

No. 1-12-0397

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

GLENN R. DEMPSEY,)
) Appeal from the
) Circuit Court of
 Plaintiff-Appellant,) Cook County
)
 v.) No. 10 L 11805
)
 BEST BUY CO., INC.,)
) Honorable
) Raymond Fuinderburk,
 Defendant-Appellee.) Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Salone and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in granting a retailer's motion for summary judgment relating to a count for the violation of the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/2 (West 2010)) where the consumer was satisfied with the retailer's actions when he purchased home theater merchandise, but alleged misrepresentation and deception relating to the retailer's conduct after the purchase.

¶ 2 Plaintiff Glenn Dempsey appeals the circuit court's granting of Best Buy's motion for summary judgment on his Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS

505/1, *et. seq.*) claim. On appeal, Dempsey claims that the circuit court erred in granting summary judgment because a genuine issue of material fact exists regarding whether Best Buy engaged in fraudulent conduct and misrepresented to him that he would receive functioning home theater merchandise and that his reliance on Best Buy's fraudulent statements induced him to make additional purchases of merchandise from the retailer. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 This appeal arises from Dempsey's purchase of a Magnolia Home Theater System from Best Buy on August 22, 2009. After Best Buy delivered and installed the theater system, the television projector began to malfunction. On October 14, 2010, after the repeated attempts to receive non-defective merchandise failed, Dempsey filed a two count complaint against Best Buy, which included a count for the violation of the Illinois Consumer Fraud and Deceptive Practices Act (Act), 815 ILCS 505/1, *et. seq.*, and a count for the breach of implied warranty of merchantability. Best Buy filed a motion for summary judgment on October 27, 2011, claiming that summary judgment was proper because Dempsey's allegations of fraud and misrepresentation related to post-sale conduct, and the Act does not protect against such conduct. Attached as exhibits to the motion for summary judgment were the depositions of Dempsey and Lucy Mrowca, who is Best Buy's sales manager at the Hancock location.

¶ 5 In his deposition, Dempsey stated that on August 7, 2009, he visited Best Buy to inquire about a specific Sony projector that he spent time researching about on the internet. Louis Miranda, a Best Buy employee, informed Dempsey that an in-home consultation would be

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helpful to fully understand the kind of home theater system that he would need. Dempsey agreed with the suggestion, and an in-home consultation was scheduled for August 11, 2009. Tobias Hull met with Dempsey on August 11, 2009 for the consultation, and Dempsey did not have any complaints about the consultation. After discussing Dempsey's needs and wishes, Hull recommended the installation of an electrical outlet on the ceiling so that the projector could be mounted on the ceiling. After the consultation, Dempsey received an email with Hull's further recommendations on August 13, 2009. On August 22, 2009, Dempsey took the email detailing Hull's recommendations to the Best Buy store, and he again spoke with Miranda, and also spoke with Antwuane Carr. Miranda and Carr showed Dempsey the various options that he had for a theater system. Based on their advice, Dempsey purchased a Samsung Blu-Ray DVD player, a Sony Bravia projector, a six piece speaker system and a Harmony remote control. A projector screen was also recommended because without one, the picture from the projector would be displayed on his wall, but Dempsey decided against the recommendation. At the time of purchase, Dempsey completed a Best Buy credit card application, which allowed for the possibility of a three year zero percent interest rate on his purchases. Carr suggested that Dempsey purchase an extended four-year warranty, but Dempsey declined because he did not want to spend any additional money.

¶ 6 The installation date for the merchandise was scheduled for September 29, 2009. Before the installation, Dempsey stated that he did not have any complaints or criticisms about his interactions with Best Buy. On September 29, 2009, installers arrived at his house to install the merchandise. Dempsey already had an electrical outlet added to his ceiling at a cost of \$230 to

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facilitate the installation of the projector on the ceiling. Shortly after the projector was installed and turned on, it shut down for no apparent reason. The installer was able to get the projector back on, and he made some adjustments to fine-tune it. Although the picture on the wall from the projector was good, Dempsey and the two installers agreed that the picture could be better with a screen because there was some reflection interfering with the picture. One of the installers suggested that he purchase a screen and gave his recommendation on a particular screen, and also recommended that he use a Logitech remote control rather than the Harmony remote control. When the installers left, the projector was working. Approximately an hour after the installers left, the projector again began to shut down. Dempsey was able to use the projector, but each time he used it, it would shut down for a period of time. Because of the projector's continued shut down, Dempsey called Best Buy and spoke with Carr about the issue, who informed him that Best Buy would provide him with a replacement projector.

¶ 7 Dempsey returned to Best Buy on or about September 29, 2009 to exchange the Harmony remote control for a Logitech remote control based on the installer's opinion that the Logitech remote control was a better one. When he exchanged the remote control, he also purchased a Stewart projector screen, which the installer recommended as being the highest quality one. In approximately the middle of October, Dempsey purchased the extended four-year warranty, and although he could not recall how he purchased the warranty, he had no reason to dispute that he purchased the warranty over the telephone. Dempsey, however, never received documentation supporting the warranty purchase.

¶ 8 The delivery date for the new projector and the screen was set for November 11, 2009.

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Carr called Dempsey on that date to inform him that Best Buy could not install the merchandise as scheduled because the screen was damaged. Dempsey told Carr that he was upset because he first received a defective projector and now the screen could not be delivered because it also was defective. Carr informed Dempsey that Best Buy would upgrade him to a better projector for all of his inconvenience, which was acceptable to Dempsey. A new installation date of January 7, 2010 was agreed upon. Dempsey requested that the same two installers who originally installed the projector return to install the merchandise on November 11, 2009 and January 7, 2010. Also during his telephone conversation with Carr on November 11, 2009, Dempsey informed him that he had not received a written copy of the warranty since it was to be delivered on that day along with the merchandise. Carr stated that he did not need the warranty to be in writing since it was in the computer, but Dempsey requested that it be delivered with the merchandise on January 7, 2010.

¶ 9 Dempsey contacted Carr the third week of December to ensure that the merchandise would be delivered according to plan on January 7, 2010, and Carr provided the assurance that Dempsey was seeking. Carr again stated that he did not need a written copy of the warranty because it was in the computer. Dempsey, though, wanted a written copy of the warranty.

¶ 10 On January 7, 2010, an installer, who was not the original installer that Dempsey requested, contacted him regarding the installation. The installer asked him what was to be done on that day, and Dempsey responded that a new projector would be installed, a new screen would be installed and they would be providing him with a copy of the extended four-year warranty. The installer told Dempsey that he would look into it and get back to him. Dempsey did not hear

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back from anyone at Best Buy.

¶ 11 Dempsey was frustrated and decided to call Best Buy to speak to a manager. He spoke with Lucy Mrowca the day after the failed delivery, as well as on January 9, 2010 and January 11, 2010. He informed her that he was to have a JVC projector delivered, the extended four-year warranty delivered, the Stewart screen delivered and that he was having a problem toggling back and forth between the projector and the DVD player with the remote control that he had in his possession. Mrowca apologized and stated that she would look into it and would arrange for a re-installation as soon as possible, and arrange for one of the installers to be Best Buy's top "Logitech" person to make sure that everything goes correctly. Dempsey expressed his anger about the fact that months after making a very large purchase, he still did not have what he purchased.

¶ 12 Mrowca called Dempsey on January 9, 2010, to inform him that she was still looking into the matter. She called him again on January 12, 2010, to inform him that the installation date had been scheduled for January 18, 2010, and that there was a new Stewart screen, the upgraded projector was available, its top "Logitech" person would be one of the installers and that the extended four-year warranty would be provided to him.

¶ 13 On January 18, 2010, the installer called Dempsey to make delivery arrangements and informed him that he would be bringing the merchandise that day, but would not be doing the installation on that day. Dempsey asked him if he spoke with Mrowca, and he responded no. Dempsey also asked him if he was Best Buy's top "Logitech" person, and he again responded no. The installer also informed Dempsey that one of the items in the truck included a screen, but “do

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not deliver” was marked on its box. Dempsey instructed him to contact Mrowca before arriving at his residence. The installer said he would look into it and call him back. When he called Dempsey back, he wanted the installer to contact Mrowca and tell her to call him. After hanging up the telephone, it occurred to Dempsey that the box said "do not deliver" on it because it was likely the damaged screen that could not be delivered on the previously scheduled November delivery date, and that after months, Best Buy still did not have the merchandise. The installers arrived at Dempsey's residence even though he told them not to come until he spoke with Mrowca. When Dempsey arrived downstairs to meet the installers, he saw the screen box and became angered because they were attempting to deliver defective merchandise and the installers that were sent would not be able to resolve the toggling issue. Apart from wear and tear on the box, however, Dempsey could not tell if the screen was damaged or in proper working condition. Dempsey assumed that the screen was damaged based on what the installer told him. When Dempsey asked the installer why he was delivering a defective piece of merchandise, the installer responded that they were delivering what was on their call. Angered, Dempsey said that he was canceling his purchase.

¶ 14 On January 19, 2010, Dempsey called Best Buy and asked to speak with a manager. He spoke with Robert Goldsmith and informed him that he was canceling his purchase and he wanted someone from Best Buy to make arrangements to pick-up the merchandise and inform him how much money he would receive back from the return. But before the merchandise could be picked up, Dempsey said that he wanted to write a letter to the Illinois Attorney General's office about his experience with Best Buy. Dempsey acknowledged that no one at Best Buy told

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him that he could not return his merchandise and get a full refund. On the Best Buy monthly credit card invoice that Dempsey received, he wrote that he was canceling his purchase, which was on January 19, 2010. Dempsey wrote this on the invoice in lieu of making a payment on his credit card.

¶ 15 On January 21, 2010, Dempsey sent a letter to the Illinois Attorney General's office regarding his transactions with Best Buy and seeking his money back from the purchases, plus compensation for time lost from work and miscellaneous expenses. He received a letter from that office on February 1, 2010 informing him that they forwarded his letter to Best Buy. He did not receive a response from Best Buy, but he received a letter from the Illinois Attorney General's office that included Best Buy's response. Dempsey disagreed with Best Buy's response that it attempted to contact him without success. Dempsey was concerned with Best Buy's policy of deducting a 15% restocking fee associated with returned merchandise, which would have totaled approximately \$1,400, and was waiting for contact from Best Buy. Dempsey was hoping that since he did not do anything wrong, he would receive all of his money and not incur the restocking fee.

¶ 16 Mrowca stated during her deposition that she first learned of the situation involving Dempsey when Carr brought to her attention that it needed to exchange a projector for Dempsey, as well as a projector screen and return to his home. From the documentation that Mrowca had, the projector and the screen were exchanged and Best Buy needed to provide Dempsey with an install date that was timely. She worked with the duty-line manager to schedule an installation date that would accommodate Dempsey because there was already some "mishap" with his sale.

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During the second or third week of January of 2010, Mrowca had multiple conversations with Dempsey. Since Mrowca first spoke with Dempsey, she tried calling him a minimum of ten times. After the attempted January 18, 2010 installation, she attempted to contact Dempsey to see what else Best Buy could do for him and if an installer could go back to his residence.

Dempsey informed her that he did not want to deal with the store anymore. Prior to that, Mrowca left perhaps two or three messages for him using her store telephone number, which had a 312 prefix. Even after Dempsey stated that he did not want to deal with the store any longer, Mrowca attempted to contact him to see if there was anything else that can be done at the store level.

¶ 17 When arrangements were being made for the second installation, Carr asked Mrowca if the same installers that went to Dempsey's residence for the first installation could return for the second installation because that was what Dempsey requested. Mrowca responded that she would try, but the scheduling of the installers was out of her hands. The installer dispatcher informed her that the original installers were unavailable for the installation date that Dempsey requested, and different installers were scheduled for Dempsey's re-installation on January 18, 2010. Mrowca agreed to that because Dempsey selected the installation date and she did not want to inconvenience him with another installation date. When Mrowca spoke with Dempsey, the selected date for the installation was important to him. A few days prior to the January 18, 2010 installation date, she spoke with Dempsey and informed him that the installation was good to go.

¶ 18 Dempsey spoke with Mrowca on approximately January 19, 2010 and he informed her

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that he did not want to deal with the store any longer and that he wanted to cancel everything. Mrowca asked him if he wanted to come to the store to return the whole order and he said no. Mrowca did not know why the wrong screen was brought to Dempsey's residence, if, in fact, it was the wrong screen. Mrowca believed that there were "mishaps" with the sale because Dempsey had difficulty receiving the merchandise that he wanted installed. Mrowca acknowledged that Dempsey purchased an extended four-year warranty. Mrowca also stated that even though Best Buy no longer had a restocking fee, in January 2010, such a fee existed, but it would not have applied to Dempsey's purchases.

¶ 19 On January 23, 2012, the circuit court granted Best Buy's motion for summary judgment and stated that the order was final and appealable. Dempsey timely appeals.

¶ 20 ANALYSIS

¶ 21 Dempsey claims that the circuit court erred in granting summary judgment in favor of Best Buy because by purchasing a four-year extended warranty, a Logitech remote control and a Stewart screen in reliance on Best Buy's promise that he would receive a functioning replacement projector he established that Best Buy violated the Act. Dempsey contends that he relied on Best Buy's misrepresentations that he would receive functioning merchandise and timely installation, and such reliance induced him into purchasing the additional merchandise. Dempsey also claims that he relied on Mrowca's representations that he would receive a new functioning Stewart screen that would be installed, that Best Buy's Logitech person would assist in the delivery as one of the installers fixing the toggling problem between the DVD player and the projector, that a printed copy of the four-year extended warranty would be delivered and that the new, upgraded,

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functioning projector would be delivered and installed. Because he relied on Best Buy's false promises ensuring the delivery and installation of the functioning items, he claims that he satisfied the pleading requirements to establish a violation of the Act sufficient to withstand a motion for summary judgment.

¶ 22 The Act states in pertinent part:

"Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact * * * in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby." 815 ILCS 505/2 (West 2010).

The Act's purpose is "to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17 (2002). The Act should be liberally construed to ensure that the Act's purpose is achieved. *Id.* at 417. To prevail on a fraud and deceptive business practice claim, a plaintiff must establish: "(1) a deceptive act or practice, (2) intent on the defendants' part that plaintiff rely on the deception, and (3) that the deception occurred in the course of conduct involving trade or commerce." *Siegel v. Levy Organization Development Co.*, 153 Ill. 2d 534, 542 (1992). A complaint raising a violation of the Act must meet the same pleading requirements of particularity and specificity as a pleading raising a common law fraud

action. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 501 (1997).

¶ 23 Summary judgment is proper "where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law." *Schultz v. Illinois Farmers Ins. Co.*, 237 Ill. 2d 391, 399 (2010). We review a circuit court's ruling on a motion for summary judgment *de novo*. *Id.* at 400.

¶ 24 Turning to Dempsey's complaint, we note that he alleges the following:

"22. By delivering a defective projector and Stewart Screen, and by continually delaying the delivery and installation of replacement merchandise, while accepting payment from Plaintiff, Defendant Best Buy has committed a deceptive business act, in direct violation of the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 *et. seq.*, upon which the Plaintiff reasonably relied on.

23. Plaintiff relied upon Defendant's deceptive promises and paid for the merchandise without knowing that, as described above, the merchandise he purchased would not be installed in a timely manner or in good working condition."

Dempsey's allegations of a deceptive business act as alleged in paragraph 22 relates to the *delivery* and *installation* of merchandise, and not to the *purchase* of that merchandise. Nowhere in the prior 21 paragraphs or subsequent one paragraph does Dempsey make another allegation of a deceptive business practice against Best Buy, and more specifically, he does not raise an allegation relating to the *purchase* of the home theater equipment itself. Moreover, Dempsey's complaint fails to establish that Best Buy knew about any of the defects in the merchandise at the

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time of purchase. See *Evitts v. DaimlerChrysler Motors Corp.*, 359 Ill. App. 3d 504, 510 (2005).

In fact, the projector's installer stated that he had never seen the problem with the projector that Dempsey was experiencing. Dempsey also contacted Sony directly about the problem, and it stated that it had no answer why the problem he was experiencing with the projector was happening. Accordingly, Dempsey fails to sufficiently allege in the complaint that Best Buy provided misrepresentations or deceptive promises regarding the home theater system before he purchased the merchandise. Instead, Dempsey's allegations relate to post-sale conduct and representations.

¶ 25 Illinois law is well established that a violation of the Act relates to the *purchase* of merchandise. The principles articulated by the Illinois Supreme Court in *Connick v. Suzuki Motor Company, Ltd.*, 174 Ill. 2d 482 (1997), controls the disposition of the instant case. In *Connick*, purchasers of the Suzuki Samurai brought an action under the Illinois and Pennsylvania consumer fraud statutes alleging that the Samurai was unsafe due to an excessive roll-over risk during sharp turns and accident avoidance maneuvers. *Id.* at 488. The increased roll-over risk became known after the consumers purchased their Samurai when Consumers Union, a consumer watchdog organization, gave the vehicle a "not acceptable" rating based on the high roll-over risk. In concluding that the plaintiffs' cause of action was properly dismissed, the *Connick* court stated that a plaintiff raises a valid consumer fraud claim only when it is "premised upon statements made prior to their dates of purchase." *Id.* The court reasoned that the plaintiffs' consumer fraud claim should be dismissed because the claim was based on statements that were made *after* the purchase date. *Id.*

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¶ 26 Similarly, in the case *sub judice*, Dempsey bases his consumer fraud act claim on Best Buy's actions and statements occurring after he already purchased the home theater merchandise. Dempsey's claims, in essence, all relate to problems encountered in the delivery and installation of the purchased merchandise and not to his actual purchase of that merchandise. We are not persuaded by Dempsey's attempt to characterize his subsequent purchase of the extended warranty, Stewart screen and Logitech remote control as an independent purchase induced by Best Buy's deception and misrepresentation. Turning first to the extended four-year warranty, we note that Best Buy does not dispute that Dempsey purchased this warranty nor are there allegations that Best Buy refused to honor the extended warranty. Dempsey did not receive a printed copy of the warranty at the time of purchase because he purchased the extended warranty over the telephone and not in person at a store. Moreover, Best Buy's sales associate assured Dempsey that his purchase of the warranty was in the computer and he did not need a printed copy of the warranty. Next, Dempsey decided to purchase the Stewart screen after the projector was installed in his home and he was not satisfied with the picture when it was viewed on his painted wall. To improve his viewing experience, he decided to purchase the Stewart screen based on the recommendation of the initial installer. This purchase, though, was not induced by any deceptive promise or misinformation by Best Buy, but on a desire to enhance his viewing of the projected picture. Lastly, Dempsey also decided to upgrade to a Logitech remote control after his discussion with the initial installer who expressed his opinion that the Logitech remote control was superior to the Harmony remote control that he originally purchased. To assist Dempsey with the toggling issue he was experiencing with the Logitech remote control, Mrowca

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offered the services of Best Buy's "top Logitech person." Although one of the installers who attempted to make the delivery of the merchandise on January 18, 2010 was not the "top Logitech person," Dempsey refused delivery of the merchandise and did not afford Best Buy any further opportunity to send that individual to his residence to assist in the installation of the merchandise. Based on the totality of the facts, Dempsey failed to demonstrate that Best Buy acted in a fraudulent or deceptive manner sufficient to raise a violation of the Act.

¶ 27 Nonetheless, Dempsey also relies on Mrowca's statements to him regarding the delivery of a "new" Stewart projector screen to establish Best Buy's misrepresentations. Dempsey alleges that Mrowca deceived him into believing that a new screen had been ordered when one, in fact, had not been ordered, and instead, Best Buy attempted to deliver the same defective screen on November 11, 2009 and January 18, 2010. Best Buy does not dispute that Dempsey purchased a new Stewart screen, and its prior act of canceling the delivery and installation of the screen on November 11, 2009 once it became known that the screen was defective further demonstrates that Best Buy did not want Dempsey to receive defective merchandise, but new and operable merchandise. The installation team on January 18, 2010, also informed Dempsey that the screen's box had "do not deliver" written on it. Thus, Best Buy was making repeated attempts to deliver functioning and not defective merchandise to Dempsey.

¶ 28 Moreover, we note that in his deposition, Dempsey indicated that he was satisfied with Best Buy's services when he purchased the home theater system on August 22, 2009, and upon the initial installation on September 29, 2009. When faced with an unsatisfied customer, Best Buy first offered to replace the defective Sony projector, and then offered him an upgraded JVC

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projector after the failed installation attempt on November 11, 2009. Even after Dempsey expressed that he wished to cancel the purchase and that he no longer wanted to deal with the store directly, Mrowca attempted to contact him to inquire if there was anything else that the store could do to make him satisfied.

¶ 29 Viewing the facts, pleadings and depositions in the light most favorable to Dempsey, we conclude that the granting of Best Buy's motion for summary judgment was proper. Here, Dempsey failed to plead and factually support an allegation that Best Buy engaged in unfair and deceptive business practices.

¶ 30 CONCLUSION

¶ 31 For the reasons stated, we affirm the circuit court's granting of Best Buy's motion for summary judgment.

¶ 32 Affirmed.