

[Cite as *Cicero v. Am. Satellite, Inc.*, 2011-Ohio-4918.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Christopher T. Cicero,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-638
American Satellite, Inc.,	:	(C.P.C. No. 08CVH-11-16725)
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on September 27, 2011

Kevin E. Humphreys, for appellant.

Benesch, Friedlander, Coplan & Aronoff LLP, and *Eric Larson Zalud*; *Law Office of Benjamin E. Kern, LLC*, and *Benjamin E. Kern*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Christopher T. Cicero, appeals from the judgment of the Franklin County Court of Common Pleas, granting a motion for summary judgment filed by defendant-appellee, American Satellite, Inc. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Appellant is an attorney who lives and practices law in the state of Ohio. Appellee has a contract with DISH Network, LLC ("DISH"), to advertise DISH Network goods and services. Appellant filed his initial complaint on November 21, 2008, alleging violations of the Ohio Consumer Sales Practices Act ("OCSPA"), R.C. 1345.01, et seq., based on a series of emails allegedly sent by appellee. After amending the complaint several times, the third amended complaint was filed on February 12, 2010, and requested a declaratory judgment as well as monetary damages and attorney's fees for the alleged OCSPA violations. Specifically, appellant alleged that between February 29 and September 17, 2009, he received 85 emails from appellee advertising satellite television equipment and services. Thirty-eight of the emails were advertising for DirecTV and 47 of the emails were advertising for DISH. According to the complaint, these solicitous emails were deceptive under the OCSPA because they failed to state on the face of the email all of the applicable terms and conditions of the offer and because they used the word "FREE" in connection with the advertised goods and services without stating all of the applicable terms and conditions. Additionally, appellant alleged violations of the OCSPA for appellee's failure to register with the Ohio Secretary of State.

{¶3} Appellee filed a motion for summary judgment on April 5, 2010, asserting several grounds for why it was entitled to judgment as a matter of law, including that the challenged emails were not deceptive. However, appellee argued alternatively that even if the challenged emails excluded certain terms, due to appellant's prior knowledge of this particular advertisement's terms and conditions, appellant was not and could not have been actually deceived by the emails and, therefore, was not entitled to recover under the

OCSPA.¹ In support of its contention, appellee relied on appellant's admission at his deposition that at the time he received the emails that are the subject of this litigation, not only was he not deceived by them, but because he believed they violated the OCSPA, he began saving the subject emails specifically for litigation purposes. During the deposition, the following exchange occurred:

Q. You can't necessarily peg an exact section to an exact violation, but you know when looking at an e-mail what is violative in your mind?

A. Yeah. And the word, "free," I know that's where it's described for consumers under OAC, Section 109, so yes.

Q. And you kind of learned that from your experiences in that first EchoStar lawsuit?

A. Well, I've learned that – I would say I knew it before that, to be honest with you, because that EchoStar was in '08. So I would have had to become familiar with that before that.

(Deposition 88-89.)

{¶4} Appellant went on to explain that once he began receiving emails from appellee, because his prior knowledge of the full terms and conditions of the offer led him to believe these emails violated Ohio law, he "began to eventually save them and collect them" for purposes of litigation. (Deposition 43.) Relying primarily on the decision of the United States District Court in *Ferron v. EchoStar Satellite, LLC* (S.D.Ohio 2009), 727 F.Supp.2d 647, 653, the trial court concluded that due to appellant's prior knowledge of

¹ Appellee asserted two alternative arguments for why it was entitled to summary judgment, i.e., because the terms complained of are incidental and not material, and, therefore, their omission does not constitute a violation of the OCSPA, and even if deceptive, appellee cannot be held liable for a third parties' acts where it may only receive an indirect monetary benefit from those acts. The trial court granted summary judgment to appellee without reference to these alternative grounds and without deciding whether or not the advertisements omitted applicable terms and conditions or were deceptive under Ohio law. Because we agree with the trial court's disposition of this matter, our analysis focuses likewise.

this subject matter, he was not and could not have been actually deceived by the emails and, therefore, was not entitled to recovery under the OCSPA.² Consequently, the trial court granted appellee's motion for summary judgment on June 15, 2010. This appeal followed and appellant brings the following seven assignments of error for our review:

[1.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN APPELLEES' FAVOR ON APPELLANT'S CLAIMS THAT APPELLEES' EMAIL ADVERTISEMENTS VIOLATED O.A.C. §109:4-3-02(A)(1) AND R.C. §1345.09(D).

[2.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN APPELLEES' FAVOR ON APPELLANT'S CLAIMS THAT APPELLEES' EMAIL ADVERTISEMENTS VIOLATED O.A.C. §109:4-3-04(A) AND (C) AND R.C. §1345.09(D).

[3.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN APPELLEES' FAVOR ON APPELLANT'S CLAIMS THAT APPELLEES' EMAIL ADVERTISEMENTS VIOLATED O.A.C. § 109:4-3-04(D)(3) AND R.C. §1345.09(D).

[4.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN APPELLEES' FAVOR ON APPELLANT'S CLAIMS THAT APPELLEES' EMAIL ADVERTISEMENTS VIOLATED O.A.C. §109:4-3-04(H) AND R.C. §1345.09(D).

[5.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN APPELLEE ASI'S FAVOR CONCERNING APPELLANT'S CLAIMS THAT APPELLEE ASI VIOLATED R.C. §1345.02(A) BY USING UNREGISTERED FICTITIOUS NAMES IN ITS SOLICITATIONS OF APPELLANT.

[6.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN APPELLEE ASI'S FAVOR CONCERNING APPELLANT'S CLAIMS THAT APPELLEE ASI VIOLATED R.C. §1345.02(A) BY DOING BUSINESS IN OHIO WITHOUT FIRST HAVING REGISTERED WITH THE OHIO SECRETARY OF STATE AS A FOREIGN CORPORATION.

² As will be discussed *infra*, the district court's decision granting summary judgment in favor of EchoStar Satellite, LLC was recently affirmed by the Sixth Circuit Court of Appeals.

[7.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN APPELLEES' FAVOR ON APPELLANT'S CLAIMS FOR DECLARATORY JUDGMENT PURSUANT TO R.C. §1345.09(D).

(Sic passim.)

{¶5} Because they are interrelated and because each challenge the trial court's decision granting summary judgment in favor of appellee, we will address appellant's seven assignments of error as one. We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221. Because we conduct an independent review of the record and stand in the shoes of the trial court, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *National/RS v. Huff*, 10th Dist. No. 10AP-306, 2010-Ohio-6530, ¶11, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107; *Coventry Twp.* at 41-42.

{¶6} Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion, and to point to portions of the record that indicate that there are no genuine issues of material fact on a material element of the non-moving party's claim. *Dresher*. Once the moving party has met its

initial burden, the non-moving party must produce competent evidence establishing the existence of a genuine issue for trial. *Id.*

{¶7} Appellant alleges appellee engaged in deceptive practices prohibited by the OCSPA. R.C. 1345.02(A) provides that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction." Additionally, the OCSPA prohibits unconscionable practices in consumer sales transactions. R.C. 1345.03. A consumer has a cause of action and is entitled to relief for any violation of the OCSPA. R.C. 1345.09. A consumer may, in an individual action, rescind the transaction or recover damages for a violation of the OCSPA. R.C. 1345.09(A). The purpose of the OCSPA is to protect consumers from the harm of deceptive or unconscionable sales practices. *Roelle v. Orkin Exterminating Co.* (Nov. 7, 2000), 10th Dist. No. 00AP-14. The statute is intended to give protection to consumers from unscrupulous suppliers of goods or services in a more efficient, expedient, and affordable manner than would be available in a common law tort or contract action. *State ex rel. Celebrezze v. Howard* (1991), 77 Ohio App.3d 387, 393. The OCSPA has a remedial purpose and must accordingly be liberally construed in favor of consumers. *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29.

{¶8} Each of appellant's assignments of error challenge the trial court's finding that based on the record appellant cannot recover under the OCSPA. According to appellant, the challenged email advertisements violate either the OCSPA or various provisions of the Ohio Administrative Code that pertain to consumer advertisements because they contain many hidden terms and conditions, including, (1) new customer

activation fees; (2) required deposits prior to service being activated; (3) deactivation fees; (4) credit checks; (5) a reservation of the right to unilaterally change the terms of the agreements; (6) binding arbitration; (7) lease requirements; and (8) choice of law provisions.

{¶9} As discussed previously, one of the theories advanced by appellee in support of its motion for summary judgment in the trial court was that regardless of whether or not exclusion of any or all of these terms violates Ohio law, appellant cannot recover because he was actually aware of the terms and conditions he claims were excluded. In other words, because appellant had prior knowledge of the allegedly omitted terms and conditions of the offers, he could not have been deceived by the emails, and, therefore, he was not entitled to recovery under the OCSPA. Finding merit to appellee's position, the trial court granted judgment as a matter of law in favor of appellee.

{¶10} Despite the numerous assignments of error and references to portions of the Ohio Administrative Code, the narrow and dispositive issue before this court is whether or not the trial court erred in concluding that a plaintiff cannot recover under the OCSPA where the record affirmatively shows the plaintiff possessed particular knowledge of the facts that prevented him from being deceived by a supplier's conduct. The Sixth Circuit Court of Appeals has recently addressed this very issue and reached the same conclusion as the trial court. *Ferron v. EchoStar Satellite, LLC* (C.A.6 2010), 410 Fed.Appx. 903. While we recognize such authority is not necessarily binding upon this court, we nonetheless find the Sixth Circuit's reasoning persuasive and agree with its analysis.

{¶11} In *EchoStar*, the Sixth Circuit Court of Appeals affirmed the judgment of the United States District Court granting summary judgment in favor of EchoStar Satellite, LLC and found that because the plaintiff had prior knowledge of the terms and conditions that applied to the purchase of the advertised products, he could not have been deceived by emails which did not contain those terms and conditions and, therefore, could not recover under the OCSPA. The court explicitly rejected the plaintiff's position, which is the same as that advanced herein by appellant, that he was not required to prove that he was deceived in order to prevail on his OCSPA claims.

{¶12} In so holding, *EchoStar* relied on *Chestnut v. Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, discretionary appeal not allowed, 111 Ohio St.3d 1414, 2006-Ohio-5083, where the purchaser of an automobile brought suit under the OCSPA. The plaintiff in *Chestnut* alleged the defendant engaged in deceptive acts by failing to obtain a salvage title after the car was damaged in a fire and by not properly representing the degree of damage to the car. The court held:

However, Chestnut was fully aware of the situation, as Ray's informed him that the Saturn was damaged in a fire and he observed the vehicle as it was being repaired. He also spent \$8,500 on a car with approximately 6,000 miles on it, when the ACV was over \$14,000. As Progressive stated in its brief, "this is not a case where an unsuspecting consumer purchased a vehicle with no knowledge of its prior history and was deceived because the vehicle's title failed to reveal that it had been damaged. Plaintiff here knew full well that the vehicle had sustained fire damage and was able to purchase the vehicle for a fraction of its retail value."

We conclude that Progressive did not commit a deceptive or unfair act as contemplated by the CSPA.

Id. at ¶24-25.

{¶13} The court in *EchoStar* also relied on *Crull v. Maple Park Body Shop* (1987), 36 Ohio App.3d 153, where a plaintiff brought an action under the OCSPA against a defendant who had painted his car. The plaintiff had taken his car to the body shop and was given a written estimate for the painting; however, a few weeks later, it was discovered that the car had been damaged by hail. Therefore, the plaintiff was notified that additional work would be necessary, he agreed to pay the additional cost, and the work proceeded. The plaintiff was apparently satisfied with the work and took the car home. Later, dissatisfied with the quality of the work, plaintiff filed a complaint alleging, in part, violations of the OCSPA, upon which the trial court granted summary judgment in favor of the defendant.

{¶14} On appeal, the plaintiff argued there was a genuine issue of material fact as to whether the defendants violated the OCSPA. According to the plaintiff, the defendants failed to post a sign in compliance with the rules promulgated under R.C. 1345.01 *et seq.*, specifically Ohio Adm.Code 109:4-3-13. Though the court presumed that the sign was not posted, the court stated, "we fail to see that the failure to post the required sign constituted a deceptive act or practice." *Id.* at 157. Because the defendants provided the plaintiff with a written estimate and the plaintiff approved an amount larger than the original estimate before the repairs were finished, the court concluded that "all the information required to be included in the sign was actually complied with. Therefore, we fail to see that appellant could have been deceived by the omission of the sign." *Id.* at 158.

{¶15} The *EchoStar* court held that "these cases, taken together, stand for the proposition 'that a plaintiff who could not have been deceived by a supplier's conduct

cannot prevail on an OCSPA claim.' " Id. at 908, quoting *EchoStar* at 653. In reaching its holding, the court expressly distinguished and rejected the cases upon which the plaintiff relied, which we note are the same cases appellant relies upon here.

{¶16} The facts before the Sixth Circuit in *EchoStar* are remarkably similar to those present before us. In *EchoStar*, the plaintiff filed his federal action contending the advertising campaign of defendant, EchoStar Satellite, LLC, n.k.a. DISH Network, LLC, violated the OCSPA. The litigation arose out of a series of emails allegedly sent out by the defendants advertising cable television services that DISH provides. The plaintiff alleged the advertisements illegally omitted certain terms and conditions relating to, inter alia, the minimum length of a contract, price quotes, mandatory leasing requirements, and terms of subscription. The plaintiff, however, was admittedly aware of the terms he complained were excluded and was not deceived at any time by the advertisements; therefore, the court held he was not entitled to recovery under the OCSPA. See also *Ferron v. 411 Web Directory* (S.D. Ohio 2010), No. 2:09-cv-153 ("for the same reasons explained in *Echostar* and adopted herein, the Court concludes that Plaintiff cannot succeed on his OCSPA claims and that Defendants are, therefore, entitled to judgment as a matter of law").

{¶17} To avoid this result and in support of his contention that *EchoStar's* conclusion is in error, appellant cites *Ferron v. SubscriberBase Holdings, Inc.* (S.D. Ohio 2010), No. 2:08-cv-760, and *Ferron v. MetaReward, Inc.* (S.D. Ohio 2010), 698 F.Supp.2d 992, as examples of the "two other jurist[s] of the United States District Court for the Southern District of Ohio, Eastern Division [that] have recently issued rulings that contradict the * * * court's ruling [in] *Echostar*." (Appellant's brief at 15.)

{¶18} The decisions from *MetaReward* and *Subscriberbase* that appellant relies upon, however, concerned pleading requirements in light of motions to dismiss and, therefore, we find are not relevant to our disposition of the issues presented in the matter sub judice. Further, the District Court in *Subscriberbase* recently rejected the theory advanced herein by appellant by stating, "[w]hile Ferron contends that *Echostar* incorrectly applies Ohio law, this Court agrees with Judge Watson's thorough and well-reasoned opinion." *Id.* (emphasis added). The court went on to state, "[m]oreover, as the facts in the instant case are substantially similar to those in *Echostar*, and because the record indicates that Ferron could not have been deceived by the emails, the Court grants summary judgment in favor of *SubscriberBase*." *Id.* (emphasis added).

{¶19} Turning to the matter before us, appellant asserts the email advertisements sent by appellee violate the OCSPA because they fail to contain applicable terms and conditions. Appellant readily concedes he was not at any time deceived by the email advertisements because he was aware of what the terms of the offer were. According to appellant, because he had previously researched this issue and because he was involved in prior litigation involving the same subject matter a year before the instant case was filed, he was aware of what could potentially be a deceptive consumer sales practice prior to ever having received any of the emails that are the subject of this lawsuit. Additionally, appellant admitted at his deposition that because he believed the emails at issue here were in violation of the OCSPA, he began saving subsequent emails for litigation purposes. Thus, just as in *EchoStar*, *Subscriberbase*, and *411 Web Directory*, the record affirmatively establishes that appellant, through prior litigation, had prior knowledge of the facts such that he was not and could not be deceived by appellee's acts because he was

aware of the terms he alleges were excluded before he received the emails in question. Therefore, we conclude that the trial court did not err in granting summary judgment in favor of appellee.

{¶20} We reiterate the sentiment expressed in *EchoStar* that this interpretation does not frustrate the purpose of the OCSPA, which is to protect consumers. *Roelle* (OCSPA's purpose is to protect consumers); *State ex rel. Celebreeze* (the OCSPA is intended to give protection to consumers). As articulated in *EchoStar*, this decision does not preclude suit from being brought under the OCSPA by persons who receive an advertisement that is allegedly deceptive on its face and then feel misled after learning there are additional terms and conditions that are applicable to the initial offer.

{¶21} Based on the foregoing, we conclude the trial court did not err in granting summary judgment in favor of appellee. Consequently, we overrule appellant's seven assignments of error, and we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.
