

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LORI GOODLING,	:	NO. 12 – 01,742
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
JP STONE, INC.,	:	Motion for Partial Summary Judgment

OPINION AND ORDER

Before the court is Defendant’s Motion for Partial Summary Judgment, filed October 23, 2013. Argument on the motion was heard December 9, 2013.

In her Complaint, Plaintiff seeks damages for breach of contract based on allegations that she contracted with Defendant to install a tile floor in her home, that Defendant failed to properly install the floor and that she will incur expenses to have the floor removed and re-installed. She also seeks treble damages and attorney’s fees under the Unfair Trade Practices and Consumer Protection Law (UTPCPL). In the instant motion for partial summary judgment, Defendant seeks to dismiss the UTPCPL claims.

In her Complaint, Plaintiff asserts that Defendant violated the UTPCPL by:

- 1) supplying a heated floor system that did not meet the representations made by the Defendant,
- 2) providing verbal representations that a state-of-the-art heated floor system would be provided for the property, and
- 3) failing to properly install a heated floor system at the property.¹

These assertions implicate the sections of the UTPCPL that make unlawful “[m]aking repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing” and “[e]ngaging in any other

¹ In her brief in response to the motion, Plaintiff also argues that Defendant’s conduct was deceptive and purposefully misleading “after issues arose”. Not only is this claim not included in the Complaint, there is nothing in the record to suggest that Plaintiff suffered any harm from any conduct of Defendant after the issues with the floor were brought to his attention. Such conduct cannot, therefore, support any UTPCPL claim. *See* 73 P.S. Section 201-9.2.

fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding”.² 73 P.S. Section 201-2((4)(xvi) and (xxi), respectively. In the instant motion, Defendant contends Plaintiff has failed to produce any evidence to support a claim under either subsection.

With respect to subsection (xvi), while Plaintiff has certainly offered sufficient evidence that the floor was not properly installed,³ and that the quality of the work was below the standard that Defendant implied would be provided,⁴ she has not offered any evidence that the quality of the work was represented “in writing” as required by the statute.

With respect to the assertion that Defendant engaged in fraudulent or deceptive conduct, again Plaintiff has offered no evidence that Defendant did so. Deceptive conduct involves acts which intentionally give a false impression. *See In re Patterson*, 263 B.R. 82 (E.D . Pa. 2001). At her deposition, she testified that she has no evidence that anyone purposely gave her an inferior floor or told her anything that was knowingly and intentionally false,⁵ and that were the work done properly, the floor would have been state-of-the-art. N.T. August 9, 2013, at p. 87-88. Plaintiff is simply unhappy with the quality of the work, and justifiably so, but such does not entitle her to bring a claim under the UTPCPL. *See Burkholder v. Cherry*, 607 A.2d 745 (Pa. Super. 1992)(without evidence of fraud, it is not enough to establish a violation of the

² While Plaintiff also seeks to apply the sub-section which makes unlawful “[r]epresenting that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another”, 73 P.S. Section 201-2(4)(vii), the court believes that to apply both this sub-section and subsection (xvi) would render the language of (xvi) which requires that the representations be in writing, mere surplusage. *See Berger v. Rinaldi*, 651 A.2d 553, 557 (Pa. Super. 1994) (“whenever possible, courts must construe a statute so as to give effect to every word contained therein”). Subsection (xvi) is the more specific of the two, applying to a particular type of services – making repairs, improvements or replacements. Therefore, the court will not apply Subsection (vii).

³ The evidence shows that the tiles were not laid evenly, there was not enough space between the tiles, the wrong type of grout was used, the underlayment was not properly attached, the tiles were not sufficiently attached to the underlayment, the heating elements under the tiles were not placed properly, the wiring was not connected properly, and the area was too large to not have an expansion joint, all of which resulted in grout coming out from the grout lines and the tiles cracking and coming loose, as well as the circuit breaker blowing every time certain sections of the heat were turned on. Defendant admitted that the installation was not proper.

⁴ The court finds Mr. Livorino’s story of his grandfather and the rolling of the dime across the tile to have implied that, at the very least, the tile surface would be even.

⁵ She also specifically stated that she has no evidence that anything Mr. Livorino told her in the showroom was a deliberate lie or deceptive, NT., August 9, 2013, at p. 66, 68, and that she has no evidence that anything he told her while he was at her home for purposes of the estimate was a lie or deceptive. *Id.* at p. 67-68. The court again notes that any statement that she was lied to *after* the installation is not material to the issues raised in the Complaint.

UTPCPL to show that the contractor failed to fulfill the expectations of the owners regarding the quality of the work).

Plaintiff argues nevertheless that the court may not enter summary judgment based on Plaintiff's deposition testimony, contending that deposition testimony is not a binding admission, but subject to rebuttal. While it is true that deposition testimony does not constitute a binding judicial admission, DeArmitt v. New York Life Ins. Co., 73 A.3d 578 (Pa. Super. 2013), it is not true that the court may not enter summary judgment based on deposition testimony. Id. Such *may* be relied on in granting a motion for summary judgment if the testimony conclusively establishes a material fact and is not subject to rebuttal. Id. In the instant case, the court cannot fathom how Plaintiff would rebut her own testimony. In her brief, she states that she will testify at trial that Mr. Livorino represented to her that her floors would last a lifetime, but this statement is perfectly consistent with her statement that no one said anything to her which was knowingly or intentionally false. As stated earlier, because the representation (as to quality of the work) was not made in writing, it cannot be used to support a claim under subsection (xvi) and thus is not a material fact in that regard, and further, in light of Plaintiff's testimony that Mr. Livorino made no knowing misrepresentations, it is not material to a claim under subsection (vii) either.

As the court believes that Plaintiff's deposition testimony conclusively establishes that there was no deceptive conduct on Defendant's part, and there is no issue of fact as to whether there was a written representation regarding quality of the work (there was not), Defendant is entitled to summary judgment on the UTPCPL claims.⁶

ORDER

AND NOW, this 18th day of December 2013, for the foregoing reasons, Defendant's Motion for Partial Summary Judgment is hereby GRANTED. Count 2 of the Complaint is hereby DISMISSED. As the breach of contract claim is for an amount which subjects the claim to compulsory arbitration, this matter is removed from this court's February

⁶ In light of this disposition, the court has not addressed Defendant's other contentions: that the UTPCPL claims are barred by the "gist of the action" doctrine, and that the evidence does not support the award of treble damages.

2014 trial term and the conference scheduled for January 14, 2014, is hereby CANCELLED.
The court administrator's office is requested to schedule an arbitration hearing at their earliest convenience.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Heather Lewis, Esq.
Bret Southard, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson
Betty Buckle, Court Administrator's office