FILED

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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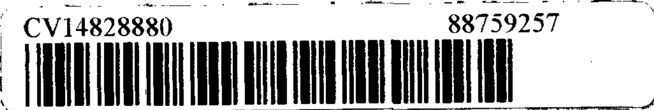
ELLIOTT GRAISER	)	**CASE NO. CV-14-828880**
Plaintiff	)	**JUDGE PAMELA A. BARKER**
v.	)	**OPINION AND JOURNAL ENTRY ON DEFENDANT VISIONWORKS OF AMERICA, INC'S MOTION FOR JUDGMENT ON THE PLEADINGS**
VISIONWORKS OF AMERICA, INC.	)	
Defendant	)	

This matter is before the Court on Defendant Visionworks of America, Inc.'s Motion For Judgment On The Pleadings ("Defendant's Motion"), Plaintiff's Opposition to Defendant's Motion, and Defendant's Reply Brief. A hearing on Defendant's Motion was held on 3/31/2015.

Standard of Review for Judgment on the Pleadings

The standard of review a trial court must use in ruling upon a motion for judgment on the pleadings pursuant to Civ.R. 12(C) was set forth in *Case Western Reserve University v. Friedman* (1986), 33 Ohio App.3d 347, 348, 515 N.E.2d 1004:

> A motion for judgment on the pleadings is the same as a motion to dismiss filed after the pleadings are closed and raises only questions of law. The pleadings must be construed liberally and in a light most favorable to the party against whom the motion is made, and every reasonable inference in favor of the party against whom the motion is made should be indulged. *Vaught v. Vaught* (1981), 2 Ohio App.3d 264, 2 Ohio B. Rep. 293, 441 N.E.2d 811; *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 63 Ohio App.2d 262, 297 N.E.2d 113. The motion should be denied if it cannot be determined from the face of the pleadings that the pleading does not state a claim upon which relief can be granted. *Calhoun v. Supreme court of Ohio* (1978), 61 Ohio App.2d 1, 15 Ohio Op. 3d 13, 399 N.E.2d 559.



The Complaint

The Complaint includes the following averments relevant to Defendant's Motion. On April 30, 2014 Plaintiff was at the Beachwood Mall when he saw a sign in front of the Visionworks store advertising that if a customer purchased a pair of eyeglasses a second pair of glasses would be "free" ("the BOGO promotion"). He then entered the store and was approached by a salesperson named Robert who quoted $409.93 for a pair of glasses with a second pair to be "free". However, upon further discussion with Robert, Plaintiff learned that by reducing his purchase to one pair of glasses only, he could obtain a discount of $163.98 off the price previously quoted under the BOGO promotion, thus paying $245.95 for a single pair of glasses. Plaintiff paid the full purchase price for the single pair of glasses but did not receive a second pair "free".

In his Complaint, Plaintiff asserts that this is a class action purely for injunctive relief brought under the Ohio Consumer Sales Practices Act's private enforcement provisions and that he does not seek, and will not accept, actual economic damages in any amount whatsoever. Specifically, Plaintiff seeks: 1.) an injunction restraining Defendant Visionworks from deceptive sales practices vis-à-vis its advertisements claiming, "falsely", that if a customer purchases a pair of eyeglasses, a second pair of glasses will be provided "free"; and 2.) a declaration that Visionworks' use of the sign constituted a deceptive practice under §1345.02(B), and under a rule adopted under division (B)(2) of §1345.05 of the Revised Code before the consumer transaction on which this action is based, i.e. OAC 109:4-3-04.

Per the Complaint, absent the injunctive and declaratory relief sought, Plaintiff "may prospectively buy deceptively advertised products from Visionworks by reason of

advertisements falsely claiming 'Buy One Get One Free'" and Plaintiff "will be harmed", such harm consisting of "the abridgment of statutory protections from deceptive consumer sales practices, and violation of the right to be free of such practices when purchasing items used for personal, family and household purposes." And, "the public will suffer significant harm if it continues to be subjected to Visionworks' deceptive advertising..."

Discussion

1. Standing.

Defendant argues that based upon the allegations set forth in the Complaint, Plaintiff does not have standing to pursue a CSPA claim because: 1.) he did not make a BOGO purchase and neither the sign and/or offer by Robert constituted a "solicitation" and therefore, there was no "consumer transaction" necessary to invoke the CSPA; and 2.) the requested injunction will not remedy any cognizable future harm to him.

This Court finds that the sign at the Beachwood Mall entrance of Visionworks advertising the BOGO promotion ("the Sign"), combined with Visionworks' salesperson, Robert approaching Plaintiff after he entered the store and quoting a price of $409.93 for a pair of glasses with a second pair to be "free" as per the Sign, constitutes "solicitation" as that term is used to define "consumer transaction" in R.C. 1345.01(A). *See Ferron v. Dish Network, LLC*, 195 Ohio App.3d 686, 2011-Ohio-5235 ¶31, 960 N.E.2d 705, 713 (10th Dist.).[1] Although a BOGO transaction or sale never occurred, the Eighth District Court of Appeals has made it clear that it

[1] In *Ferron*, the Court found that because the CSPA does not define the term "solicitation", it must be given its common meaning, i.e., defined by Black's Law Dictionary (5th ed. 1979) as "'[a]sking, enticing, urgent request'", and defined by Webster's Encyclopedic Unabridged Dictionary (Random House 1997) as "'2. entreaty, urging, or importunity; a petition or request. 3. Enticement or allurement'." It further found that because the plaintiff alleged that the defendant's T.V. advertisements urged viewers to enter into a consumer transaction and to call the provided toll-free number in order to do so, the offers made within the advertisements constituted solicitation under the CSPA.

is not necessary that a sale actually take place; a defendant's actions in negotiating a sales agreement amounts to solicitation. *McDonald v. Bedford Datsun*, 59 Ohio App.3d 38, 40, 570 N.E.2d 299 (8th Dist. 1989); and *Weaver v. J.C. Penney Co.*, 53 Ohio App.2d 165, 168, 372 N.E.2d 633 (8th Dist. 1977).

Defendant is correct in asserting that under both federal law and state law standing requires an injury in fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *Lujan v. Defenders v. Wildlife*, 504 U.S. 555, 560-61 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); and *Moore v. City of Middleton*, 133 Ohio St.3d 55, 2012 Ohio 3897, 973 N.E.2d 977 ¶22.[2] And, Defendant correctly cites *Fraternal Order of Police v. City of Cleveland*, 141 Ohio App.3d 63, 74, 749 N.E.2d 840 (8th Dist. 2001) for the proposition that "[a] party has standing to request injunctive relief when he has a 'personal stake' in the granting of the injunction", meaning that "he faces an immediate and impending threat of irreparable injury." According to Defendant, it is the absence of the "redressability" factor[3] and Plaintiff's "'personal stake' in the granting of the injunction", or stated differently, the conclusion that Plaintiff's requested injunction will not remedy any cognizable future harm to him, that defeats his standing to pursue the injunction. In support thereof, Defendant cites and relies upon the federal District Court's Opinion and Order remanding the case to this Court based upon its conclusion that Plaintiff lacks Article III standing to pursue his claim for an injunction in federal court.[4]

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[2] According to the Ohio Supreme Court, [t]hese three factors—injury, causation, and redressability—constitute 'the irreducible constitutional minimum of standing.'" *Moore v. City of Middleton, id.* ¶22, citing and quoting from *Lujan v. Defenders of Wildlife, supra* at 560.

[3] *Moore v. City of Middletown, id.*

[4] In its Opinion and Order the District Court set forth the following conclusions. "In general, Article III standing requires (1) an injury in fact (2) caused by the defendant that (3) can be redressed by a favorable resolution of the

This Court is persuaded by Defendant's argument and the Opinion and Order of the District Court supporting it. Plaintiff has argued that the injunction is necessary and warranted to prevent his future exposure to the allegedly deceptive advertising and the prospect of buying deceptively advertised products from Defendant because of the allegedly false advertisements. Judge Gwin rejected that argument, as does this Court based upon the case law cited and relied upon by Defendant.

In *Fraternal Order of Police v. City of Cleveland*, 141 Ohio App.3d 63, 75, the Court, quoting from *City of Los Angeles v. Lyons, supra*, 461 U.S. 95, 102, noted as follows. "'A plaintiff's injury cannot be merely speculative. A bare allegation that plaintiff fears some injury will or may occur is insufficient to confer standing.'"[5] Quoting from *Johnson's Island Prop. Owners' Ass'n v. Schregardus*, 1997 Ohio App. LEXIS 2839 (June 30, 1997), Franklin App. No. 96APH10-1330, unreported, the Eighth District also noted that "'[t]he alleged injury must be concrete, rather than abstract or suspected.'"[6] Since any harm that the requested injunction could redress is speculative, hypothetical or conjectural, this Court finds that Plaintiff does not have standing.

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suit. [*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).] Plaintiffs seeking injunctions must show that they are 'likely to suffer future injury' in order to establish standing. [*City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).] The mere fact of a past injury does not necessarily establish the required likelihood of future harm. [*Id.*] And the future injury in question must not be 'conjectural' or "hypothetical.' [*Id.* at 102 (internal quotation marks and citations omitted).] *** Thus, at most, Graiser could obtain an injunction preventing his future exposure to the allegedly deceptive advertising. But that injury is not cognizable for purposes of Article III standing. Because no injunction Graiser could obtain would prevent a future injury cognizable under Article III, he lacks standing to pursue his injunction-only claim in federal court. This conclusion is further bolstered by the need to strictly construe removal statutes and resolve all doubts against removal jurisdiction. [Citation omitted.] *** It is worth noting that this conclusion does not foreclose all relief, or indeed, any relief at all. *** [B]ecause state courts are not bound by Article III's strictures, the injunction claim itself may still be viable in state court after remand." Opinion and Order, at pages 4-5, 7-8.

[5] *Fraternal Order of Police v. City of Cleveland, supra*, 141 Ohio App.3d 63, 75.

[6] *Id.*

2. Availability of Injunctive Relief under R.C. 1345.09(D)

Plaintiff argues that because he is seeking a statutory injunction pursuant to R.C. 1345.09(D), he is not required to allege or show irreparable harm and, in support thereof, relies upon *Ackerman v. Tri-City Geriatric & Health Care* (1978), 55 Ohio St.2d 51, 378 N.E.2d 145. However, as Defendant points out, because R.C. 1345.09(D) does not contain specific standards or prerequisites for injunctive relief, *Ackerman* is distinguishable or does not apply to relieve Plaintiff of his obligation to aver in his Complaint, and ultimately demonstrate, by clear and convincing evidence, irreparable harm.[7]

Plaintiff argues that his Complaint includes allegations of irreparable harm, to wit: "Graiser ... may prospectively buy deceptively advertised products from Visionworks by advertisements falsely claiming 'Buy One Get One Free'"; "Graiser ... will be harmed absent injunctive relief"; "the public will suffer significant harm if it continues to be subjected to Visionworks' deceptive advertising." However, these averments do not amount to allegations of irreparable harm and there is no explanation in the Complaint as to how the harm alleged in the Complaint is irreparable. Moreover, the harm alleged can be remedied by money damages.

[7] *Jones v. Hamilton County Bd. Of Commrs.*, 124 Ohio App.3d 184, 189, 705 N.E.2d 1247 (1997) (wherein the Court concluded that "[t]he *Ackerman* court was dealing with R.C. 3721.08, a statute that sets forth specific guidelines for the granting of an injunction and confers upon the trial court the jurisdiction to grant injunctive relief upon a showing that the statutory prerequisites have been met."; and *Proctor & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 747 N.E.2d 268; *Litigation Management, Inc. v. Bourgeois*, 8th Dist. No. 95730, 2011 Ohio 2794, ¶10, and *Acacia on the Green Condominium Assoc., Inc. v. Gottlieb*, 8th Dist. No. 92145, 2009 Ohio 4878, ¶18, citing *Proctor & Gamble Co. v. Stoneham, supra* at 268. *See, also, Doran v. Northmont Board of Education*, 153 Ohio App.3d 499, 2003 Ohio 4084; *State of Ohio, ex rel., Marc Dann v. R&J Partnership*, 2nd Dist. No. 22162, 2007 Ohio 7165, ¶¶21-23; and *Mick v. Level Propane Gases, Inc.*, 168 F.Supp.2d 804, 2001 U.S. Dist. LEXIS 22598 (wherein the federal district court concluded that "injunctive relief under §1345.09(D) is governed by the same equitable principles that apply to injunctions generally).

3. Declaratory Judgment Claim

A declaratory judgment claim is properly dismissed if no real controversy or justiciable issue exists between the parties;[8] and "for a justiciable question to exist, the danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events *** and the threat to his position must be actual and genuine and not merely possible or remote."[9]

Again, Plaintiff claims only that he may prospectively buy deceptively advertised products from Visionworks as a result of the allegedly false advertisements. Whether Graiser purchases glasses from Visionworks in the future is purely hypothetical or speculative. Therefore, the Complaint does not allege a genuine dispute between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

4. Class Action

Since Plaintiff's Complaint seeks only injunctive and declaratory relief and fails to allege or seek actual damages, the class claim fails as a matter of law. *Konarzewski v. Ganley*, 8th Dist. No. 92623, 2009 Ohio 5827, ¶46; *Searles v. Germain Ford of Columbus, LLC*, 10th Dist. No. 08AP-728, 2009 Ohio 1323, ¶22.

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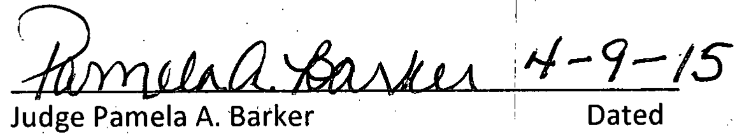
[8] *Cleveland Elec. Illum. Co. v. Better Meat Prod. Co.*, 8th Dist. No. 74495, 1999 @L 475858, *2 (July 8, 1999).

[9] *Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007 Ohio 1248, 863 N.E.2d 142, ¶9 (internal quotations omitted), quoting *League for Preservation of civil Rights v. Cincinnati*, 64 Ohio App. 195, 197, 28 N.E.2d 660 (1st Dist. 1940).

Conclusion

Accordingly, Defendant's Motion for Judgment on the Pleadings is **CONDITIONALLY GRANTED**. Plaintiff has 14 days from the filing date of this Opinion and Journal Entry to file any Amended Complaint he deems necessary to attempt to secure appropriate relief.

IT IS SO ORDERED.



Judge Pamela A. Barker Dated