

IN THE UTAH COURT OF APPEALS

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| Robert Kleyweg, |) | MEMORANDUM DECISION |
| |) | (Not For Official Publication) |
| Plaintiff and Appellant, |) | |
| |) | Case No. 20080801-CA |
| v. |) | |
| |) | F I L E D |
| Memorial Estates, Inc., |) | (February 12, 2009) |
| |) | |
| Defendant and Appellee. |) | 2009 UT App 37 |

Third District, Salt Lake Department, 050913080
The Honorable Anthony B. Quinn

Attorneys: Jon H. Rogers, Salt Lake City, for Appellant
B. Ray Zoll and Micah Bruner, Sandy, for Appellee

Before Judges Thorne, Bench, and Orme.

PER CURIAM:

Robert Kleyweg appeals the district court's final judgment entered on August 18, 2008. This matter is before the court on Memorial Estates, Inc.'s (Memorial Estates) motion for summary disposition. We affirm.

Mr. Kleyweg asserts that the district court erred in finding: (1) that Memorial Estates's actions did not fall within the scope of the Consumer Sales Practices Act (the Act); (2) that Mr. Kleyweg failed to demonstrate by a preponderance of the evidence that he suffered a loss under the Act; and (3) that any violation of the Act by Memorial Estates resulted from a bona fide error, which constitutes a statutory defense. This court will not disturb the district court's factual findings unless they are clearly erroneous. See Wilde v. Wilde, 2001 UT App 318, ¶ 31, 35 P.3d 341.

The Act makes it a deceptive practice to knowingly or intentionally fail to ship goods or furnish services "within the time advertised or otherwise represented." Utah Code Ann. § 13-11-4(2)(1) (2005). Assuming that a party demonstrates that a supplier violated the terms of the Act, the Act provides a statutory defense for any violation that is a result of a bona fide error. Under the Act, if a supplier demonstrates, by a preponderance of the evidence, that its violation of the Act resulted from a bona fide error, notwithstanding the maintenance

of procedures reasonably adapted to avoid the error, recovery shall be limited to the amount, if any, in which the supplier was unjustly enriched by the violation. See id. § 13-11-19(4)(c).

This court need not reach Mr. Kleyweg's assertions that Memorial Estates's actions fell within the scope of the Act, and that Memorial Estates violated the terms of the Act, because even were this court to assume the accuracy of his assertions, the record also supports the district court's determination that Memorial Estates proved, by a preponderance of the evidence, that any violation of the Act would have been the result of a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid such error, and that Memorial Estates was not unjustly enriched by any such violation.

The record demonstrates that there was evidence that Mr. Kleyweg's order was not timely placed due to a bona fide error by one of Memorial Estates's employees. The record also demonstrates that there was evidence that this bona fide error occurred notwithstanding Memorial Estates's maintenance of procedures reasonably adapted to avoid such error. There was also evidence to support the district court's determination that Memorial Estates was not unjustly enriched by its purported violation of the Act. Thus, we cannot say that district court erred in weighing the evidence and determining that Memorial Estates had established a statutory defense under Utah Code section 13-11-19(4)(c). Accordingly, Mr. Kleyweg is not entitled to any recovery. See id.

Both parties have also requested that this court award their attorney fees pursuant to Utah Code section 13-11-19(5). Based on the record, Mr. Kleyweg, who did not prevail below, is unable to prevail on appeal. Thus, we need not reach the question of whether he is entitled to recover his attorney fees. See id. § 13-11-19(5). Memorial Estates's request for attorney fees is denied as the record does not support a finding that Mr. Kleyweg brought or maintained this action knowing it to be groundless. See id. § 13-11-19(5)(a).

Affirmed.

William A. Thorne Jr.,
Associate Presiding Judge

Russell W. Bench, Judge

Gregory K. Orme, Judge