STATE OF INDIANA) IN THE LAKE COUNTY SUPERIOR COURT
) SS:
COUNTY OF LAKE) CAUSE NO. 45D10-0610-PL-00132

FILED IN
CLERK'S OFFICE
2008 JAN 10 AM 10 56
THOMAS R. PHILPOT
CLERK LAKE SUPERIOR COURT

STATE OF INDIANA,)
)
Plaintiff,)
)
v.)
)
SUSAN DIANE PERIGO, doing business)
as, Picture This Photography,)
)
Defendant.)

REGISTERED/CERTIFIED
RECEIVED
JAN 10 2008
Thomas R. Philpot
CLERK LAKE SUPERIOR COURT

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff, State of Indiana, by Attorney General Steve Carter and Deputy Attorney General Mary Ann Wehmueller, submits its Memorandum in Support of the Plaintiff's Motion for Summary Judgment.

I. Procedural History

On October 24, 2006, the Plaintiff filed its Complaint for Injunction, Costs, and Civil Penalties against the Defendant. The Complaint alleges that Diana Perigo d/b/a Picture This Photography ("Perigo") violated the Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-1, *et seq*. The Defendant filed an answer on December 14, 2006. The Plaintiff now seeks summary judgment against the Defendant on all counts.

II. Applicable Legal Standards

Summary judgment is appropriate if the designated evidentiary matter shows there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Wade v. Norfolk & Western Ry. Co.*, 694 N.E.2d 298, 301 (Ind. App.1998). The purpose of summary judgment is to terminate litigation about which there can

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be no factual dispute. *Id.* The party moving for summary judgment bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Luider v. Skaggs*, 693 N.E.2d 593, 595 (Ind. App. 1998).

Once a movant meets these two requirements, the burden shifts to the non-moving party to set forth specifically designated facts showing the existence of a genuine issue. *Id.* Any doubts as to any facts or inferences to be drawn from are resolved in the light most favorable to the non-moving party. *Id.* Furthermore, despite a conflict in facts and inference on some elements of a claim, summary judgment may be proper when no dispute exists with respect to the facts that are dispositive of the litigation. *Id.* The non-moving party may not merely rest upon denials of his pleadings but must use supporting materials to set forth facts. *Allstate Ins. Co. v. Bradtmueller*, 715 N.E.2d 993 (Ind. App. 1999).

III. Designation of Supporting Materials

The Plaintiff, pursuant to Rule 56(C) of the Indiana Rules of Trial Procedure, designates the following materials on which it relies for purposes of this motion:

1. The Plaintiff's Complaint for Injunction, Costs, and Civil Penalties, filed in this matter on October 24, 2006.
2. The Defendant's Answer, a letter filed in this matter on December 14, 2006.
3. The Affidavit of Melody J. Rozdelsky ("Rozdelsky").
4. The Affidavit of Robert W. Stanford ("Stanford").
5. The Affidavit of Sandra Koza ("Koza").
6. The Affidavit of Stacey Orzel ("Orzel").
7. The Affidavit of Kelly Mills ("Mills").

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10. The Affidavit of Mary Ann Wehmueller, Supporting Request for Attorney Fees.

IV. Undisputed Material Facts

1. Since at least October of 2004, Perigo has entered into wedding photography contracts with consumers in which Perigo promised to provide photography services, which included the delivery of photographs and wedding albums to consumers.

SOURCE: Plaintiff's Complaint, page 2

Defendant's Answer

2. On or around October 16, 2004 Rozdelsky placed her wedding photograph order with Perigo.

SOURCE: Plaintiff's Complaint, page 2

Rozdelsky affidavit

Defendant's Answer

3. Rozdelsky paid Perigo a total of $1,149.99.

SOURCE: Plaintiff's Complaint, page 2

Rozdelsky affidavit

4. Perigo, expressly or by implication, represented that she would deliver the photographs and album to Rozdelsky within a reasonable time frame.

SOURCE: Plaintiff's Complaint, page 2

Rozdelsky affidavit

5. Perigo has failed to deliver the photographs and album to Rozdelsky and has failed to refund her monies.

SOURCE: Plaintiff's Complaint, page 2

Rozdelsky affidavit

6. On January 11, 2005 Stanford placed his wedding photograph order with Perigo.

SOURCE: Plaintiff's Complaint, page 2

Stanford affidavit

7. Stanford paid Perigo a total of $1,127.09.

SOURCE: Plaintiff's Complaint, page 2

Stanford affidavit

8. Perigo, expressly or by implication, represented that she would deliver the photographs and album to Stanford within a reasonable time frame.

SOURCE: Plaintiff's Complaint, page 2

Stanford affidavit

9. Perigo has failed to deliver the photographs and album to Stanford and has failed to refund his monies.

SOURCE: Plaintiff's Complaint, page 2

Stanford affidavit

10. On or around June 6, 2005 Koza placed her wedding photograph order with Perigo.

SOURCE: Plaintiff's Complaint, page 3

Koza affidavit

11. Koza paid Perigo a total of $1,050.00.

SOURCE: Plaintiff's Complaint, page 3

Koza affidavit

12. Perigo, expressly or by implication, represented that she would deliver the photographs and album to Koza within a reasonable time frame.

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Koza affidavit

13. Perigo has failed to deliver the photographs and album to Koza and has failed to refund her monies.

SOURCE: Plaintiff's Complaint, page 3

Koza affidavit

14. On December 29, 2004 Orzel placed an order for wedding photographs with Perigo.

SOURCE: Plaintiff's Complaint, page 3

Orzel affidavit

15. Orzel paid Perigo a total of $936.29.

SOURCE: Plaintiff's Complaint, page 3

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Orzel affidavit

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IV. Undisputed Material Facts

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17. Perigo has failed to deliver the photographs and album to Orzel and has failed to refund her monies.

SOURCE: Plaintiff's Complaint, page 3

Orzel affidavit

18. On November 14, 2004 Mills placed an order for wedding photographs with Perigo.

SOURCE: Plaintiff's Complaint, page 4

Mills affidavit

19. Mills paid Perigo a total of $1,068.99.

SOURCE: Plaintiff's Complaint, page 4

Mills affidavit

20. Perigo, expressly or by implication, represented that she would deliver the photographs and album to Mills within a reasonable time frame.

SOURCE: Plaintiff's Complaint, page 4

Mills affidavit

21. Perigo has failed to deliver the photographs and album to Mills and has failed to refund her monies.

SOURCE: Plaintiff's Complaint, page 4

Mills affidavit

22. On February 16, 2006 Biesboer placed an order for wedding photographs with Perigo.

SOURCE: Plaintiff's Complaint, page 4

Biesboer affidavit

23. Biesboer paid Perigo a total of $1,706.13.

SOURCE: Plaintiff's Complaint, page 4

Biesboer affidavit

24. Perigo, expressly or by implication, represented that she would deliver the photographs and album to Biesboer within a reasonable time frame.

SOURCE: Plaintiff's Complaint, page 4

Biesboer affidavit

25. Perigo has failed to deliver the photographs and album to Biesboer and has failed to refund her monies.

SOURCE: Plaintiff's Complaint, page 4

Biesboer affidavit

26. On January 2, 2005 Frazee placed an order for wedding photographs with Perigo.

SOURCE: Plaintiff's Complaint, page 4

Frazee affidavit

27. Frazee paid Perigo a total of $1,149.99.

SOURCE: Plaintiff's Complaint, page 5

Frazee affidavit

28. Perigo, expressly or by implication, represented that she would deliver the photographs and album to Frazee within a reasonable time frame.

SOURCE: Plaintiff's Complaint, page 5

Frazee affidavit

29. Perigo has failed to deliver the photographs and album to Frazee and has failed to refund her monies.

SOURCE: Plaintiff's Complaint, page 5

Frazee affidavit

30. The Attorney General's Office has expended 10.95 hours in prosecuting this case and has incurred expenses of $109.60. A reasonable fee attorney fee for the investigation and prosecution of this case is $150.00 an hour.

SOURCE: The Affidavit of Mary Ann Wehmueller in Support of Request for Attorney Fees.

V. Argument

A. The Defendant violated the Indiana Deceptive Consumer Sales Act

1. PERIGO IS A "SUPPLIER" WITHIN THE MEANING OF IND. CODE § 24-5-0.5-2(a)(3).

Ind. Code § 24-5-0.5-2(a)(3) defines "supplier" as "a seller, lessor, assignor, or other person who regularly engages in or solicits consumer transactions, including a manufacturer, wholesaler, or retailer, whether or not he deals directly with the consumer." Since at least October 14, 2004, Perigo has entered into wedding photography contracts with consumers in which Perigo promised to provide photography services, which included the delivery of photographs and wedding albums to consumers. Perigo's activities make her a supplier.

2. THE TRANSACTIONS AT ISSUE INVOLVED THE SALE OR OTHER DISPOSITION OF PERSONAL PROPERTY OR SERVICES, OR THE SOLICITATION OF THE SAME, MADE FOR PURPOSES THAT WERE PRIMARILY PERSONAL, FAMILIAL, CHARITABLE, AGRICULTURAL, OR HOUSEHOLD, AND SO WERE "CONSUMER TRANSACTIONS" AS DEFINED AT IND. CODE § 24-5-0.5-2(a)(1).

There are 9 transactions involved in this case. Given the nature of the services the Defendant contracted to perform, as well as the fact the services were to be rendered for individuals, there is no genuine factual dispute the transactions involved services that were

primarily personal, familial, or charitable and constitute "consumer transactions" as defined by Ind. Code § 24-5-0.5-2(a)(1).

3. *THE DEFENDANT MADE MISREPRESENTATIONS CONSTITUTING DECEPTIVE ACTS UNDER THE INDIANA DECEPTIVE CONSUMER SALES ACT.*

Ind. Code § 24-5-0.5-3(a) enumerates specific types of acts or representations that are deceptive under the Deceptive Consumer Sales Act. A supplier who commits any of the prohibited acts or representations enumerated by this section of the Act commits a *per se* deceptive act. *See McCormick Piano & Organ Co., Inc. v. Geiger*, 412 N.E.2d 842, 846 (Ind. App. 1980). A Plaintiff need show only a single violation of the Act in order to prevail on a claim under it. *See Captain & Company, Inc. v. Stenberg,* 505 N.E.2d 88, 95 (Ind. App. 1987). Thus, if the State can show that there is no genuine issue with respect to whether a Defendant committed a prohibited act or representation, the State can prove a violation of the Deceptive Consumer Sales Act, and is entitled to the remedies the Act provides.

In this case Perigo violated Ind. Code § 24-5-0.5-3(b)(10) by implicitly representing she would deliver the consumers' complete wedding photograph orders within a reasonable period of time, when she knew or should reasonably have known that she could not do so. Ind. Code § 24-5-0.5-3(b)(10) states that if a specific delivery or completion date is not identified, the transaction must be completed within a reasonable time, according to the course of dealing or the usage of the trade.

B. The Defendant knowingly violated the Deceptive Consumer Sales Act

Perigo committed violations of Ind. Code § 24-5-0.5-3(a) with knowledge. Perigo knew or should have known that she could not deliver or complete the subject of the consumer transactions within the stated time or within a reasonable period of time. However, she

continued to accept orders and consumers' money over a sixteen month period from the consumers identified herein.

VI. Relief

Restitution and Contract Cancellation

Ind. Code § 24-5-0.5-4(c)(2) states the court may "order a supplier to make payment of the money unlawfully received from the aggrieved consumers to be held in escrow for distribution to aggrieved consumers." Consumers Rozdelsky and Frazee already have judgments against Perigo; therefore, the Plaintiff does not seek restitution on their behalf. However, the Plaintiff is seeking restitution on behalf of the following consumers for the following amounts:

1. Robert W. Stanford ($1,127.09)
2. Sandra Koza ($1,050.00)
3. Stacey Orzel ($936.29)
4. Kelly Mills ($1,068.99)
5. Shelly Biesboer ($1,706.13).

Civil Penalties

Ind. Code § 24-5-0.5-8 states a person who commits an incurable deceptive act, defined by Ind. Code § 24-5-0.5-2(a)(8), as "a deceptive act done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead", is subject to a civil penalty of a fine of not more than Five Hundred Dollars ($500.00) for each violation.

Ind. Code § 24-5-0.5-4(g) states if a person knowingly violates the Deceptive Consumer Sales Act, then the Attorney General, in an action pursuant to Ind. Code § 24-5-0.5-4(c), may recover from the person a civil penalty of a fine not exceeding Five Thousand Dollars ($5,000.00) per violation. For transactions prior to July 1, 2005, the penalty under this provision

cannot exceed Five Hundred Dollars ($500.00). The Rozdelsky, Stanford, Koza, Orzel, Mills, and Frazee transactions all occurred prior to July 1, 2005. The Biesboer transaction is the only transaction occurring after July 1, 2005.

Injunctive Relief

Ind. Code § 24-5-0.5-4(c)(1) states the court may issue an injunction if the Deceptive Consumer Sales Act is violated. The Plaintiff requests the Court issue an injunction preventing Perigo, individually and doing business as Picture This Photography, from the following: representing, expressly or by implication that consumers will receive photographs or services upon receipt of payment, when the Defendant knows or should reasonably know she cannot or will not provide the photographs or services; and representing that the Defendant will deliver photographs or services within a stated or reasonable time frame, when the Defendant knows or should reasonably know she cannot or will not provide the photographs or services as represented.

Costs of Investigation and Prosecution

Ind. Code § 24-5-0.5-4(c)(3) allows a court to "order the supplier to pay the State the reasonable costs of the attorney general's investigation and prosecution." The Attorney General's office has spent at least 10.95 hours on the investigation and prosecution of this matter and has incurred expenses in the amount of $109.60. Therefore the Plaintiff requests that Defendant Perigo be required to pay the State for its reasonable cost of investigating and prosecuting this case, as referenced by the affidavit of Deputy Attorney General Mary Ann Wehmueller, filed herewith.

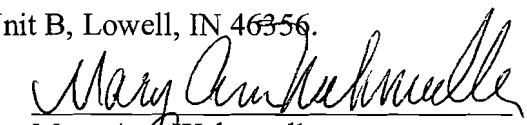
Respectfully submitted,

STEVE CARTER
Attorney General of Indiana
Atty. No. 4150-64

By:
Mary Ann Wehmueller
Deputy Attorney General
Atty. No. 15251-49A
Office of the Attorney General
Indiana Government Center South
302 W. Washington Street, 5th Floor
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

Service of the foregoing was made by placing a copy of the same into the United States mail, first class postage prepaid, this 8th day of January, 2008, to: Susan Diane Perigo, d/b/a Picture This Photography, 240 Washington Street Unit B, Lowell, IN 46356.


Mary Ann Wehmueller

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v.	)
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	)
Defendant.	)

Affidavit of Melody J. Rozdelsky

I, Melody J. Rozdelsky affirm and state as follows:

1. This affidavit is made upon my personal knowledge.

2. I am over eighteen years of age and am competent to make this affidavit.

3. On October 16, 2004, I placed a wedding photograph order with Susan Diane Perigo, d/b/a Picture This Photography ("Perigo").

4. I paid Perigo approximately $1,300.00.

5. I received negatives and proofs, but I have not received photographs or an album.

6. I have not received a refund.

7. I received a judgment against Perigo for $6,000.00, and I have received $66.67.

8. Further, Affiant sayeth not.

I, AFFIRM UNDER PENALTIES FOR PERJUY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE.

Melody J. Rozdelsky

Melody J. Rozdelsky

434805

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	)
Defendant.	)

Affidavit of Robert W. Stanford

I, Robert W. Stanford, affirm and state as follows:

1. This affidavit is made upon my personal knowledge.

2. I am over eighteen years of age and am competent to make this affidavit.

3. On November 1, 2005, I placed a wedding photograph order for my son and future daughter-in-law's wedding with Susan Diane Perigo, d/b/a Photograph This Photography ("Perigo").

4. I paid Perigo $1,127.09.

5. Perigo said she mailed proofs to my son and daughter-in-law. My son and daughter-in-law never received them.

6. I met Perigo in person to review the proofs.

7. I later tried to contact Perigo to order photographs, but her number was disconnected.

8. I have not received photographs.

9. I have not received a refund.

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Affidavit of Sandra Koza

I, Sandra Koza, affirm and state as follows:

1. This affidavit is made upon my personal knowledge.

2. I am over eighteen years of age and am competent to make this affidavit.

3. On June 6, 2005, I placed a wedding photograph order for my daughter's wedding with Susan Diane Perigo, d/b/a Photograph This Photography ("Perigo").

4. I paid Perigo $1,050.00.

5. I have not received photographs.

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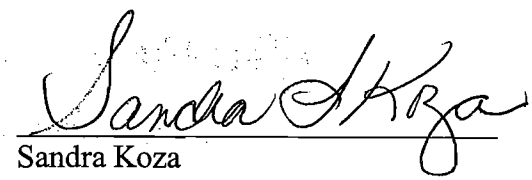
7. Further, Affiant sayeth not.

I, AFFIRM UNDER PENALTIES FOR PERJUY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE.



Sandra Koza

434805

STATE OF INDIANA	)	IN THE LAKE COUNTY SUPERIOR COURT
	) SS:	
COUNTY OF LAKE	)	CAUSE NO. 45D10-0610-PL-00132

STATE OF INDIANA,	)
	)
Plaintiff,	)
	)
v.	)
	)
SUSAN DIANE PERIGO, doing business as, Picture This Photography,	)
	)
Defendant.	)

Affidavit of Stacey Orzel

I, Stacey Orzel, affirm and state as follows:

1. This affidavit is made upon my personal knowledge.

2. I am over eighteen years of age and am competent to make this affidavit.

3. On December 29, 2004, I placed a wedding photograph order with Susan Diane Perigo, d/b/a Picture This Photography ("Perigo").

4. I paid Perigo $936.29.

5. Perigo said she would give me an additional $150 credit to be used towards my order.

6. I received the negatives, but I have not received photographs. Many of the negatives are underexposed. I have spent $3,949.56 in an attempt to restore the negatives.

7. I have not received a refund.

8. Further, Affiant sayeth not.

I, AFFIRM UNDER PENALTIES FOR PERJUY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE.

Stacey Orzel

I, AFFIRM UNDER PENALTIES FOR PERJUY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE.

Kelley Mills

Kelley Mills

STATE OF INDIANA	)	IN THE LAKE COUNTY SUPERIOR COURT
	) SS:	
COUNTY OF LAKE	)	CAUSE NO. 45D10-0610-PL-00132

STATE OF INDIANA,	)
	)
Plaintiff,	)
	)
v.	)
	)
SUSAN DIANE PERIGO, doing business as, Picture This Photography,	)
	)
Defendant.	)

Affidavit of Shelly Biesboer

I, Shelly Biesboer, affirm and state as follows:

1. This affidavit is made upon my personal knowledge.

2. I am over eighteen years of age and am competent to make this affidavit.

3. On June 22, 2004, I paid a $300 deposit for an order that totaled $1,049.99.

4. Before the wedding, I paid the remaining $749.99

5. On February 16, 2005, I placed a wedding photograph order with Susan Diane Perigo, d/b/a Picture This Photography ("Perigo").

6. I paid Perigo $656.14.

7. On October 11, 2005, Perigo gave me a partial refund of $300.00. The check number was 1777, and it was returned for insufficient funds.

8. I received proofs, but I cannot print photographs from them because Defendant has not issued a release.

9. I received some photographs from my order, but they were poor quality.

11. Further, Affiant sayeth not.

I, AFFIRM UNDER PENALTIES FOR PERJUY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE.

Vicki S. Frazee

Vicki S. Frazee