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IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO

MAZOLA FRANK,	:	Case No. A2100934
Plaintiff,	:	Judge Shanahan
v.	:	Decision on Cross-Motions for Summary Judgment
BARRETT WISE, LLC, *et al.*,	:	
Defendants.	:	

BARRETT WISE, LLC,	:	
Defendant/ Third-Party Plaintiff,	:	
v.	:	
ALISA B. CULYER, *et al.*,	:	
Third-Party Defendants.	:	

This case came on to be heard on the cross motions for summary judgment filed by Plaintiff, Mazola Frank, and Defendant, Barrett Wise, LLC. Also pending are 1) Defendant's Motion to Strike Plaintiff's Supplemental Reply Memorandum in Support of her Motion for Summary Judgment on her Second Cause of Action and Memorandum in Opposition to Defendant Barrett Wise, LLC's Cross Motion for Summary Judgment and 2) Plaintiff's Motion for Leave to file Supplemental Authority in Support of Motion for Summary Judgment with

Memorandum in Support and Memorandum in Opposition to Defendant's Motion to Strike. The Court has considered the papers filed by the parties, the oral argument of the parties, and the relevant law.

The Court denies the Motion to Strike Plaintiff's Supplemental Reply Memorandum in Support of her Motion for Summary Judgment on her Second Cause of Action and Memorandum in Opposition to Defendant Barrett Wise, LLC's Cross Motion for Summary Judgment. The Court grants Plaintiff's Motion for Leave to file Supplemental Authority in Support of Motion for Summary Judgment with Memorandum in Support and Memorandum in Opposition to Defendant's Motion to Strike.

STANDARD

Rule 56(C) provides that summary judgment may be granted when the moving party demonstrates (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom summary judgment is made. *Zurich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370 (1998); *Vahila v. Hall*, 77 Ohio St.3d 421, 429-430 (1997).

Under Civil Rule 56, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The party moving for summary judgment bears the burden of demonstrating no genuine issue of material fact exists with regard to the essential elements of the claims of the non-moving party. *Id.* The burden is then on the non-moving party to present evidence showing that there is some issue of material fact yet remaining for the trial court to resolve. *Dresher* at 293. The non-moving party may not rely on

mere allegations or denials in his pleading. Civ.R. 56(E); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1998).

Whether a genuine issue of material fact exists is answered by the inquiry of whether the evidence presents "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]" *Anderson v Liberty-Lobby, Inc.*, 477 U.S. 242, 251 (1986). The inquiry performed is the threshold inquiry of determining whether there is a need for trial - whether, in other words, there are any genuine factual issues that can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. *Id.* at 250.

The Court finds that the issue presented at this time does not require submission to a jury but may be decided as a matter of law.

DISCUSSION

The parties dispute whether the Ohio Consumer Sales Practice Act (R.C. Chapter 1345) applies to the transaction between the parties, and if so, whether the Home Solicitation Sales Act (R.C. Chapter 1345.21) was violated, or whether the Home Construction Service Suppliers Act (R.C. Chapter 4722) applies to the transaction. The parties agree that the two Acts are mutually exclusive in this case. According to Plaintiff, if the Remodel Proposal submitted by Defendant to Plaintiff is a proposal to remodel an existing home, then Plaintiff's motion for summary judgment should be granted; if it is a proposal for construction of a residential building, then Defendant's motion for summary judgment should be granted.

Plaintiff says that in order for the Home Construction Service Suppliers Act (HCA) to apply, the Remodel Proposal must be for the construction of a one-family building. In support of her position that the Ohio Consumer Sales Practices Act (OCSPA) applies rather than the HCA, Plaintiff reasons as follows: The BW remodeling contract with Plaintiff is covered by the OCSPA

as a "Consumer transaction." The OCSPA defines a "Consumer transaction," in pertinent part, as a "transfer of ...a service...to an individual for purposes that are primarily...household." (R.C. 1345.01(A)). Here, BW sought to transfer a home remodeling service to Plaintiff, said "home" remodeling service being primarily "household." BW is a "Supplier" under the OCSPA. The OCSPA defines a "Supplier" as a "seller...engaged in the business of effecting or soliciting consumer transactions." (R.C. 1345.01(C)). Plaintiff is a "Consumer" under the OCSPA. The OCSPA defines a "Consumer" as a "person who engages in a consumer transaction with a supplier." (R.C. 1345.01(D)).

Defendant counters that the HCA applies, reasoning as follows: In 2012, the OCSPA was amended to reflect that "'Consumer transaction' does not include transactions ... involving a home construction service contract as defined in section 4722.01 of the Revised Code." The HCA defines "home construction service" as "the construction of a residential building." A "home construction service contract" is defined as "a contract between an owner and a supplier to perform home construction services ...for an amount exceeding twenty -five thousand dollars." A "home construction service supplier" is "a person who contracts with an owner to provide home construction services for compensation and who maintains in force a general liability insurance policy in an amount of not less than two hundred fifty thousand dollars." "Residential building" is defined as "a one, two of three family dwelling and any accessory construction incidental to the dwelling." Further, R.C. 4722.01 (B) provides that "'Home construction service' does not include construction performed on a structure that contains four or more dwelling units, except for work on an individual dwelling unit within that structure, or construction performed on the common area of a condominium property."

For the reasons that follow, the Court finds that the HCA applies to the transaction and the OCSPA and the Home Solicitation Sales Act (HSSA) do not apply.

The undisputed facts are that Defendant, Barrett Wise, LLC, performed extensive remodeling work at Plaintiff's home. Plaintiff paid Defendant $143,929 for the work. In November 2019, Plaintiff terminated her relationship with Defendant. On December 16, 2020, Plaintiff notified Defendant that she was cancelling the agreement with Defendant pursuant to Section 1345.22(A) of the Ohio Revised Code, the HSSA. Plaintiff says that pursuant to R.C. 1345.22 (A), she was entitled to a three-day cancellation notice. Plaintiff was not given a three-day cancellation notice. Thus, argues Plaintiff, she has an unexpired right to cancel the transaction, a right that she exercised on December 16, 2020, when she sent Defendant a notice of cancellation and demanded a refund of all monies paid by her in the amount of $143,929. Defendant refused Plaintiff's demand, countering that the OCSPA and the HSSA do not apply to the transaction. Specifically, Defendant argues that R.C. 1345.21(A)(4) exempts this transaction from the HSSA.

R.C. 1345.21(A)(4) provides that a home solicitation sale does not include a transaction in which "the 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." Defendant maintains that Plaintiff initiated the contact with Defendant.

As noted above, the legislature recognized that home construction projects did not fit the mold of consumer transactions under the OCSPA and in 2012, a carve out was created for home construction services contracts in excess of $25,000 and performed by contractors that maintain in force a general liability insurance policy in an amount of not less than two hundred fifty thousand dollars. Plaintiff argues that the HCA applies only to new construction; it does not apply to

remodeling projects. Plaintiff refers to the following legislative history to support this conclusion, to wit: The Senate bill was "to establish laws governing the practices of home improvement contractors and to provide civil remedies for home owners who are damaged by a home improvement contractor who violates the law." The bill applied to "Home improvement contractors" performing "home improvements" defined as "any repair, alteration, or addition to any residential building..." This bill did not pass. The bill that did pass refers to "construction of a residential building". It does not mention remodeling home improvements.

Countering Plaintiff's conclusion regarding this piece of legislative history, Defendant responds that, first, if the HCA applies only to new construction projects for one, two or three family residential buildings, a floor of $25,000 seems unworthy of serious consideration. Second, if the legislature intended for the HCA to apply only to "new construction", why did it not simply say "new construction" in its definition of a home construction service contract?

Some of the difficulty may lie in one's definition of "construction": does it apply only to construction of new residential premises or does it also apply to remodeling construction on existing premises? Again, if it applies only to construction of new residential premises, then a floor of $25,000 does seem abysmally low. Further, R.C. 4722.01(E) provides that an "owner" includes "a tenant who occupies the dwelling unit on which the home construction service is performed." This appears inapposite to the statute if the statute applies only to construction of new residential premises. Finally, how does R.C. 4722.01(B) fit in if the HCA does not apply to remodeling contracts on existing premises? R.C. 4722.01(B) provides: "'Home construction service' does not include construction performed on a structure that contains four or more dwelling units, except for work on an individual dwelling unit within that structure, or construction performed on the common area of a condominium property." (Emphasis added.)

Both parties presented excellent briefs on the issues and presented excellent oral arguments. After due consideration, the Court is persuaded that, as a matter of law, the HCA applies to the transaction and the OCSPA and the HSSA do not apply to the transaction.

The Court denies Plaintiff's Motion for Summary Judgment on her OCSPA claim and her HSSA claim. The Court grants Defendant's Motion for Summary Judgment on Plaintiff's OCSPA and HSSA claim.

The parties shall submit an entry pursuant to Rule 17 of the Local Rules of Hamilton County.

1/24/22

Judge Megan Shanahan

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