

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

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|--|---|--------------------------|
| DEBORAH and DOUGLAS ERHART, |) | C.A. NO: N10C-09-019 PLA |
| wife & husband |) | |
| |) | |
| Plaintiffs, |) | |
| v. |) | |
| |) | |
| DIRECTV, INC., a Corporation of the |) | |
| State of California, and LUXE |) | |
| COMMUNICATIONS, LLC, a Corporation |) | |
| Of State of Delaware, and EDDIE MENA, |) | |
| Individually and as a representative of Luxe |) | |
| Communications, LLC., |) | |
| Defendants. |) | |

**ON PLAINTIFFS' MOTIONS FOR REARGUMENT
DENIED**

Submitted: June 27, 2012
Decided: August 7, 2012

I. Introduction

Plaintiffs Douglas Erhart and Deborah Erhart have filed two motions for reargument asking the Court to reconsider its decision of June 20, 2012 granting Defendants' motions *in limine* to exclude Plaintiffs' claims of unprofessional installation and their claim under the Home Solicitation Sales Act. For the reasons set forth below, both motions for reargument are hereby DENIED.

II. Facts

This case arises out of the installation of satellite cable television equipment in the home of Douglas and Deborah Erhart (“Plaintiffs”), which Plaintiffs allege caused substantial damage to their home.¹ On June 20, 2012, this Court granted six motions *in limine* filed by Defendants DirecTV, Inc. (“DirecTV”), Luxe Communications, LLC (“Luxe”), and Edie Mena (“Mena”) excluding Plaintiffs’ claims for (1) unprofessional installation; (2) violation of the Home Solicitation Sales Act;² (3) violation of the Consumer Contracts Act;³ (4) violation of the Consumer Fraud Act;⁴ (5) a claim for treble damages under the Elderly or Disabled Victims Enhanced Penalties Act;⁵ and (6) a claim to recover attorneys’ fees. Plaintiffs now ask the Court to reconsider its rulings with respect to its claims for unprofessional installation and violation of the Home Solicitation Sales Act.

III. Standard of Review

A motion for reargument pursuant to Rule 59(e) will only be granted “if the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the

¹ For a complete description of the facts giving rise to this litigation, *see Erhart v. DirecTV*, 2012 WL 2367426 (Del. Super. Jun. 20, 2012).

² 6 *Del. C.* §§4401-04.

³ 6 *Del. C.* §§2731-34.

⁴ 6 *Del. C.* §§2511-2527.

⁵ 6 *Del. C.* §4602(10).

underlying decision.”⁶ A motion for reargument should not be used as a vehicle to rehash arguments already presented or to raise new arguments which should have been presented previously.⁷ In a motion for reargument the “moving party has the burden of demonstrating ‘newly discovered evidence, a change in the law or manifest injustice.’”⁸ Under Rule 59(e), a party may not raise new arguments on a motion for reargument that could have been raised prior to the Court’s opinion or decision.⁹

IV. Discussion

A. *The Unprofessional Installation Claim*

In its June 20, 2012 ruling, the Court excluded Plaintiffs’ claim that the installation was unprofessional on the ground that Plaintiffs had failed to designate an expert witness who could testify as to the standards of “professional” cable installation. In so holding, the Court rejected Plaintiffs’ argument that satellite cable installation is a matter within the common knowledge and experience of lay persons.

Now, on motion for reargument, Plaintiffs contend that they have provided standards for cable installation and expert witnesses who can testify as to those standards and how they were breached. Specifically, Plaintiffs refer to a document

⁶ *Kennedy v. Invacare, Inc.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006) (citation omitted).

⁷ *See, e.g., Plummer v. Sherman*, 2004 WL 63414, at *2 (Del. Super. Jan. 14, 2004).

⁸ *Id.* (citations omitted).

⁹ *Id.*

entitled “DirecTV’s Standard Professional Guidelines,” which the Plaintiffs received from Defendants by letter dated March 19, 2012. In the letter, Defendants designated Blaine Illingworth as an expert on cable installation. Plaintiffs assert that several witnesses, including Mena, Jermaine Simms of Luxe Communications, and Anthony DelRay, who conducted the post-installation inspection for DirecTV, qualify as experts in cable installation and will be able to testify as to how Mena’s installation work failed to live up to the standard of professionalism in his field. At the end of the brief, Plaintiffs ask the Court to re-open discovery to permit them to take the deposition of Blaine Illingworth on the subject of professional installation standards. Plaintiffs submit that manifest injustice will result if expert discovery is not re-opened because of the extended trial date and Defendants’ failure to produce the manual on professional installation during the discovery period.

Plaintiffs have failed to meet their burden of showing that reargument should be granted. First, the Court cannot consider Plaintiffs’ argument that the DirecTV manual sets forth the standards for professional installation in the cable industry because they should have made this argument in their response to Defendants’ motion *in limine*. Plaintiffs received the manual on March 19, 2012. They filed their responses to Defendants’ motions *in limine* on May 8, 2012. There is therefore no reason that Plaintiffs could not have addressed DirecTV’s training manual in their response to Defendants’ motion *in limine*. Rule 59(e) prohibits the

Court from hearing new arguments on a motion for re-argument that could have been previously raised. As such, the Court cannot consider the DirecTV document outlining its standards for professional installation on this motion for reargument.

Furthermore, Plaintiffs' claim that they can produce expert witnesses to testify to the standards of professional installation and how they were breached in this case is disingenuous at best. According to the Trial Scheduling Order issued in this case, Plaintiffs were due to submit expert reports by November 7, 2011. At the time Defendants filed their motion *in limine*, Plaintiffs had designated no expert witness with respect to their unprofessional installation claim. To make matters worse, at the end of their brief, Plaintiffs undermine their original assertion that there are already expert witnesses present in the case by asking the Court to re-open expert discovery in light of the fact that Defendants successfully moved to continue this case and submitted DirecTV's standard professional guidelines after the close of discovery. While the Court notes that neither party in this case has distinguished itself by adhering to the Court's scheduling order, Plaintiffs' effort to circumvent those deadlines by first asserting that there are expert witnesses in the case, then asking the Court to reinstate their claim and re-open expert discovery, ostensibly for the purpose of obtaining testimony supporting the unprofessional installation claim, so that they may *then* prove their claim, is unacceptable to the

Court. Plaintiffs' motion to reargue the motion *in limine* excluding the claim of unprofessional installation is DENIED.

B. *Home Solicitation Sales Act Claim*

In its June 20, 2012 ruling, the Court also excluded Plaintiffs' claim against Defendants based on an alleged violation of the Home Solicitation Sales Act.¹⁰ The Court determined that the Home Solicitation Sales Act did not apply to the transaction in this case because the plaintiffs had initiated the transaction by telephone in response to a flyer left at their home as part of a mass-distribution advertising campaign. The Court held that the transaction as alleged in the Complaint fell within the exemptions described in sections 4403(d) and (e) of the statute, which provide that the Home Solicitation Sales Act do not apply to telephone transactions initiated by the consumer and to transactions where the consumer invited the seller to visit the buyer's home for the purpose of repairing or performing maintenance upon the seller's personal property.¹¹ In particular, the Court noted that the type of arm's-length transaction in which the Erharts engaged DirecTV and its subcontractors did not implicate the statute's overriding policy concern, which is to protect consumers from high-pressure, door-to-door sales techniques.¹²

¹⁰ 6 *Del. C.* §§4401-04.

¹¹ *Erhart*, 2012 WL 2367426, at * 5; 6 *Del. C.* §4403(d)-(e).

¹² *Erhart*, 2012 WL 2367426, at *5; 6 *Del. C.* §4401.

In their motion for reargument, Plaintiffs submit that the Court misapprehended the Home Solicitation Sales Act and that the Court misapprehended the nature of the transaction in light of the purpose of the Act and Rule to prohibit deception in door-to-door sales. Plaintiffs assert, with no citation to any authority, that the Home Solicitation Sales Act is “based upon and in many respects identical to” the Federal Trade Commission’s Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or At Certain Other Locations.¹³ Plaintiffs proceed to discuss various regulations and secondary sources interpreting the FTC regulation and conclude that the Home Solicitation Sales Act does apply to the present transaction because there was additional contact between the buyer and seller beyond the initial telephone transaction. To bolster their argument, Plaintiffs cite to a number of cases in other jurisdictions holding that consumer protection statutes apply regardless of whether a consumer appears to need special protection and that the seller ordinarily has the burden of proving that an exception to a consumer protection statute applies.

Upon review of the record and applicable law, the Court will not allow reargument of Plaintiffs’ Home Solicitation Sales Act claim. Plaintiffs’ brief, which was less than cogently argued, is nothing more than a rehash of the argument over whether the Home Solicitation Sales Act applies to the transaction

¹³ 16 C.F.R. 429.

at issue in this case. The Court has already determined that the Home Solicitation Sales Act does not apply to the Erharts' transaction with DirecTV. Plaintiffs' submission, with its numerous citations to secondary sources discussing an FTC regulation and citations to decisions in other jurisdictions, fails to persuade the Court that it has misapprehended the law of Delaware. Nor have Plaintiffs presented new factual evidence to suggest persuasively that the Court misunderstood the nature of the transaction. All Plaintiffs have done is rehash facts and arguments that were raised on the first round of argument. Plaintiffs' dissatisfaction with the Court's decision is not a sufficient reason to grant a reargument. Accordingly, Plaintiffs' motion to reargue the decision excluding Plaintiffs' claim under the Home Solicitation Sales Act is DENIED.

V. Conclusion

For the reasons set forth above, Plaintiffs' Motions for Reargument are hereby DENIED.

IT IS SO ORDERED.

/s Peggy L. Ableman

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: All Counsel via File & Serve