STATE OF INDIANA) IN THE HAMILTON SUPERIOR
) SS: COURT #3
COUNTY OF HAMILTON) CAUSE NO.: 29D03-1706-PL-005767

CHAD HUGHES AND KRISTA HUGHES,)
Plaintiffs,)
)
v.)
)
INDIANAPOLIS CUSTOM CARPENTRY,)
INC, d/b/a ICC FLOORS,)
Defendant.)

FILED
January 16, 2018
CLERK OF THE HAMILTON
CIRCUIT COURT

ORDER ON THE DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT
ON COUNT III OF THE PLAINTIFF'S COMPLAINT

This matter came before the Court on the Defendant's Motion for Partial Summary Judgment on Count III of the Plaintiffs' Complaint which alleges that the Defendant violated the Deceptive Consumer Sales Act (DCSA), codified at IC 24-5-0.5 *et seq*. The Court examined the motions, briefs and exhibits for both parties and heard argument on the Motion on January 9, 2018. The Court, being duly advised, now finds as follows:

I. Standard of Review for Summary Judgment Motions

The Trial Court reviews all motions for summary judgment to determine whether there is a "general issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267,1269-1270 (Ind. 2009) (citing Ind. Trial Rule 56(C); Freidline v. Shelby Ins. Co., 774 N.E.2d 37, 39 (Ind.

2002). The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Id. at 1270. Once the moving party meets this burden then the burden shifts to the non-moving party to designate and produce sufficient evidence of facts which show that a genuine issue of material fact exists. Id. (citing Mullin v. Mun. City of South Bend, 639 N.E.2d 278, 281 (Ind. 1994). Lastly, the trial court construes all factual inferences in the non-moving party's favor and resolves all doubts regarding the existence of a material issues against the moving party. Id. (citing N. Ind. Pub. Serv. Co. v. Bloom, 847 N.E.2d 175,180 (Ind. 2006).

Ultimately, the purpose of summary judgment is to end litigation about which there can be no factual dispute and which can be determined by the Court as a matter of law. Prassas v. Corick Constr., LLC, 44 N.E.3d 839 (Ind. Ct. App. 2015) (citing LeBrun v. Conner, 702 N.E.2d 754, 756 (Ind. Ct. App. 1998)).

II. Background

The Plaintiffs, Chad and Krista Hughes (hereinafter referred to as "Plaintiffs"), agreed to purchase hardwood flooring, carpet, and tile from Defendant, Indianapolis Custom Carpentry, Inc. (hereinafter referred to as "Defendant"). Pl.'s Complaint, π 3 through 7. The Defendant arrived

at Plaintiff's home to install the materials purchased by Plaintiffs. During the installation process, the Defendant recommended installing a floating floor in the home. Pl.'s Complaint, π 9. The Plaintiff expressed initial concern with installing floating floors on the home's hard slab. Id. Plaintiffs communicated to the Defendant that they preferred the floor to be glued to the slab or nailed to a new subfloor. Id. The Defendant verbally assured Plaintiffs that a floating installation would not pose any issues. Pl.'s Complaint, π 10. The Defendant installed the floating floor. Following the installation of the purchased materials, the Plaintiffs determined that the materials were installed in an unworkmanlike manner. Specifically, the Plaintiffs allege the subsurface of the floating floor was not properly leveled, uneven in places and had weak spots which caused excessive flex in the floor. Pl.'s Complaint, π 15.

Following this discovery, Plaintiffs requested that Defendant perform repairs to correct the defective installations. Defendant attempted to repair the alleged defects on nine (9) occasions. Pl.'s Complaint, π 16-18. The Plaintiffs determined each of these repairs proved to be ineffective. Pl.'s Complaint, π 8. The Plaintiffs subsequently hired an attorney who sent a pre-suit letter to the Defendant. This letter is the subject of the Partial Summary Judgment issue before the Court.

The Plaintiffs further worked with the Defendant before filing the Complaint. Pl.'s Memorandum in Support of Pl's Reply to MSJ, p.2. The parties communicated orally on numerous occasions to resolve the dispute outside of litigation. Id. However, these attempts proved to be unsuccessful and the Plaintiffs filed their Complaint alleging two counts of breach of contract and one count, Count III of the Complaint, a violation of the Home Improvement Contract Act (hereinafter referred to as "HICA") which required pre-suit notice under DCSA.

III. Count III of the Plaintiff's Complaint- The DCSA Claim

In addition to two (2) breach of contract claims, set out in Counts I and II of the Complaint, the Plaintiff also included Count III based on a breach of the DCSA. Specifically, the Plaintiff alleges the Defendant committed a deceptive act by "failing to include in their contracts, the approximate starting and completion dates of the home improvements, contingencies that would materially change the completion date, and failing to have signature lines for all parties involved." Pl.'s Complaint, π 32 and 33. The contract requirements for a home improvement contract are set out in

HICA, codified at IC 24-5-11 *et seq*.[1] A violation of HICA is listed as a deceptive act in the DCSA at IC 24-5-0.5-3 (b) (24).

IV. The Defendant's Partial Motion for Summary Judgment

Defendant bases his Partial Summary Judgment on Plaintiffs' DCSA claim on the argument that the Plaintiff failed to provide proper pre-notice of any deceptive practice committed by the Defendant as required by IC 24-5-0.5-5. The Defendant designates in his evidence "the entirety of each and every paragraph of the Affidavit of Cameron Haughey, attached hereto as Exhibit A; including the correspondence from Hughes' attorney to ICC Floors attached thereto as Exhibit 1." Def.'s Designation of Evidence, π 5. Exhibit 1, (hereafter referred to as "the Notice"), is a letter from the attorney for the Plaintiffs to the Defendant, ICC Floors, dated December 15, 2016. The Notice is one of the documents before the Court the parties have designated to satisfy the written notice requirement of the DCSA. The Notice alleges "defective installation" of a floating floor on the Plaintiff's hard slab at the address designated. The Notice states specifically:

> Based on his knowledge of home renovation, Mr. Hughes expressed initial concern with installing floating floors on the hard slab. Mr. Hughes preferred the floor to be glued to the slab or nailed to a new subfloor. Your company verbally assured him that a floating installation would not

[1] Counsel for the Defendant correctly noted during the Summary Judgment Hearing that HICA was amended as of July 1, 2017 and is now known as the Real Property Improvement Act. At that time of the transaction that led to this lawsuit, the law was still known as HICA.

> pose any issues. The flooring was installed incorrectly and is defective. Specifically, the subsurface was not properly leveled, and therefore the floating installation has uneven places and weak spots where the floor flexes excessively.

V. The Deceptive Consumer Sales Act And its Notice Requirements

The DCSA is intended to provide a remedy or cure for certain proscribed consumer deceptive practices. The DCSA is to be "liberally construed and applied to promote its purposes and policies of protecting consumers from deceptive and unconscionable sales practices" Castagna v. Newmar Corporation, 2016 Westlaw 3413770 at 6. (citing Kesling v. Hubler Nissan, 997 N.E.2d 327, 332 (Ind. 2013). Under the DCSA, "a supplier commits a deceptive act when it makes certain representations "as to the subject matter of a consumer transaction, which can be made orally, in writing, or by electronic communication." Id. (quoting IC 24-5-0.5-3.)

Regarding the notice requirement, IC 24-5-0.5-5 states:

> (a) No action may be brought under this chapter, except under section 4 (c) of this chapter, unless (1) the deceptive act is incurable or (2) the consumer bringing the action shall have given notice in writing to the supplier within the sooner of (i) six (6) months after the initial discovery of the deceptive act, (ii) one (1) year following such consumer transaction, or (iii) any time limitation, not less than thirty (30) days, of any period of warranty applicable to the transaction, which notice shall state fully the nature of the alleged deceptive act and the actual

> damage suffered therefrom, and unless such deceptive act shall have become an uncured deceptive act.
>
> (b) No action may be brought under this chapter except as expressly authorized in section 4 (a), 4(b), or 4(c) of this chapter. Any action brought under this chapter may not be brought more than two (2) years after the occurrence of the deceptive act.

I.C. 24-5-0.5-5

The language in this statute is not as illuminating as it could be. Unlike the notice requirements in the Tort Claims Act, for example, the content requirements of which are specifically spelled out in IC 34-13-3-10, the only guidance the DCSA provides on the required notice is that: 1) it must be in writing; 2) sets out a time period in which the notice must be sent; and 3) requires the notice to fully state the nature of the alleged deceptive act and actual damages incurred as a result. The DCSA doesn't specifically say whether the notice must include the terms "deceptive", "deceptive act" or cite the Indiana Code section for the DCSA to give clear warning to a party of the consumer's invocation of the DCSA.

This notice portion of the DCSA must be also be read in conjunction with the definitions of "uncured deceptive acts" and "incurable deceptive acts", found at numerical paragraphs 6 and 7 at IC 24-5-0.5-2. McCormick Piano & Organ Co. v. Geiger, 412 N.E.2d 842, 848-49 (Ind. Ct. App. 1980). The significance of these provisions is clear. Id. Once the consumer gives

notice to the supplier within the applicable period of an alleged deceptive act stating completely the nature of the act and the actual damages suffered therefrom, then the supplier has thirty days in which to make adjustments or modifications. Id. After this thirty-day interval has expired the consumer may bring suit for "an uncured deceptive act" if he still feels aggrieved by the supplier's actions, but if the consumer fails to comply with the notice procedures then his suit can only be for "an incurable deceptive act." Id.

The distinction drawn between these two definitions is important. Id. Where a consumer has given the prescribed notice his statutory cause of action is predicated on an "uncured deceptive act" and he need only prove commission of an act or practice which has been defined as deceptive by IC 24-5-0.5-3 in order to establish a prima facie case, but, where he has not satisfied the notice prerequisites, the consumer must prove that a deceptive act was committed and also that it was done as part of a "scheme, artifice or device with the intent to defraud or mislead"[2]. This is what the statute means by an "incurable deceptive act."

VI. Discussion

[2] There is no claim alleged by the Plaintiffs alleging fraud.

The Defendant has submitted a narrow question for the Court to decide. Does the pre-suit Notice sufficient to satisfy the requirement of the DCSA? This is an appropriate issue for summary judgment because the Notice speaks for itself. In the Court's review of the Notice, the Court noted that it does not specifically state a deceptive practice. In fact, the Notice does not contain the word "deceptive" or "deceptive act" anywhere in the document. It does not reference the DCSA either by name or by statutory cite either. Unlike Count III in the Complaint, which specifically lists defects in the contracts between the parties which qualify as deceptive practices, such as the "approximate starting and completion dates of the home improvements, contingencies that would materially change the completion date, and failing to have signature lines for all parties", the Notice doesn't discuss these issues at all. It doesn't reference the format of the contracts between the parties in any form. It only mentions the contract estimate totals. Instead, the Notice fixates on workmanship issues.[3] The Notice does refer to verbal reassurances stated by the Defendant's installation representative that the floating floor "would not pose any issues". The context surrounding this statement though is all about workmanship issues. Additionally, the

[3] The Notice, in terms of workmanship issues, lists "defective installation" (referring to the floating floor), "the flooring was installed incorrectly", "the subsurface was not properly leveled", "the floating installation was not properly leveled", "weak spots", "floor flexes excessively", "significant cracks in grout" and "defective floor and grout".

manufacturer of the flooring specifies that a floating floor is one of the suggest ways of installing the floor material purchases by the Plaintiff. Def. Supplemental Designation of Evidence. Thus, there is nothing in that statement which suggests the use of a floating floor is deceptive.

Further, the remedies suggested by the Notice were also eye-catching to the Court. The Notice only requests two things: 1) the Defendant "remove and replace the defective floor and grout"; or, in the alternative, 2) provide a written agreement that the Defendant will "bear the cost of the removing and replacing the defective floor and grout." Again, while the Complaint specifically references defects in the content of the contracts between the parties as deceptive acts, the Notice does not suggest re-writing, excision or contract amendments to make the contracts legally compliant and not deceptive acts.

The Court's conclusion, even in a light most favorable to the non-moving party, is that the Notice does not provide the Defendant <u>any</u> advisement or warning that the dispute between the parties is anything other than a workmanship issue. There is absolutely nothing in the Notice which serves to state fully the nature of a deceptive act as required by the DCSA.

The Court also finds that the Notice does not contain sufficient advisement of actual damages flowing from a deceptive act either.

Regarding damages, the Notice states, “These issue [sic] has driven up the cost of the project, and have prevented the Hughes family from fully utilizing and enjoying their home.” The issues referred to in this sentence are workmanship issues, not damages flowing from an enumerated deceptive act.

The Plaintiffs, in their designation of evidence, included email exchanges between the parties. Pl.’s Designation of Evidence, Ex. 1-4. The email exchanges fall within the time period considered by the DCSA for the notice requirement. Thus, in reviewing the evidence in a light most favorable to the non-moving Plaintiff, the Court considered whether the contents of the emails might satisfy the notice requirement. The emails discuss the FDCPA, pre-suit mediation, inspection reports and potential litigation. The emails do not, however, mention anything that might be liberally construed as a deceptive act or practice. The emails also do not establish actual damages caused by a deceptive act. Thus, the Court does not find that the emails satisfy any portion of IC 24-5-0.5-5 either.

The Defendant argues that any pre-suit settlement discussions were limited to construction defects and at no time did Defendant understand that the Plaintiffs claimed damages because of a HICA violation. After all, nothing prevented the Plaintiffs from incorporating in the letter in question

the very same HICA violations specifically outlined in their Complaint. Defendant further responded that failing to give a literal application to the requirement of fully stating the deceptive act as a HICA violation and the damages caused by the HICA violation deprived the Defendant of the opportunity to make a written offer to cure. In the case of a noncompliant contract, a contractor might be able to cure such deceptive act by, in part, tendering a compliant contract. *See* Hayes v. Chapman, 894 N.E.2d 1047, 1055 (Ind. Ct. App. 2008). Defendant, in addition to offering compliant contracts, could have also offered a price adjustment if the Plaintiffs fully described the damages in the letter in question. The opportunity to cure was important because the offer to cure, if rejected, is admissible into evidence and could limit the Defendant's exposure to an award of attorney fees and court costs. I.C. 24-5-0.5-4 (j) and (k).

The Court has previously expressed its belief that the DCSA is less than helpful as to the content requirement of a proper notice compared to other notice requirements in the Indiana Code. It is common sense though that to properly invoke the remedial protections of the DCSA, the claimant's notice must provide sufficient language to advise the receiving party that more is in dispute than mere workmanship issues. Though all agree the

DCSA does not provide a form notice, the Court is mindful that the notice requirement must give "the supplier a reasonable opportunity to remedy the consequences of an alleged deceptive act about which the consumer complains." Lehman v. Shroyer, 721 N.E.2d 365, 368-69 (Ind. Ct. App. 1999). The court finds that, to give the Defendant in this case a reasonable opportunity to cure the omission of contract terms, such as the starting and ending date in a home improvement contract, required by HICA and the damages arising from such omission, the Notice in question should have described the deceptive act as a failure to include such terms in the contracts that the Defendant and Plaintiffs entered for this project. It should have also described the damages the Plaintiffs suffered because of the failure to comply with HICA's contract provision requirements. The Notice does none of this.

This case is similar to A.B.C. Home & Real Estate Inspection, Inc. v. Plummer, 500 N.E.2d 1257, 1262 (Ind. Ct. App. 1986) where, after buying a home, the consumer sent a letter to the home inspector explaining the problems they had encountered with their new home that the inspection should have revealed to them, but they never mentioned a purportedly false advertisement on which they relied to hire the supplier. On appeal, the court of appeals reversed the trial court's ruling in favor of the consumer

determining that the DCSA prevented the consumer for suing under the DCSA because the consumer's letter never mentioned the false advertisement that the consumer claimed violated the DCSA before bringing the suit. Plummer, 500 N.E.2d at 1262-63. Like the pre-suit notice in Plummer, the Notice in question only mentioned construction/workmanship issues. It never mentioned any purported HICA violation.

The Notice states that the Defendant "verbally assured [Hughes] that a floating installation would not pose any issues," and this is hardly sufficient to put Defendant on reasonable notice of an act of deception arising from a violation of HICA. It is an opinion regarding the best method to install a floor. Moreover, this letter does not claim damages for a HICA Violation, only that the product was "incorrectly installed and is defective."

At this point, the parties are beyond the time in which a proper pre-suit notice can be sent or corrected. There is no reason to delay judgment on Count III of the Complaint.

The Court therefore orders as follows:

1. The Defendant's Motion for Partial Summary Judgment is GRANTED on Count III of the Plaintiff's Complaint as to any DCSA claim due to insufficient notice as required by IC 24-5-0.5-5.

SO ORDERED this January 16, 2018.

Recommended for Approval,

Darren J. Murphy, Magistrate

So Ordered,

William J. Hughes, Judge
Hamilton Superior Court 3

January 16, 2018

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