

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER DIPIERO,

Plaintiff-Appellant,

v

BETTER BUSINESS BUREAU OF WEST
MICHIGAN, INC.,

Defendant-Appellee.

UNPUBLISHED
November 25, 2014

No. 316308
Kent Circuit Court
LC No. 13-000827-CZ

Before: BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Plaintiff Christopher DiPiero wanted to buy expensive, custom-made windows for his Kalamazoo home. He found windows meeting his needs at Jack’s Wholesale Windows & Design (Jack’s). Before committing to a purchase, DiPiero consulted a website sponsored by defendant Better Business Bureau of West Michigan, Inc., (BBBWM) to investigate Jack’s track record and trustworthiness. According to the BBBWM website, Jack’s merited an “A+” rating as an accredited business that maintained high marketplace standards. DiPiero signed a contract with Jack’s.

Unfortunately, the windows Jack’s supplied were too small and Jack’s installed them improperly. Jack’s refused to correct these problems. DiPiero successfully sued Jack’s in the Kalamazoo district court and obtained a substantial judgment. He then filed this lawsuit against the BBBWM, alleging that the BBBWM committed four violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* The circuit court granted summary disposition in the BBBWM’s favor, ruling that DiPiero’s complaint failed to state an actionable claim under the MCPA. We affirm, albeit for reasons other than those cited by the circuit court.

I.

DiPiero’s complaint details his unsatisfactory experience with Jack’s and asserts that he selected Jack’s as a window supplier based “in part” on the fact that for many years, the company had “enjoyed an Accredited Business status” with the BBBWM. Through its website, the complaint avers, the BBBWM “actively markets and holds itself to be an advocate and activist of consumers and consumer rights in the marketplace in the West Michigan region.” The BBBWM portrays itself as “the leader in advancing marketplace trust,” the complaint alleges, and seeks to achieve this goal by “creating a community of trustworthy businesses; setting

standards for marketplace trust; encouraging and supporting best practices; celebrating marketplace role models; and denouncing substandard marketplace behavior.” According to the complaint, three separate online programs further these objectives: a rating system, an accreditation program, and an online system for managing consumer complaints. The BBBWM website declares that accredited businesses agree if requested to “[m]ake a good faith effort to resolve disputes” through mediation or arbitration.

DiPiero’s complaint recites that after Jack’s failed to correct its “clear mistake of mis-sized windows,” he filed a complaint about Jack’s with the BBBWM. The BBBWM revoked Jack’s accreditation status and awarded it a “D-” rating, only to subsequently reinstate both the accreditation and an A+ rating. As an accredited business, the complaint contends, Jack’s was duty-bound to submit to arbitration if demanded by a consumer. DiPiero demanded arbitration, but Jack’s refused. And according to the complaint, the BBBWM essentially closed its eyes to Jack’s transgressions, made no meaningful effort to compel arbitration, and with only a small hiatus, continued its highly favorable rating of the company.

The complaint set forth four counts, all invoking the MCPA. Count I asserted that by untruthfully suggesting and marketing that accredited businesses are required to arbitrate disputes, the BBBWM caused “a probability of confusion or of misunderstanding” of the legal rights and remedies of the parties to the window transaction, in violation of MCL 445.903(1)(n). In Count II, DiPiero alleged that the BBBWM contravened § 903(1)(bb) of the MCPA by falsely representing to consumers that Jack’s was currently entitled to accredited business status and an “A+” rating. Count III avers that the BBBWM violated MCL 445.903(1)(s) by failing to reveal the amount of money that businesses pay for accreditation status, which misleads “the consumer into believing that no meaningful conflict of interest exists.” In Count IV, the complaint states that by misrepresenting on the website that Jack’s had maintained its accreditation since 1995, the BBBWM misled or deceived consumers, again infringing § 903(1)(s).

In lieu of filing an answer, the BBBWM moved to summarily dismiss DiPiero’s claims. The circuit court found the BBBWM’s arguments persuasive and granted its motion. In its written opinion and order, the court found that any misrepresentations or incomplete disclosures were not material to DiPiero’s transaction with Jack’s, and that the failure of the BBBWM’s arbitration program did not constitute a violation of the MCPA.

II.

We review de novo a trial court’s resolution of a summary disposition motion. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). MCR 2.116(C)(8) authorizes the dismissal of a complaint that fails to state a claim upon which relief may be granted. We accept all well-pleaded allegations in the complaint as true, and “construe them in the light most favorable to the nonmoving party.” *Zaher*, 300 Mich App at 139. A motion brought under MCR 2.116(C)(8) “should be granted only if no factual development could possibly justify recovery.” *Id.* The construction and application of the MCPA presents a separate question subject to our de novo review. *Liss v Lewiston-Richards, Inc.*, 478 Mich 203, 207; 732 NW2d 514 (2007).

III.

“The MCPA provides protection to Michigan’s consumers by prohibiting various methods, acts, and practices in trade or commerce.” *Slobin v Henry Ford Health Care*, 469 Mich 211, 215; 666 NW2d 632 (2003). MCL 445.902(g) defines “trade or commerce” as:

the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. “Trade or commerce” does not include the purchase or sale of a franchise, but does include pyramid and chain promotions, as “franchise”, “pyramid”, and “chain promotions” are defined in the franchise investment law, 1974 PA 269, MCL 445.1501 to 445.1546.

MCL 445.903(1) defines over 30 different unfair, unconscionable, or deceptive methods, acts, or practices that are prohibited by the MCPA in the course of trade or commerce. DiPiero relies on three specific subsections of the Act:

(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

* * *

(n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.

* * *

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

* * *

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

Two of these subsections support a claim under the MCPA only if the challenged actions affect a “transaction” subject to the MCPA. Subsection (s) defines a failure to reveal a material fact, thereby misleading or deceiving the consumer, as an “unfair, unconscionable, or deceptive method, act, or practice in the conduct of trade or commerce” under the MCPA.¹

¹ We note that a number of other subsections of the MCPA do not require a “transaction.” For example, MCL 445.903(1)(p) prohibits “[d]isclaiming or limiting the implied warranty of merchantability and fitness for use, unless a disclaimer is clearly and conspicuously disclosed,”

We first address DiPiero's allegations under subsections (1)(n) and (bb), which specifically reference a "transaction." The MCPA does not define the term "transaction." In *Zine v Chrysler Corp*, 236 Mich App 261, 280; 600 NW2d 384 (1999), this Court examined several definitions for the term, looking first to the *Black's Law Dictionary* interpretation:

"Act of transacting or conducting any business; negotiation; management; proceeding; that which is done; an affair. It may involve selling, leasing, borrowing, mortgaging or lending. Something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered." [*Id.*, quoting *Black's Law Dictionary* (5th ed).]

Next, the Court reviewed definitions offered by the *Random House Webster's College Dictionary* (1997): "'1. the act or process of transacting; the fact of being transacted. 2. something that is transacted, esp. a business agreement.'" *Zine*, 236 Mich App at 280. Finally, the Court consulted *Webster's*, which defines "transact" as: "'1. to carry on or conduct (business, negotiations, etc.) to a conclusion or settlement. 2. to carry on or conduct business, negotiations, etc.'" *Id.* The *Zine* Court concluded that a "transaction" for purposes of the MCPA refers to "the business conducted between the parties," which in that case were the negotiations that led to the plaintiff's purchase of a truck. *Id.*

Other than DiPiero's unsatisfactory window purchase from Jack's, we find no transactions alleged in the complaint. The term "transaction" connotes the mutual and reciprocal acts typical of business deals that alter the legal relationships of the parties. The common thread in all three of the MCPA subsections on which DiPiero relies is that the parties to a transaction have done business with each other.

Here, DiPiero consulted a website that conveyed information relevant to a separate, independent transaction. DiPiero and the BBBWM did no business together. They forged no agreement and exchanged no promises. BBBWM derived no benefit from DiPiero's consultation of its website. Simply put, DiPiero was not a "party" to a "transaction" with the BBBWM.² Absent this relationship, the MCPA does not afford a right to vindicate confusing, false or misleading website representations.

and subsection (1)(j) bars "[r]epresenting that a part, replacement, or repair service is needed when it is not."

² We also reject DiPiero's argument that he is a third-party beneficiary of any listing or accreditation agreement between Jack's and the BBBWM. At best, DiPiero is an incidental beneficiary of that contract (assuming a contract exists).

"A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof. Where the contract is primarily for the benefit of the parties

Subsection (1)(s) does not include the term “transaction.” However, this Court in *Zine* held that despite the absence of the phrase “material to the transaction,” “a material fact for purposes of the MCPA would likewise be one that is important to the transaction or affects the consumer’s decision to enter into the transaction.” *Zine*, 236 Mich App at 283. Accordingly, DiPiero’s claim under subsection (1)(s) fails for the same reasons that defeat his other MCPA allegations.

We affirm.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher

thereto, the mere fact that a third person would be incidentally benefited does not give him a right to sue for its breach.” [*Greenlees v Owen Ames Kimball Co*, 340 Mich 670, 676; 66 NW2d 227 (1954), quoting 12 Am Jur, Contracts, § 282, p 834.]