintiff Franciscus and Defendant [Mr.] Balunek and the June 30, 2010 contract which is the subject of Defendant [Mr.] Balunek's Amended Counter-claim and Amended Third Party Complaint filed on June 3, 2011 is not a home solicitation sale. Therefore, this Court declares that the transaction between Plaintiff Franciscus and Defendant [Mr.] Balunek is not governed by any provision of the Ohio Home Solicitation Sales Act, R.C. 1345.21-[]28 and is not subject to any of the requirements of the Home Solicitation Sales Act. * * *

This Court further declares that the June 30, 2010 contract and roof sale transaction which is the subject of Defendant [Mr.] Balunek's Amended Counter-claim and Amended Third Party Complaint filed on June 3, 2011 is not governed by the Home Solicitation Sales Act.

Notably, the trial court did not issue a declaration directly addressing Mr. Balunek's attempts to cancel the contract in its June 10, 2013 entry. However, in the court's January 9, 2013 entry, it had stated that Mr. Balunek's "re[s]cission remedy pursuant to HS[S]A is no longer applicable." Thus, the trial court has issued a declaration declaring all the rights and responsibilities requested by Franciscus' declaratory judgment. *See Gargas v. Lorain Cty*, 9th Dist. Lorain No. 12CA010215, 2013-Ohio-1218, ¶ 11 (In a declaratory judgment action, a "trial court is merely required to expressly state the rights and responsibilities of the parties involved in the matters at issue.").

{¶11} Before we proceed any further, however, we find it necessary to clarify the issue before us on appeal. Franciscus' request for a declaratory judgment *only* sought a declaration as to the effect of the HSSA on this case. It did not seek to have a declaration of the parties' rights and responsibilities *under the contract*. Thus, the only question before us in this appeal is whether the transaction at issue was a home solicitation sale pursuant to R.C. 1345.21(A) and, therefore, governed by the HSSA as a matter of law.¹ We express no opinion as to whether the sales contract incorporates *the obligations* of the HSSA so as to become substantive terms of the contract itself.

{¶12} The trial court's declarations that the transaction at issue in this case was not governed by the HSSA were based upon the definition of a home solicitation sale found in R.C. 1341.21(A).

"Home solicitation sale" means a sale of consumer goods or services in which the seller or a person acting for the seller engages in a personal solicitation of the sale at a residence of the buyer, including solicitations in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller, or in which the buyer's

¹ This is also in keeping with the trial court's actual decision as it focused solely on the language of the HSSA and did not examine the language of the contract.

agreement or offer to purchase is made at a place other than the seller's place of business.

R.C. 1345.21(A). However, certain types of transactions are excluded from this definition. *See* R.C. 1345.21(A)(1)-(7). The trial court determined that the undisputed facts of this case placed the transaction firmly within the R.C. 1345.21(A)(4) exception, which exempts a transaction from the definition of home solicitation sale where “[t]he buyer initiates the contact between the parties for the purpose of negotiating a purchase and the seller has a business establishment at a fixed location in this state where the goods or services involved in the transaction are regularly offered or exhibited for sale[.]” R.C. 1345.21(A)(4).

{¶13} On appeal, Mr. Balunek does not dispute that he initiated contact with Franciscus or that Franciscus has “a business establishment at a fixed location” in Ohio where “the goods or services involved in the transaction are regularly offered or exhibited for sale.” R.C. 1345.21(A)(4). *See* App.R. 16(A)(7); *Lytle v. Mathew*, 9th Dist. Summit No. 26932, 2014-Ohio-1606, ¶ 11. Instead, Mr. Balunek argues, without citing any authority in support, *see* App.R. 16(A)(7), that R.C. 1345.21(A)(4) is inapplicable because *he* did not *know* about the business location. However, nothing in R.C. 1345.21(A)(4) requires a buyer be aware that the establishment has a fixed business location, only that the business location must exist. Thus, Mr. Balunek's argument to the contrary is without merit.

{¶14} Mr. Balunek also argues that the trial court incorrectly determined that no provision of the HSSA applied in this case because the contract he signed contained the following clause: “Pursuant to the Home Sales Solicitation Act, 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.” According to Mr. Balunek, this clause “*expressly made* [the HSSA] *applicable* to the transaction * * *.”

(Emphasis sic.). Essentially, Mr. Balunek believes that this clause brings the contract under the scope of the HSSA and all of its requirements as a matter of law. We again note that Mr. Balunek has not cited any authority to support his position. *See* App.R. 16(A)(7). Regardless, we cannot agree given that there is no dispute of fact that the transaction at issue in this case falls outside of the parameters of the HSSA. In this regard, Mr. Balunek's argument pertains to whether the parties intended to contractually bind themselves to the provisions of the HSSA. As noted above, this issue is beyond the scope of the appeal before us.

{¶15} Accordingly, given the arguments set forth by Mr. Balunek, we overrule his first assignment of error.

III.

{¶16} To the extent Mr. Balunek appeals from the trial court's denial of his motion for summary judgment, his appeal is dismissed as that portion of the trial court's order is not yet final and appealable. The judgment of the Lorain County Court of Common Pleas declaring that the HSSA does not apply to this transaction is affirmed.

Appeal dismissed in part,
and judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

HENSAL, P. J.
CONCURS.

CARR, J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶17} I concur with the majority that Mr. Balunek's appeal must be dismissed as it relates to his challenge to the trial court's denial of his motion for summary judgment.

{¶18} With regard to the remainder of the opinion, I respectfully dissent.

{¶19} Partial summary judgment, in which the trial court declared that the Home Solicitation Sales Act is not applicable to this case and that the roofing contract is not governed by the act, was granted in error. The parties' contract invoked the act, expressly providing that Mr. Balunek had three days in which to rescind the contract pursuant to the Home Solicitation Sales Act, and directing him to the attached notice of cancellation for further explanation of this right. By its very terms, the contract brought the transaction within the purview and protection of the act. Franciscus has cited no authority to support the conclusion that it could not contract to provide greater protections to its clients equal to those to which they would not otherwise be entitled pursuant to statute. In this case, the nature of the parties' business relationship exempts

it from the statutory purview of the Home Solicitation Sales Act. The contract, however, invokes the protection of the act by its express language, thereby creating ambiguity as to the applicability of the statute. Such ambiguities must be construed against the drafter of the contract. *Kleve v. Thermo-Rite Mfg. Co.*, 9th Dist. Summit No. 22205, 2005-Ohio-718, ¶ 20. Franciscus drafted the contract at issue.

{¶20} In this case, the trial court did not consider the parties' contract which established the terms, rights, and responsibilities of the parties' relationship. The contract invokes the protections of the Home Solicitation Sales Act which inure to Mr. Balunek's benefit. The trial court, therefore, erred by considering the applicability of the act solely on the basis of the statutory provisions. The substance of this transaction is subsumed within the terms for which the parties bargained and to which they agreed. They agreed to reestablish the protections of the Home Solicitation Sales Act which would not otherwise apply. The trial court issued its declarations in error. I would sustain Mr. Balunek's first assignment of error, reverse the trial court's judgment, and remand the matter for further proceedings.

APPEARANCES:

ROBERT J. GARGASZ, Attorney at Law, for Appellant.

MARK M. TURNER and RICHARD C.O. REZIE, Attorneys at Law, for Appellees.

RACHELLE KUZNICKI DIZAR and MATTHEW W. NAKON, Attorneys at Law, for Appellees.

ANDREW M. WARGO, Attorney at Law, for Appellees.