2012 IL App (4th) 111004-U

Filed 6/18/12

NO. 4-11-1004

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

MARY MEEKER,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Vermilion County
MEDI-CHAIR, LLC,	)	No. 10LM232
Defendant-Appellee.	)	
	)	Honorable
	)	Karen E. Wall,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices McCullough and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where the sale of a wheelchair occurred as a result of plaintiff's actions and plaintiff failed to present any facts showing defendant persuaded her to purchase the wheelchair, the trial court properly granted defendant summary judgment on plaintiff's count that alleged a violation of the Arizona Home Solicitations and Referral Sales Act.

¶ 2 The trial court properly granted summary judgment on the count alleging a violation of the Arizona Consumer Fraud Act based on a violation of the Federal Trade Commission's rule concerning door-to-door sales, which contained the same language as the Arizona Home Solicitations and Referral Sales Act found not to apply to the facts of this case.

¶ 3 Plaintiff, Mary Meeker, appeals the Vermilion County circuit court's September 2011 order, denying her motion for summary judgment and granting the summary judgment motion of defendant, Medi-Chair, LLC. Specifically, the court found the Arizona Home Solicitations and Referral Sales Act (Arizona Home Solicitations Act) (Ariz. Rev. Stat. Ann. §

44-5001 *et. seq.* (2009)) and the Arizona Consumer Fraud Act (Ariz. Rev. Stat. Ann. § 44-1521 *et. seq.* (2009)) did not apply to the undisputed facts surrounding the contract entered into by the parties for plaintiff's purchase of a motorized wheelchair.

¶ 4 On appeal, plaintiff contends (1) defendant solicited the sale of the wheelchair in her home and thus violated the Arizona Home Solicitations Act by not disclosing a three-day right of cancellation and (2) defendant's failure to disclose the three-day right of cancellation as required by the Federal Trade Commission's Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (Cooling-Off Rule) (16 C.F.R. § 429.1 (2009)) is a deceptive act or practice under the Arizona Consumer Fraud Act. We affirm.

¶ 5 I. BACKGROUND

¶ 6 Plaintiff suffers from multiple sclerosis and has been wheelchair bound since 1996. Plaintiff learned about defendant at a "handicap expo" in 2004. She spoke to a representative of defendant's at a booth and received some of defendant's literature. In May 2004, defendant received a request for information card from plaintiff, inquiring about a wheelchair. According to plaintiff, she filled out the card at the "handicap expo." Don Redman, defendant's manager, stated the card came from a magazine. In August 2004, defendant's representative demonstrated a chair in plaintiff's home, and plaintiff did not purchase a wheelchair at that time.

¶ 7 In August 2008, plaintiff called defendant's headquarters, expressing an interest in the wheelchair that had been previously demonstrated to her. In October or November 2008, defendant sent a representative to plaintiff's home to demonstrate the wheelchair. Plaintiff believed the representative's name was Jim Moore. Plaintiff later called Moore about the wheelchair, and he told her that he no longer dealt with defendant and she would have to contact

defendant. Plaintiff obtained defendant's telephone number from an advertisement in a multiple sclerosis publication.

¶ 8 In January 2009, plaintiff called defendant's headquarters and requested another demonstration. That same month, defendant sent plaintiff an authorization-for-release-of-medical-information form, which plaintiff signed on January 21, 2009. Plaintiff could not recall if she received the document before or after the third demonstration and could not recall if she gave the document to the representative at the third demonstration. On February 19, 2009, plaintiff had an office visit with her doctor, Kenneth Aronson, during which she discussed getting a new wheelchair and mentioned she was working with an Arizona company. Dr. Aronson indicated he was going to arrange for plaintiff to receive a wheelchair evaluation and see if the wheelchair she was looking at was an appropriate piece of equipment.

¶ 9 Sometime between January to April 2009, defendant's representative, Mike Murphy, visited plaintiff's home and conducted a third demonstration of the chair. The demonstration lasted three to four hours. Murphy showed plaintiff all of the features of the chair and told her defendant always customized foot plates for a disabled person. Murphy also measured plaintiff's body. Murphy and plaintiff discussed the fitting of her legs on the chair and what Murphy could do to fit her legs.

¶ 10 In May 2009, plaintiff called defendant's headquarters and stated she wanted to purchase a wheelchair. Defendant's representative stated plaintiff would have to put down a deposit, and plaintiff stated she could not get all of the money at that time. Defendant's representative also stated the company would have to see what Medicare would pay on it. Defendant then prepared (1) a written estimate of $36,425 with $7,120 of it to be paid by plaintiff and (2) a terms

and conditions agreement. The agreement did not contain a notice about the three-day period of cancellation. Plaintiff received the documents on May 20, 2009, via the United Parcel Service (UPS). According to plaintiff, she also received a telephone call in late May, informing her of the total cost of the chair and the amount she would have to pay. Plaintiff signed the documents on May 26, 2009, and defendant received the signed documents on June 3, 2009, via UPS. In a check dated June 2, 2009, plaintiff paid defendant $2,000, and in a check dated June 8, 2009, plaintiff paid defendant $5,120. The rest of the cost was paid by Medicare.

¶ 11 On August 19, 2009, Murphy delivered plaintiff's wheelchair to her home. The wheelchair did not work properly at that time. A couple of days after delivery, Murphy attempted to repair the chair for the first time. Plaintiff asked Murphy to take the chair back and refund her money. Murphy requested time to repair the wheelchair. Plaintiff was not satisfied with Murphy's repairs. In December 2009, plaintiff attempted to cancel the contract and return the wheelchair, but defendant refused to accept the return of the wheelchair, noting the wheelchair was customized for plaintiff.

¶ 12 In May 2010, plaintiff filed a two-count complaint against defendant, alleging a violation of (1) the federal Cooling-Off Rule and (2) the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2008)). To the complaint, plaintiff attached, *inter alia*, a copy of the two separate checks she wrote to pay her portion of the wheelchair. After the trial court dismissed the complaint because count I failed to state a cause of action and Arizona law controlled, plaintiff filed a first-amended complaint, (1) asserting a violation of (a) the Arizona Home Solicitations Act and (b) the Arizona Consumer Fraud Act and (2) requesting attorney fees.

¶ 13 In August 2011, defendant filed a motion for summary judgment. The motion contended defendant was not liable under the Arizona Home Solicitations Act because (1) defendant did not solicit plaintiff, (2) plaintiff did not give defendant her offer or agreement to purchase at a place other than defendant's place of business, and (3) the parties' contract did not provide for installment payments. The summary judgment motion also asserted the failure to have notice of a three-day option of rescission in the agreement did not violate the Arizona Consumer Fraud Act. Attached to the summary judgment motion was (1) the affidavit of Redman; (2) defendant's intake form dated August 1, 2008, for plaintiff; (3) defendant's authorization for release of medical information that plaintiff signed on January 21, 2009; (4) Dr. Aronson's note for plaintiff's February 19, 2009, appointment with him; (5) a UPS shipment tracking page showing a package delivered to plaintiff on May 20, 2009, and a package delivered to defendant on June 3, 2009; (6) the estimate, terms and conditions, and a warranty registration form, all of which were signed by plaintiff; (7) defendant's delivery ticket for plaintiff's chair, which was signed by plaintiff on August 19, 2009; and (8) the transcript of plaintiff's deposition. Defendant also filed a memorandum of law in support of its summary judgment motion.

¶ 14 On August 16, 2011, plaintiff filed her motion for summary judgment, asserting no genuine issue as to any material facts existed and she was entitled to judgment as a matter of law and to reasonable attorney fees. Plaintiff did not attach any supporting materials to her motion but did file a memorandum of law in support of her motion. That same day, the trial court heard the cross-motions for summary judgment and took the matter under advisement.

¶ 15 On September 1, 2011, the trial court entered its written order, finding (1) the Arizona Home Solicitations Act did not apply because, under the circumstances, plaintiff

solicited or invited the sale and (2) the Arizona Consumer Fraud Act did not apply because the lack of notice about the three-day rescission period was not a deceptive act or omission. On September 7, 2011, plaintiff filed a motion to reconsider, asserting that, if the sale occurred in plaintiff's home, the Arizona Home Solicitations Act should apply and the court's order created "an unclear, fact-intensive test." After an October 13, 2011, hearing, the court denied plaintiff's motion to reconsider.

¶ 16 On November 9, 2011, plaintiff filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008). Thus, this court has jurisdiction over the appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 17 II. ANALYSIS

¶ 18 A. Standard of Review

¶ 19 In this case, plaintiff appeals the trial court's ruling on cross-motions for summary judgment. A grant of summary judgment is only appropriate when the pleadings, depositions, admissions, and affidavits demonstrate no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 8-9 (2008). " 'As in this case, where the parties file cross-motions for summary judgment, they invite the court to decide the issues presented as a matter of law.' " *A.B.A.T.E. of Illinois, Inc. v. Giannoulias*, 401 Ill. App. 3d 326, 330, 929 N.E.2d 1188, 1192 (2010) (quoting *Liberty Mutual Fire Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 363 Ill. App. 3d 335, 339, 842 N.E.2d 170, 173 (2005)). We review *de novo* the trial court's ruling on a motion for summary judgment. See *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 20 B. Arizona Home Solicitations Act

¶ 21 Plaintiff first asserts defendant solicited the sale of the wheelchair in her home, and thus defendant violated the Arizona Home Solicitations Act by not disclosing the three-day right of cancellation. Defendant contends it was plaintiff who solicited the transaction.

¶ 22 Section 44-5002(A) of the Arizona Home Solicitations Act (Ariz. Rev. Stat. Ann. § 44-5002(A) (2009)) provides a "buyer may cancel a home solicitation sale until midnight of the third business day after the day on which the buyer signs an agreement subject to the provisions of this chapter." Section 44-5004(B) of the Arizona Home Solicitations Act declares an agreement of the buyer in a home solicitation sale will not be effective unless, *inter alia*, it contains a notice to the buyer, which includes informing the buyer of the three-day cancellation period provided by section 44-5002(A). Ariz. Rev. Stat. Ann. § 44-5004(B)(4) (2009). Section 44-5004(C) of the Arizona Home Solicitations Act also requires the agreement in a home solicitation sale to contain a notice of cancellation, explaining the right to cancel provided by section 44-5002(A) and providing a cancellation form. Ariz. Rev. Stat. Ann. § 44-5004(C) (2009). The Supreme Court of Arizona has stated an agreement of sale is invalid under section 44-5004 unless the agreement contains a conspicuous notice of various matters, including the buyer's right to cancel. *State v. Direct Sellers Ass'n*, 108 Ariz. 165, 166, 494 P.2d 361, 362 (1972). In this case it is undisputed, the contract at issue did not contain any notice of the three-day cancellation period provided by section 44-5002(A). The issue here is whether the parties' agreement was the result of a home solicitation sale.

¶ 23 Section 44-5001(1) of the Arizona Home Solicitations Act (Ariz. Rev. Stat. Ann. § 44-5001(1) (2009)) defines a " 'home solicitation sale' " and provides, in pertinent part, the

following:

> "a sale of goods or services in which the seller or his representative personally solicits the sale and the buyer's agreement or offer to purchase is made at a home other than that of the person soliciting the same and that agreement or offer to purchase is there given to the seller or his representative and all or any part of the purchase price is payable in installments, or a debt incurred for payment of the purchase price is payable in installments."

Plaintiff asserts the trial court erred by finding the Arizona Home Solicitations Act did not apply because defendant did not "personally solicit[] the sale." Specifically, plaintiff argues (1) the fact she initially contacted defendant does not mean defendant did not "personally solicit[] the sale"; (2) the act covers more than just high-pressure sales; (3) the federal Cooling-Off Rule's definition of "door-to-door sale" (16 C.F.R. § 429.0(a) (2009)) expressly includes "personally solicit[ed] *** sale[s]" that were "in response to or following an invitation by the buyer" and should guide the interpretation of the Arizona act; (4) the trial court's holding creates uncertainty and unpredictability; and (5) where the sale occurred and not who solicited whom should control whether the sale was a "home solicitation sale." No Arizona cases have interpreted the "personally solicits the sale" language.

¶ 24 The fundamental rule of statutory construction requires courts to ascertain and give effect to the legislature's intent. *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 180, 950 N.E.2d 1136, 1146 (2011). The statutory language, given its plain and ordinary meaning, best indicates the legislature's intent. *Pappas*, 242 Ill. 2d at 180, 950 N.E.2d at 1146. In interpreting

a statutory provision, courts evaluate the statute as a whole, "with each provision construed in connection with every other section." *Pappas*, 242 Ill. 2d at 180, 950 N.E.2d at 1146. When the statutory language is clear and unambiguous, a court must give effect to the statute's plain meaning without resorting to extrinsic statutory-construction aids. *Pappas*, 242 Ill. 2d at 180, 950 N.E.2d at 1146. Thus, a court may examine legislative history only when the legislature's intent is not clear from the statute's plain language. *People v. Jones*, 214 Ill. 2d 187, 193, 824 N.E.2d 239, 242 (2005). Thus, we do not look to the purpose behind a statute unless the statute is ambiguous. "A statute is ambiguous if it is capable of more than one reasonable interpretation." *People ex rel. Department of Public Aid v. Smith*, 212 Ill. 2d 389, 397, 818 N.E.2d 1204, 1209 (2004).

¶ 25 Accordingly, we begin our analysis by addressing plaintiff's arguments that suggest this court should essentially ignore the "personally solicits the sale" language and consider only where the sale occurred in determining whether the Arizona Home Solicitations Act applies. We note the statute at issue in *Weatherall Aluminum Products Co. v. Scott*, 71 Cal. App. 3d 245, 139 Cal. Rptr. 329 (Cal. Ct. App. 1977), which plaintiff cites in support of her assertion, does not contain the "personally solicits the sale" language. Thus, that case is irrelevant to the issue before us. Moreover, by adding such limiting language as "personally solicits the sale," "agreement or offer to purchase is there given," and "and all or any part of the purchase price is payable in installments," the legislature clearly chose not to impose the act on all sales in which "the buyer's agreement or offer to purchase is made at a home." Thus, we cannot rewrite the statute to create a bright-line rule when the legislature's language did not provide for such a rule. See *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81, 919 N.E.2d 311,

316-17 (2009) (noting a cardinal rule of statutory construction is a court cannot rewrite a statute and depart from its plain language by reading into it exceptions, limitations, or conditions not expressed by the legislature). Thus, we must consider the "personally solicits the sale" language.

¶ 26 As to the plain and ordinary meaning of "solicit," no Arizona case has yet to define it. In dealing with the sale of insurance, an Illinois court has noted the following definitions of "solicit":

> "The American Heritage Dictionary defines 'solicit' as '1. To seek to obtain by persuasion, entreaty, or formal application.' The American Heritage Dictionary 1163 (2d College ed. 1982). Black's Law Dictionary's definition includes, '[t]o appeal for something; *** to endeavor to obtain by asking or pleading; *** to try to obtain.' The definition continues, '[t]o awake or incite to action by acts or conduct intended to and calculated to incite the act of giving.' Black's Law Dictionary 1392 (6th ed. 1990). " *Aste v. Metropolitan Life Insurance Co.*, 312 Ill. App. 3d 972, 979, 728 N.E.2d 629, 634 (2000).

¶ 27 Even ignoring the fact plaintiff made the initial contact, the facts do not show defendant personally solicited the sale of the wheelchair. Plaintiff was the party that initiated the contacts between the parties. She requested a second demonstration in 2008, and, when the representative who did that demonstration no longer dealt with defendant, she contacted defendant's headquarters herself and requested a third demonstration. Plaintiff also signed a form authorizing the release of her medical records to defendant. Moreover, her medical records from

a February 2009 doctor's appointment show she was pursuing the purchase of a new wheelchair. The physician indicated he was going to arrange for plaintiff to receive a wheelchair evaluation and see if the wheelchair she was looking at was an appropriate piece of equipment.

¶ 28 Sometime between January and April 2009, Murphy, defendant's representative, visited plaintiff's home and conducted the third demonstration of the chair. The demonstration lasted three to four hours. Murphy showed plaintiff all of the features of the chair and told her defendant always customized foot plates for a disabled person. Murphy also measured plaintiff's body. Murphy and plaintiff discussed the fitting of her legs on the chair and what Murphy could do. Then, in May 2009, plaintiff called defendant's headquarters and stated she wanted to order a chair. Thereafter, defendant sent plaintiff via commercial carrier an estimate and the terms and conditions contract. On May 20, 2009, plaintiff received the documents and signed and dated them May 26, 2009. Plaintiff then returned the documents to defendant's headquarters via commercial carrier.

¶ 29 The aforementioned facts show it was plaintiff who pursued the sale. Until plaintiff stated she wanted to purchase the wheelchair, all contact between the parties was initiated by plaintiff. Plaintiff does not allege any specific statement or thing that defendant or its representatives did to persuade her to buy the wheelchair. In her reply brief, plaintiff asserts that "[b]y making sales demonstrations, they were 'asking' and 'enticing' [her] to buy." However, plaintiff requested the demonstrations, and in her deposition, she describes trying the wheelchair out and learning all of its features. Plaintiff provides nothing but conclusory allegations that defendant solicited the sale. In fact, defendant did not even send an estimate or contract until plaintiff stated her intent to purchase the wheelchair. No representative of defendant was present

in person when she decided to purchase the wheelchair. The history between the parties shows the sale never would have occurred if plaintiff had not called defendant's headquarters and stated she wanted to purchase the wheelchair. Thus, we find defendant did not "personally solicit the sale" of the wheelchair and the Arizona Home Solicitations Act does not apply to defendant.

¶ 30 Our conclusion is supported by *Patrick v. U.S. Tangible Investment Corp.*, 234 Mich. App. 541, 547, 595 N.W.2d 162, 166 (Mich. App. 1999), in which a Michigan appellate court found its state's home solicitations sales act did not apply for a couple of reasons, including the fact the seller did not solicit the buyers. The Michigan act defines a "home solicitation sale" as follows:

> "[A] sale of goods or services of more than $25.00 in which the seller or a person acting for the seller engages in a personal, written, or telephonic solicitation of the sale at a residence of the buyer and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller." *Patrick*, 234 Mich. App. at 545, 595 N.W.2d at 165 (quoting Mich. Comp. Laws § 445.111(a)).

Thus, like Arizona, for the act to apply, the defendant or a person acting on its behalf must engage in the solicitation of the sale for the act to apply. In *Patrick*, 234 Mich. App. at 542, 595 N.W.2d at 164, the plaintiffs contacted Patterson Strategy Organization for investment advice, which referred the plaintiffs to the defendant. The defendant's representative presented the plaintiffs with an investment strategy in precious metals and rare coins at the home of two of the plaintiffs. *Patrick*, 234 Mich. App. at 542-43, 595 N.W.2d at 164. The plaintiffs did not sign a

contract, but after negotiations, the plaintiffs entered into an agreement to purchase gold coins around a month after the representative's presentation. *Patrick*, 234 Mich. App. at 543, 595 N.W.2d at 164.

¶ 31 The *Patrick* court found the actions of the plaintiffs in seeking out investment avenues were not solicitations inasmuch as the defendant was responding to the plaintiffs' inquiries. *Patrick*, 234 Mich. App. at 547, 595 N.W.2d at 166. The court noted the dissent in *Brown v. Jacob*, 183 Mich. App. 387, 392-95, 454 N.W.2d 226, 229-31 (1990) (Griffin, P.J., dissenting)), which was adopted by the Supreme Court of Michigan in reversing the appellate court (*Brown v. Jacob*, 439 Mich. 865, 476 N.W.2d 156 (1991)), addressed a similar circumstance, in which the buyer sought out the contractor without any solicitation. The dissent in *Brown* stated, " '[t]here was little danger that [the buyer] would be unduly pressured by the [contractor] since [the buyer] clearly initiated and controlled the negotiation process.' " *Patrick*, 234 Mich. App. at 547, 595 N.W.2d at 166 (quoting *Brown*, 183 Mich. App. at 395, 454 N.W.2d at 230 (Griffin, P.J., dissenting)). The *Patrick* court found the plaintiffs' efforts in that case to enhance their investment portfolios by contacting Patterson Strategy Organization, which led to the meeting between plaintiffs and the defendant's agent, constituted the same affirmative actions as those of the buyer in *Brown*. *Patrick*, 234 Mich. App. at 547, 595 N.W.2d at 166.

¶ 32 Accordingly, the trial court did not err by granting summary judgment in favor of defendant on the Arizona Home Solicitations Act count.

¶ 33 C. Arizona Consumer Fraud Act

¶ 34 Plaintiff also contends the trial court erred by dismissing her count II alleging a violation of the Arizona Consumer Fraud Act. Specifically, she asserts defendant's failure to

disclose a three-day right to cancel as required by the federal Cooling-Off Rule (16 C.F.R. § 429.1 (2009)) is a deceptive act or practice under the Arizona Consumer Fraud Act.

¶ 35 The federal Cool-Off Rule applies to door-to-door sales. 16 C.F.R. § 429.1 (2009). For purposes of the rule, "door-to-door sale" is defined as the following:

> "A sale, lease, or rental of consumer goods or services with a purchase price of $25 or more, whether under single or multiple contracts, in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller (e.g., sales at the buyer's residence or at facilities rented on a temporary or short-term basis, such as hotel or motel rooms, convention centers, fairgrounds and restaurants, or sales at the buyer's workplace or in dormitory lounges)." 16 C.F.R § 429.0(a) (2009).

Thus, like the Arizona Home Solicitations Act, the federal Cooling-Off Rule contains the same "personally solicits the sale" language, which we found the facts of this case do not meet. The federal Cooling-Off Rule does include the additional language, stating "including those in response to or following an invitation by the buyer" language. However, that language does not alter our analysis because we found the Arizona Home Solicitations Act did not apply, even without considering plaintiff made the initial contact. Accordingly, the facts of this case also do not meet the federal Cooling-Off Rule's definition of a "door-to-door sale" and plaintiff cannot establish a violation of the Arizona Consumer Fraud Act based on a violation of the federal

Cooling-Off Rule.

¶ 36 Thus, this court also finds the trial court did not err by granting summary judgment in favor of defendant on the Arizona Consumer Fraud Act count.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the Vermilion County circuit court's judgment.

¶ 39 Affirmed.