

IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS
GENERAL DIVISION

State of Ohio, *ex rel.* Attorney General
Michael DeWine,

Plaintiff,

vs.

Restore It USA, LLC, *et al.*,

Defendants.

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Case No. 13-CV-005121

Judge Patrick E. Sheeran

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ATTORNEY GENERAL OF OHIO

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DECISION CONSUMER PROTECTION SECTION
FOLLOWING NON-ORAL HEARING ON DAMAGES PUBLIC INSPECTION FILE

SHEERAN, J.

This matter came before the Court for a non-oral hearing on damages pursuant to the agreement of the parties and an Order of the Court issued July 16, 2015. Plaintiff, the State of Ohio, *ex rel.* Attorney General Michael DeWine, and Defendants, Restore It USA, LLC and James Twaddle, have submitted affidavits and written closing arguments.

1. Background¹

This is an action brought by the Ohio Attorney General, pursuant to the authority granted to him in R.C. 1345.07, for violations of the Ohio Consumer Sales Practices Act and the Ohio Home Solicitation Sales Act. The Defendants are Restore It USA, LLC and James Twaddle.

Twaddle founded Restore It in 2011. Restore It was in the business of repairing storm damage to homes. Restore It would solicit business at residences that it knew were affected by storm damage. With customer approval Restore It would assist the homeowners in submitting an insurance claim. Following an inspection and approval by insurance adjusters, Restore It would receive a down payment for the work. The homeowners and Restore It would then sign a written

¹ A more detailed recitation of the facts can be found in the Magistrate's Decision issued November 11, 2013, and the Court's Decision and Entry Granting Plaintiff's Motion for Summary Judgment issued June 9, 2015.

agreement for the work. Restore It generally used subcontractors to perform the actual home repairs.

Restore It grew its business – in terms of staff and geographic area – very quickly. Twaddle devoted much of his time in 2012 to that expansion. Put differently, until October of 2012, he did not concern himself with Restore It's performance (or lack thereof) on the contracts. In October of 2012, Restore It entered into approximately 400 contracts but only performed on approximately half of them. From that point, Restore It began reducing its work staff and closing offices to reduce costs.

At Twaddle's direction, Restore It employees used delay tactics in response to customer inquiries and demands for performance. Two former Restore It employees testified that Twaddle instructed them to respond to customer inquiries by saying that Restore It was "busy with other jobs" and "backed up." However, those same employees said that there was simply a great deal of work not being done and that Twaddle's directed responses were largely untrue.

Also at Twaddle's direction, Restore It refused to return customer down payments.

During this time, Twaddle controlled and accessed Restore It's finances and accounts. He was described as living a lavish and extravagant lifestyle by August of 2012. Restore It's bank records show several purchases for items that would appear to be personal in nature (jewelry, sporting goods, food, clothes).

On November 24, 2012, Twaddle sold Restore It's assets to Jennifer Collmar and James Barden. At the time, he states that he had approximately 182 pending jobs nationwide, including 40 in Ohio. The buyers, Collmar and Barden, received Restore It's assets, including accounts receivable and cash on hand, along with its liabilities. After the sale, Twaddle paid \$100,000 to the buyers for the purpose of finishing the pending jobs.

Ms. Collmar was deposed in this matter. She testified that, in conversations leading up to the sale, Twaddle made several material misrepresentations about the corporate financial situation, the number of outstanding jobs, and the value of those jobs. She retained counsel and withheld payment to Twaddle for the purchase. She further testified that Twaddle withdrew \$2,500.00 from Restore It's bank accounts in February of 2013 (more than two months after the sale).² Restore It stopped doing business in February 2013.

In 2013, Twaddle was indicted in the Union County, Ohio, Common Pleas Court for his conduct at Restore It. *State v. Twaddle*, Union C.P. No. 2013-CR-204. On December 19, 2014, Twaddle plead guilty to (1) Attempted Engaging in a Pattern of Corrupt Activity, in violation of R.C. 2923.02(A) and .32(A)(2), (2) Theft from an Elderly Person or Disabled Adult, R.C. 2913.02(A)(2) and (B)(3), and (3) Grand Theft, R.C. 2913.02(A)(3) and (B)(2). As part of his plea of guilty to the above counts, counsel submitted a Sentencing Recommendation on December 19, 2014, which included an agreement that Twaddle would pay \$153,127.82 in restitution to 41 victims throughout Ohio. On January 5, 2015, Twaddle's counsel sent that payment to the Union County Common Pleas Court's Clerk's Office.

Plaintiff filed this instant action against Restore It and Twaddle on May 8, 2013. Plaintiff alleged violations of the Ohio Consumer Sales Practices Act, including (1) accepting money from consumers for home improvement services and permitting 8 weeks to elapse without delivering the contracted services or making a full refund in violation of R.C. 1345.02 and O.A.C. § 109:4-3-09(A)(2), (2) accepting money from consumers when Defendants knew or should have known that, due to the Defendants' precarious financial situation, the consumers would not receive the goods or services paid for, (3) accepting deposits from consumers and failing to provide a dated written receipt stating clearly and conspicuously whether the deposit is

² The police were notified and the funds were eventually credited back to the account.

refundable and under what conditions. Plaintiff further alleged a violation of the Home Solicitation Sales Act by failing to give proper notice to consumers of their right to cancel the contract. Plaintiff sought a declaratory judgment, permanent injunction, reimbursement for consumers, and civil penalties of \$25,000.00 per violation.

Default judgment was rendered against both Restore It and Twaddle on August 13, 2013. Pursuant to an order of reference, the matter was referred to Magistrate Browning for a hearing on damages. Plaintiff submitted affidavits in lieu of live testimony. Magistrate Browning issued her Decision on November 11, 2013, in which she (1) entered permanent injunctions against Defendants to prevent them from future CSPA violations and all future business activities in the State of Ohio until the judgment is paid in full, (2) Ordered Defendants to maintain their business records for 5 years, (3) awarded the Plaintiff compensatory damages of \$155,218.12 against Defendant, which would be distributed to the 37 consumer-victims identified by Plaintiff, (4) awarded Plaintiff a civil penalty against Defendants in the amount of \$100,000.00, and (5) awarded court costs to Plaintiff. The Court adopted the Magistrate's Decision in full and rendered judgment accordingly on November 27, 2013.

On March 28, 2014, Defendants moved for relief from judgment. In a Decision and Entry issued April 29, 2014, the Court granted that Motion as it related to Defendant Twaddle but denied the motion regarding Defendant Restore It.

Service was eventually obtained on Defendant Twaddle, who filed an Answer and Third-Party Complaint against Jennifer Collmar and James Barden. Ms. Collmar was served by certified mail on October 10, 2014. A review of the docket shows that Mr. Barden has not been served.

On February 17, 2015, Plaintiff moved for summary judgment on liability against Defendant Twaddle. The Court granted that Motion on June 9, 2015, and found Twaddle to be personally liable under the Consumer Sales Practices Act. The trial date was converted to a damages hearing. Thereafter, the parties agreed to submit affidavits in lieu of live testimony on the damages issue.³ The parties have filed their affidavits and written closing arguments.

2. Affidavits and Closing Arguments

a. Plaintiff's Affidavits and Closing Arguments

According to Plaintiff, there are three consumers who are still owed money (who were not repaid by Twaddle as restitution in the Union County criminal action): Louise Heartstedt (\$9,966.56); Robert Hitchens (\$1,872.30); and Robert Luckey (\$4,376.00). Each of those consumers provided Affidavits, which were filed on June 23, 2015.

Ms. Heartstedt testifies in her Affidavit that she contracted with Restore It on November 13, 2012, for repairs on her home in Circleville, Ohio. The total cost of the job was \$14,498.78 and, with a check from her insurance company, Ms. Heartstedt paid \$9,966.56 as a down payment. She states that she was not advised if her down payment was refundable. Restore It did no work to her home and, in response to her inquiries, gave excuses for the continuous delay. Ms. Heartstedt's down payment was never returned.

Robert Hitchens also gave an Affidavit. He testified that, on September 1, 2012, he contracted with Restore It a roof on his home in Chillicothe, Ohio. He made a down payment of \$1,872.30 with a check from his insurance company. He states that he was not given a "proper three day right to cancel" nor was he advised whether and under what circumstances his down

³ This, of course, is not the Court's preferred method of determining damages. However, the parties agreed to this process and at least one of the consumer-witnesses was elderly and residing in Georgia.

payment would be refundable. When he called Restore It to ask about work delays, he was given excuses. Restore It never performed the work on his roof and never refunded his money.

Robert Luckey submitted the last Affidavit. Mr. Luckey is from Cincinnati, Ohio. On June 12, 2012, he contracted with Restore It for home repairs with a total cost of \$7,034.33. Similar to the other consumers, he negotiated a check from his insurance carrier to Restore It as a down payment. His down payment was \$4,376.00. He was not told whether his down payment was refundable and, if so, under what circumstances. He states that the materials were delivered to his home but no work was ever started. Restore It again made excuses for the delay, never started the work, and never refunded Mr. Luckey's down payment.

Plaintiff filed a Closing Argument on August 13, 2015. Plaintiff seeks compensation for the three consumers who provided the above Affidavits and a civil penalty of \$50,000.00. Regarding Mr. Hitchens and Mr. Luckey, Plaintiff states that Mr. Twaddle's Affidavit admits that they are entitled to reimbursement in the amount of \$6,248.30. Regarding Ms. Heartstedt, Plaintiff argues that Twaddle should be personally liable to her, even though Twaddle believes her down payment was not received until after the sale of Restore It to Collmar and Barden, because (1) Twaddle was holding himself out as the owner, (2) Twaddle's third-party agreement with Collmar does not affect his duties to Ms. Heartstedt, and (3) Twaddle continued to have personal access to the bank account into which Ms. Heartstedt's down payment was deposited. One of the documents attached to that Affidavit is a cover letter from Ms. Heartstedt's insurance company dated November 27, 2015, indicating that a check for the repairs was enclosed.

Regarding the request for a \$50,000.00 civil penalty, Plaintiff argues that such an award is justified based on the number of violations, number of consumer affected (37), and the amount of resulting damages (over \$155,000.00). Plaintiff acknowledges that Twaddle paid restitution

to most of the consumers but notes that the restitution was mandatory and given after two years of refusals.

b. Defendant's Affidavit and Closing Arguments

Twaddle submitted his own Affidavit on August 5, 2015. Regarding Mr. Hitchens and Mr. Luckey, he acknowledges that their down payments were paid to Restore It prior to the sale to Collmar and Barden. Accordingly, he admits that Restore It is liable to reimburse them – he does not admit personal liability.

Regarding Ms. Heartstedt, Twaddle states that, based on the date of the contract, is it “highly unlikely that a check would have been issued to Restore It” before the sale to Collmar and Barden.

On the issue of a civil penalty, Twaddle asks the Court to take into consideration that after his sale of Restore It, Collmar and Barden received significant revenue and assumed the company's liabilities but, still, failed to perform the work. He argues that Collmar and Barden caused him to incur damages (i.e., restitution paid in the criminal action).

3. Discussion

This matter is before the Court on the issue of damages to be awarded to the Plaintiff against Defendant Twaddle.⁴ Plaintiff must, of course, establish these damages by a preponderance of the evidence.

This is an action brought by the Ohio Attorney General under R.C. 1345.07. In pertinent part, that section allows the Attorney General to seek the following relief:

(B) On motion of the attorney general and without bond, in the attorney general's action under this section, the court may make appropriate orders, including...to reimburse consumers found to have been damaged...

⁴ The Court has already awarded damages against Restore It and, more recently, rendered summary judgment finding Twaddle personally liable for CSPA violations during his time at Restore It. A judgment of reimbursement for each of the consumer-victims was previously awarded to Plaintiff against Restore It.

* * *

(D) In addition to the other remedies provided in this section, if the violation is an act or practice that was declared to be unfair, deceptive, or unconscionable by rule adopted pursuant to division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based occurred or an act or practice that was determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the court's determination was made available for public inspection pursuant to division (A)(3) of section 1345.05 of the Revised Code, the attorney general may request and the court may impose a civil penalty of not more than twenty-five thousand dollars against the supplier. The civil penalties shall be paid as provided in division (G) of this section.

a. Consumer Reimbursement

The first relief sought by the Attorney General is reimbursement of three consumers' down payments. The first two consumers, Mr. Hitchens and Mr. Luckey, clearly paid their down payments to Restore It while Twaddle was operating the company. Restore It and Twaddle held their down payments and performed no work for more than eight weeks. Twaddle acknowledges that those consumers are entitled to a refund, but seems to indicate that Restore It is the responsible entity.⁵ The Court will simply note that Twaddle is personally liable for CSPA violations while at Restore It which were established by his guilty plea and conviction and his direction, participation, cooperation, and personal involvement in the CSPA violations. Therefore, the Court finds that Twaddle is liable to the Plaintiff for reimbursement of Mr. Hitchens (\$1,872.30) and Mr. Luckey (\$4,376.00).

The issues regarding Ms. Heartstedt are somewhat different. She signed her contract with Restore It on November 13, 2013, ten days before Twaddle sold it. The other exhibit attached to Ms. Heartstedt's Affidavit was a letter from her insurance carrier dated November 27, 2012, stating that a check was enclosed. That was four days after Twaddle's sale of the company

⁵ Restore It ceased operations in February 2013 according to Jennifer Collmar.

to Collmar and Barden. The Court's summary judgment in favor of the Plaintiff and against Twaddle was based on the failure to perform the work or return consumers' down payments within eight weeks in violation of O.A.C. § 109:4-3-09(A)(2). Based on the above, Plaintiff has not established that (1) Twaddle received these funds from Ms. Heartstedt when they were available, at the earliest, four days after he sold the company⁶ and (2) that Twaddle had any control over Restore It during the eight weeks after Restore It received Ms. Heartstedt's down payment. Although Plaintiff points to some evidence that Twaddle may have kept access to Restore It's accounts, those were company assets that no longer belonged to him after November 13, 2012. Even if he theoretically could have withdrawn money to reimburse Ms. Heartstedt, he had no legal authority to do so.⁷ Moreover, when Twaddle sold Restore It, he conveyed both the assets and the liabilities. Restore It, under the control of Collmar and Barden, was responsible to Ms. Heartstedt. Plaintiff's claims are against Restore It and Twaddle – not Collmar or Barden.

In the Court's Decision and Entry Granting Plaintiff's Motion for Summary Judgment, it also based Twaddle's personal liability on his criminal conviction and guilty plea arising from the same events. However, as acknowledged by all parties, Ms. Heartstedt was not one of the victims who were the subjects of that conviction.

Plaintiff's Motion for Summary Judgment argued that Twaddle's personal liability could also be based on (1) his direct involvement with some customers, (2) his corporate decision-making, including which customers were served and whether to issue refunds, (3) directing

⁶ Plaintiff argues that "Twaddle agreed to provide services to this consumer and accepted a substantial down payment..." The evidence that Ms. Heartstadt's down payment was paid, at the earliest, on November 27, 2012, means that Twaddle did not accept it. Although Twaddle controlled the company until November 23, there is no evidence that he was personally involved in contracting with Ms. Heartstadt.

⁷ Plaintiff notes that Twaddle had access to that account until February of 2013. However, when he withdrew \$2,500.00 at that time the police were notified and the money was returned. The Court does not agree that he should be required to make the Hobson's Choice of committing theft or violating the CSPA.

employees to accept payments from consumers and control of those funds.⁸ Regarding Ms. Heartstadt, there is no evidence that Twaddle was personally involved in her transaction. The issues of whether to do her work and/or issue a refund were already addressed above – those duties fell upon Restore It while under the ownership of Collmar and Barden.

In sum, the Court finds that Plaintiff has failed to meet its burden to show that Twaddle is liable to reimburse Ms. Heartstedt.

b. Civil Penalty

Next, Plaintiff asks the Court to impose civil penalties against Twaddle in the amount of \$50,000.00. Civil penalties are provided for under R.C. 1345.07(D) and require a showing that the defendant's violations meet one or both of the following:

(1) the act or practice that was declared to be unfair, deceptive, or unconscionable by rule adopted pursuant to division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based occurred; or

(2) an act or practice that was determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the court's determination was made available for public inspection pursuant to division (A)(3) of section 1345.05 of the Revised Code.

The Court has found that Twaddle violated O.A.C. § 109:4-3-09 by accepting money from a consumer for goods or services ordered by mail, telephone, or otherwise and then permit

⁸ Plaintiff's Complaint also alleges a violation of R.C. 1345.02 by accepting money from consumers when Defendants knew, or should have known that, due to the precarious financial situation, consumers would not receive the goods or services for which they paid. Again, all evidence indicates that Twaddle sold Restore It by the time any money, i.e. the down payment, was received from Ms. Heartstedt.

eight weeks to elapse without (a) Making shipment or delivery of the goods or services ordered or (b) Making a full refund.

Plaintiff has also produced a copy of an Agreed Final Judgment Entry and Order rendered on January 24, 2007, in the case of *State ex rel. Petro v. Vision Home Improvement*, Summit C.P. No. CV-2006-03-1819, which was made part of the Ohio Attorney General's Public Inspection File on January 31, 2007. That court found the defendants engaged in unfair and deceptive acts or practices in violation of R.C. 1345.02 by *inter alia* "failing to deliver services after accepting money from consumers for services."

The Court agrees with Plaintiff and finds that Twaddle engaged in unfair and deceptive acts and practices that were previously declared by a duly promulgated rule of the Ohio Attorney General and by a decision of a court published in the Ohio Public Inspection File. Accordingly, civil penalties may be imposed.

Of course, the more hotly contested questions are whether to impose a penalty and, if so, in what amount? "[C]onsumer protection laws must be interpreted in a manner that is calculated to provide courts with flexibility in fashioning remedies intended by the General Assembly to redress the wrong committed." *Motzer Dodge Jeep Eagle v. Ohio Atty. Gen.*, 95 Ohio App.3d 183, 192, 642 N.E.2d 20 (12th Dist. 1994). R.C. 1345.07(D) vests courts with "broad discretion." *Id.* In exercising its discretion to determine the amount of a civil penalty, the Court should make such penalties "significant enough to affect the violator and deter future violations." *State ex rel. Ohio Atty. Gen. v. LG Dev. Corp.*, 187 Ohio App.3d 211, 219, 2010-Ohio-1676, 931 N.E.2d 642 (6th Dist.) (civil penalties under the Ohio Hazardous Waste laws). Among the factors to be included when evaluating a civil penalty are the "offender's good or bad faith, the financial gain which accrued to the offender and the...harm." *State ex rel. Ohio Atty. Gen. v.*

Shelly Holding Co., 191 Ohio App.3d 421, 441, 2010-Ohio-6526, 946 N.E.2d 295 (10th Dist.) (Ohio EPA enforcement action).

Here, the Plaintiff points to Twaddle's pattern of continuing to accept payments while failing to perform on contracts, his delays, excuses, and flat out refusals to return down payments as evidence of deliberate bad faith. This conduct, according to Plaintiff, injured 37 consumers for a total loss of over \$155,000.00.

In his defense, Twaddle notes that he has already paid restitution in the amount of \$153,127.82. He also states that, at the time he sold Restore It, he "turned over all of the money in the company bank account (\$23,660.96)" and that Restore It had revenue totaling approximately \$100,000.00 for the months of November 2012 through January 2013. He further suggests, without any noteworthy background, that Restore It would have had an additional \$80,000.00 in back-end revenue if it had completed the pending jobs.

The Court agrees with Plaintiff that Twaddle's bad faith is evident. While at Restore It, he would solicit homeowners' business, secure sizeable down payments for the work, use the corporate accounts containing those down payments for at least some of his personal expenses and benefit,⁹ and then failed to perform the work or return the money. He instructed employees against returning down payments and ordered them to give excuses (if not outright lies) in response to customer inquiries. Twaddle's explanation – that Restore It grew too quickly and he had more jobs than he could promptly perform – would be much more convincing if, for example, he offered to return money, gave honest answers about when the work would be done, and did not use consumers' down payments for his personal gain. The Court also notes on this

⁹ Twaddle has not attempted to explain these expenditures, which include purchases from jewelry and sporting goods stores.

factor, that Twaddle's guilty plea and conviction in the Union County Common Pleas Court required Twaddle to admit to theft and the scienter elements thereof.¹⁰

Twaddle's effort to point the finger at Collmar and Barden for failing to perform the work after they purchased Restore It on November 23, 2012, is largely unavailing. While Collmar and Barden did indeed purchase the company, including its liabilities, most of the contracts were already well overdue.¹¹ Restore It survived only a few months after the sale. Twaddle should not benefit due to the fact that he received no payment from Collmar or Barden. Collmar testified in her deposition that she retained counsel and refused payment to Twaddle after discovering that he made material misrepresentations during their pre-sale discussions. Finally, while the Court appreciates Twaddle's point that Restore It had considerable funds with which to perform the work after the sale, the Court does not agree with the implication that Twaddle acted out of good will or generosity when he transferred the company bank accounts to the buyers. That was Restore It's property, not his.

The next element is financial gain. According to the Attorney General, the total amount of down payments received for which Restore It did no work was over \$155,000.00. Twaddle has already paid restitution of \$153,172.82. This compensated 34 of the 36 consumers. Although the company's bank account records show many purchases of a personal nature (jewelry, sporting goods, etc.), Plaintiff has not really provided the Court with much detail about purchases that could be either personal or business-related (e.g., meals, furniture). On top of that, the actual gain to Twaddle is muddled by the fact that he was not paid a consistent salary. Instead, he was using company funds as if they were his own or, in Twaddle's own words,

¹⁰ "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways..." R.C. 2913.02(A).

¹¹ Again, noting Ms. Heartstedt as an exception.

“money in the bank.”¹² Finally, the Court explicitly notes its disagreement with Twaddle’s implication that the restitution paid as part of his criminal case was voluntary.

The last factor, harm, does not differ significantly except that the Court will note that the consumers were, no doubt, subjected to inconvenience, stress, frustration, and other negative emotions. This is particularly noteworthy for those without the means to hire another company to repair their homes until their down payments were returned.

In light of the foregoing, the Court finds beyond a preponderance of the evidence that Plaintiff has met its burden of proof on the claim for a civil penalty and that the requested penalty of \$50,000.00 is appropriate under the circumstances.

4. Conclusion

Based on the foregoing, and pursuant to R.C. 1345.07, the Court finds that Plaintiff has proven beyond a preponderance of the evidence that it is entitled to an award of damages against Defendant Twaddle as follows:

- (1) \$6,248.30 as reimbursement for the consumers Robert Hitchens (\$1,872.30) and Robert Luckey (\$4,376.00);
- (2) a civil penalty of \$50,000.00; and
- (3) court costs are assessed to the Defendants, pursuant to Civ.R. 54(D).

A judgment entry in accord with this decision will issue separately.

IT IS SO ORDERED.

Copies electronically to:
All counsel of record.

¹² Twaddle Dep. Tr. at 155.

Franklin County Court of Common Pleas

Date: 12-22-2015
Case Title: OHIO STATE ATTORNEY GENERAL MICHAEL DEWI -VS-
RESTORE IT USA LLC ET AL
Case Number: 13CV005121
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read "Patrick E. Sheeran", is written over a circular, textured stamp. The signature is fluid and cursive.

/s/ Judge Patrick E. Sheeran