[Cite as *McGill v. Image Scapes, L.L.C.*, 2010-Ohio-6246.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

MICHAEL McGILL, et al.	C.A. No. 10CA0043-M
Appellees	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
IMAGE SCAPES, LLC, et al.	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellants	CASE No. 07CIV1462

DECISION AND JOURNAL ENTRY

Dated: December 20, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellants, Image Scapes, LLC, and Joshua Smith (collectively "Image Scapes"), appeal from the judgment of the Medina County Court of Common Pleas in favor of Plaintiff-Appellees, Michael and Lauren McGill ("the McGills"). This Court affirms.

I

{¶2} This is the third time this matter has been before this Court. In October 2008, Image Scapes appealed and at the request of the McGills, the Court dismissed the appeal because a motion for attorney fees remained pending before the trial court. *McGill, et al. v. Image Scapes, et al.* (Nov. 24, 2008), 9th Dist. No. 08CA0075-M. In May 2009, the trial court awarded the McGills $3,578.80 in attorney fees, and Image Scapes again appealed from the trial court's decision. In January 2010, this Court dismissed Image Scapes' appeal because the trial court's order had not resolved all of the claims between all the parties. Specifically, the trial court had failed to dispose of the breach of contract, negligence, and individual liability counts that were

included in the McGills' complaint, but were the subject of an oral motion to dismiss at the hearing. Because those counts remained pending before the trial court, this Court dismissed Image Scapes' appeal for a second time. *McGill, et al. v. Image Scapes, et al.*, 9th Dist. No. 09CA0038-M, 2010-Ohio-36. In its March 2010 judgment, the trial court dismissed the three remaining claims. Image Scapes has appealed from that judgment, and this matter is now properly before the Court.

{¶3} Previously, we set forth the facts of this case as follows:

> "In 2006, the McGills contracted with Image Scapes to install a new lawn and landscaping on their property. In May 2007, Image Scapes began landscaping the property and installing the lawn. Over time, the lawn failed to grow properly and the McGills' yard began to develop bare patches and significant weeds. The McGills attempted to contact Image Scapes by phone and by mail to correct the problem, but never received a response.
>
> "In September 2007, the McGills filed a five-count complaint based on their inability to resolve the matter with Image Scapes. The complaint alleged a violation of the Consumer Sales Practices Act ("CSPA") and the Home Solicitation Sales Act ("HSSA"), with the remaining counts alleging breach of contract, negligence, and individual liability against Smith. In February 2008, the McGills provided Image Scapes with written notice that they sought to cancel the parties' contract and requested the return of the money they had paid to Image Scapes under the contract." Id. at ¶2-3.

At the August bench trial, the McGills elected to proceed solely on their alleged violations of the HSSA and the CSPA. Image Scapes moved for a directed verdict before and after the McGills' case, arguing that McGills' complaint had not sought to recover based on the cancellation of the contract, but had instead sought to enforce the contract and recover compensatory damages. The trial court denied Image Scapes' motion in both instances.

{¶4} The McGills prevailed on their claims and, in its October 2008 decision, the trial court awarded them $2,102.13, an amount equal to the amount they had paid Image Scapes under

their contract, and attorney fees. Image Scapes appealed, asserting one assignment of error for our review.

II

Assignment of Error

"PLAINTIFFS' COMPLAINT IS AN ACTION FOR COMPENSATORY DAMAGES, NOT RECISION (sic) OR CANCELLATION."

{¶5} In the preliminary pages of its brief, Image Scapes identified three assignments of error. In the argument section of its brief, however, Image Scapes separately captioned and discussed only the preceding assignment of error. Accordingly, we limit our review to the above-captioned assignment of error and the arguments offered by Images Scapes in support of it. App.R. 16(A)(7). Image Scapes argues that the trial court erred as a matter of law by permitting the McGills to proceed at trial on a cancellation theory when their complaint sought compensatory damages as a remedy. Additionally, Image Scapes maintains that the trial court erred by entering judgment against Smith, as the McGills dismissed the fifth count of their complaint in which they sought to recover against him individually. Image Scapes further asserts that Smith was acting as an officer for the corporation and, therefore, he cannot be held personally liable on the contract, despite having signed it. We disagree.

{¶6} As mentioned, Image Scapes moved for a directed verdict both before and after the McGills presented their case. A motion for a directed verdict under Civ.R. 50, however, is only appropriate when a matter is being tried to a jury. *ALH Properties, P.P.L., v. Procare Automotive Service Solutions, L.L.C., et al.*, 9th Dist. No. 20991, 2002-Ohio-4246, at ¶8. In a bench trial, a motion for a directed verdict at the close of the plaintiff's evidence is considered a motion for involuntary dismissal under Civ.R. 41(B)(2). Id. "[W]hen the trial court rules on a motion for involuntary dismissal under Civ.R. 41(B)(2), the court weighs the evidence, resolves

any conflicts, and may render judgment in favor of the defendant if the plaintiff has shown no right to relief." Id. at ¶9. "The trial court's conclusions will not be set aside unless they are erroneous as a matter of law or against the manifest weight of the evidence." Id. at ¶10. Image Scapes' does not challenge the weight of the evidence adduced at trial. That is, Images Scapes does not challenge the trial court's conclusion that, as a service contract entered into at the McGills' residence, the transaction between it and the McGills constituted a home solicitation sale under the HSSA. Instead, it argues that the trial court erred as a matter of law in permitting the McGills to pursue cancellation of their contract because their complaint sought only damages under the contract, and further, that Smith could be held individually liable under the contract.

{¶7} The McGills' complaint alleges in count one that Image Scapes "committed unfair, deceptive, and unconscionable acts and practices in violation of [the CSPA]" by which the McGills "ha[d] been damaged[.]" Count four of the complaint alleged that Image Scapes "committed acts and practices [] in violation of [the HSSA]." Pursuant to the provisions of the HSSA, every home solicitation sale agreement shall include a "notice of cancellation" informing the buyer that he or she has the right to cancel the sale "until midnight of the third business day after the day on which the buyer signs [the] agreement[.]" R.C. 1345.22. Moreover, the HSSA expressly provides that:

> "Until the seller has complied with [the written notice of cancellation requirements outlined in R.C. 1345.23(A) and (B)] the buyer may cancel the home solicitation sale by notifying the seller by mailing, delivering, or telegraphing written notice to the seller of his intention to cancel. The three day period prescribed by section 1345.22 of the Revised Code begins to run from the time the seller complies with [the written notice of cancellation requirements]." R.C. 1345.23(C).

Generally, home improvement contracts, in which there are a combination of goods and services provided as is the case here, are considered a contract for services. *Clemens v. Duwel* (Jan. 27,

1995), 100 Ohio App.3d 423, at 431-32. Where the seller is providing a service to the buyer, the seller "shall not commence performance of such services during the time in which the buyer may cancel." R.C. 1345.22. Thus, the statute "clearly [places] the risk on the home improvement contractor who begins performance before giving the consumer proper notice of the right to cancel." *Clemens*, 100 Ohio App.3d at 431, quoting *R. Beaver & Sons Roofing & Siding, Inc. v. Kinderman* (1992), 83 Ohio App.3d 53, 61. If a buyer elects to cancel the contract, the buyer is entitled to a refund of all payments made under the contract. R.C. 1345.23(D)(4)(a). Upon demand from the seller, the buyer must make the goods available for return to the seller. R.C. 1345.27. With respect service contracts, however, the buyer is not required to return the goods used under the contract because it is generally impractical and/or wasteful to remove the items. *Clemens*, 100 Ohio App.3d at 432. Moreover, permitting the buyer to retain the goods used under the service contract is consistent with the legislative design to impose the risk of loss upon the seller where the seller provides services in the absence of providing the buyer with the proper notice of his or her cancellation rights. Id.

{¶8} It is undisputed that Image Scapes did not provide the McGills with a notice of cancellation as required by the HSSA, but performed under the contract in spite of this omission. As a result of Image Scapes' failure to inform the McGills of their right to cancel under the HSSA, the McGills' three-day cancellation period never expired, despite Image Scapes commencing and completing the work the McGills had contracted for under the parties' agreement. R.C. 1345.23(C). See, also, *Knight v. Colazzo*, 9th Dist. No. 24110, 2008-Ohio-6613, at ¶19-21 (permitting a buyer to cancel under the HSSA six years after the parties entered into a service contract because the seller failed to inform the buyer of her right to cancel the contract in accordance with R.C. 1345.23). Thus, once the McGills informed Image Scapes in

writing of their desire to cancel the contract, Image Scapes was obligated to refund the payments the McGills had made under the contract. R.C. 1345.23(D)(4)(a). See, also, *Clemens*, 100 Ohio App.3d at 431-32. Moreover, the McGills' cancellation letter from February 2008 put Image Scapes on notice that they sought to recover based on their alleged violations of the HSSA, and that they sought to do so by cancelling the contract under R.C. 1345.23.

{¶9} In support of its argument on appeal, Image Scapes directs this Court to *Rosenfield v. Tombragel* (Dec. 31, 1996), 1st Dist. No. C-950871, at *2, where the court focused on the election of remedies sought by the buyer. The *Rosenfield* Court concluded that, where a buyer has sued for damages under the CSPA before informing the seller of his desire to cancel the contract, the buyer is precluded from simultaneously cancelling the contract and seeking to recover damages under it. Therefore, the *Rosenfield* Court reversed the trial court's decision to award treble damages at the same time the buyer had recovered under the contract based on the CSPA's cancellation provision. *Rosenfield*, at *3.

{¶10} The Eleventh District later analyzed the *Rosenfield* decision in a case remarkably similar to the case at bar and aptly noted, that, "[while] a buyer may not *recover* on two different theories for damages, [] a buyer may *assert* alternative theories for recovery in [a] complaint." *Kamposek v. Johnson*, 11th Dist. No. 2003-L-124, 2005-Ohio-344, at ¶26. In *Kamposek*, as was the case here, the buyers filed suit to recover for breach of contract and violations of the HSSA. Approximately seven months after filing suit, the buyers sent the sellers a written notice of cancellation. The trial court's decision to permit the buyers to cancel the contract and to order the refund of their payments was affirmed on appeal, because unlike the court in *Rosenfield*, the *Kamposek* Court did not also award any damages under the contract. In doing so the *Kamposek* Court distinguished between the availability of cancellation of a contract under the HSSA and

rescission of a contract under the CSPA. *Kamposek* at ¶30. Specifically, the court noted that when a contract is properly cancelled under the HSSA, there is no reason to resort to rescission of the contract under the CSPA, nor would a buyer be entitled to rescission, given the CSPA's requirement that rescission of the contract must occur "before any substantial change" is made to the subject matter of the transaction. Id.; R.C. 1345.09(C).

{¶11} We consider the case at bar analogous to the situation in *Kamposek,* as the McGills' complaint alleged both breach of contract and violations of the HSSA. Similarly, the McGills provided a written notice of their desire to cancel the contract under the HSSA after having filed their complaint and receiving Image Scapes' answer generally denying their claims. As in *Kamposek,* it was evident that the McGills had elected to cancel the contract and were no longer seeking to recover damages under it, nor were they seeking rescission under the CSPA. Having cancelled the contract, the McGills were statutorily entitled to a refund of their money. R.C. 1345.23(D)(4)(a); see, also, *Kamposek* at ¶24-26. Accordingly, the trial court did not err in denying Image Scapes' motion and allowing the McGills to recover the amount they had paid under the parties' contract based on their desire to cancel the contract.

{¶12} We are mindful that the HSSA is not to be used as a sword by the buyer to take advantage of a seller's failure to inform the buyer of his right to cancel, but rather, is meant to shield the consumer from deceptive practices. *Kamposek* at ¶33; *White v. Allstate Ins. Co.*, 8th Dist. No. 92648, 2009-Ohio-5829, at ¶17-19 (awarding the buyer $0 in damages given the buyer's attempt to cancel the contract under the HSSA and obtain a full refund, despite his house being repaired to its original condition under the buyer's homeowner's policy.) There is neither any evidence nor any allegation, however, that the McGills have acted in such a manner in this case.

{¶13} Next we consider whether the trial court erred in granting judgment against Smith individually based on his status as a corporate officer of Image Scapes. In their complaint, the McGills' sought joint and several liability against Image Scapes and Smith for violations of the HSSA and the CSPA. R.C. 1345.28 provides that the "[f]ailure to comply with [the HSSA] constitutes a deceptive act or practice in connection with a consumer transaction in violation of [the CSPA]." This Court has previously held that "[u]nder the CSPA, if an individual employee engages in unfair consumer acts and deals directly with the consumer, that person can be held personally liable, notwithstanding that the individual acted as an agent of his employer." *Stultz v. Artistic Pools, Inc.* (Oct. 10, 2001), 9th Dist. No. 20189, at *4, quoting *Inserra v. J.E.M. Building Corp*. (Nov. 22, 2000), 9th Dist. No. 2973-M, at *5. "In order to hold a corporate officer personally liable for his actions in violation of the [CSPA], the evidence must show the officer took part in the commission of the act, specifically directed the particular act to be done, or participated or cooperated therein." *Stultz*, at *3, quoting *Grayson v. Cadillac Builders, Inc.* (Sept. 14, 1995), 8th Dist. No. 68551, at *3 (assigning personal liability to the corporation's president based on the false representations he made to the buyer on behalf of his corporation). Moreover, if an officer "personally commits acts in violation of [the] CSPA on behalf of the corporation, he can be held personally liable for damages caused by his own acts." *Inserra*, at *5.

{¶14} Smith testified that he is a co-owner of Image Scapes. Additionally, the record reveals that Smith came to the McGills' home and gave them a verbal contract, which he followed up with a written contract for the work to be done. Smith signed the contract which omitted a notice of cancellation as required by the HSSA and performed the work on the McGills' property, despite this omission. Initially, Smith was the party to whom the McGills'

made their payment, and later, was the party to whom they served their notice of cancellation. In essence, Smith was the only point of contact that the McGills had with Image Scapes. Thus, it is evident that Smith personally committed the act that violated the HSSA, which in turn constituted a violation of the CSPA. Id. See, also, R.C. 1345.28. Therefore, the trial court did not err in assigning joint and several liability to Smith based on these actions.

{¶15} For the foregoing reasons, Image Scapes' argument lacks merit and its sole assignment of error is overruled.

III

{¶16} Image Scapes' assignment of error is overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

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 Medina, 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(E). 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 Appellants.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS IN JUDGMENT ONLY

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶17} I concur in the judgment. In my view, the main opinion does not squarely address one of the Appellants' core arguments, namely that because the McGills specifically requested compensatory damages in their complaint, they were foreclosed from seeking cancellation as a remedy. The prayer for relief section of the McGills' complaint does not contain a request for cancellation or rescission of the contract. Instead, the McGills only requested compensatory damages as their prayer for relief. Appellants have argued, in part, that because the McGills did not actually request cancellation in their complaint and only sought compensatory damages, they were foreclosed from seeking cancellation as a remedy.

{¶18} Thus, although I might have analyzed the Appellants' assignments of error differently, I concur in the result.

APPEARANCES:

O. JOSEPH MURRAY, Attorney at Law, for Appellants.

ROBERT B. CAMPBELL, Attorney at Law, for Appellees.