

NOTICE  
Decision filed 09/14/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 150509-U

NO. 5-15-0509

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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DAVID NELSON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Jackson County.
	)	
v.	)	No. 14-L-116
	)	
VIC KOENIG,	)	Honorable
	)	Ralph R. Bloodworth III,
Defendant-Appellee.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Presiding Justice Schwarm and Justice Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's order granting summary judgment in favor of the defendant is affirmed where there is no genuine issue of material fact as to whether the defendant had violated the Illinois Prizes and Gifts Act (815 ILCS 525/1 *et seq.* (West 2014)).

¶ 2 The plaintiff, David Nelson, appeals from an order of the circuit court of Jackson County granting summary judgment in favor of the defendant, Vic Koenig. For the following reasons, we affirm.

¶ 3 The plaintiff received a promotional mailer from the defendant, a Carbondale car dealership, in regard to a sales event being held at the dealership. The mailer was in the form of a glossy large sheet of paper folded in half, which created a front page, two

interior pages, and a back page. The mailer featured a sweepstakes prize opportunity in the form of a scratch-off game. The interior page advertised the following: "If your scratch-off matches one of the prize boxes or your key opens the lockbox YOU HAVE WON! Call the Event Hotline 877-667-2276. Have your Activation Code Ready!" The back page of the brochure contained a "Prize Box Game" inviting recipients to play by scratching an opaque scratch-off circle. The mailer further stated as follows below the prize boxes: "If your scratch didn't match a prize box, come in and try your key." A key was attached to the mailer. In addition, next to the prize-box game, the mailer contained the following statement: "How to win: if your scratch-off matches one of the prize boxes below, you have won!"

¶ 4 The plaintiff's scratch-off contained the words "Box 1" and "2015 Malibu or \$25,000 cash" along with a picture of a Chevrolet Malibu. Below the scratch-off circle, the plaintiff's mailer contained four boxes labeled one through four. Each box contained a prize, *i.e.*, a 2015 Chevy Malibu or \$25,000 cash, a John Deere Gator, a Microsoft Surface 2, and up to \$2,500 in Illinois lottery tickets. The box labeled "Box 1" contained a picture of a Chevrolet Malibu and a stack of what appeared to be U.S. currency as well as the words "2015 Chevrolet Malibu or \$25,000 Cash." The plaintiff's scratch-off box matched the prize box absent the stack of cash in the picture. Activation code "240485" was listed on the back of the mailer.

¶ 5 Moreover, the mailer included the following pertinent disclaimers in all capital letters, which appeared at the bottom of the interior pages:

"In order for the grand prize to be awarded, the randomly selected individual designated to receive the winning mail piece must redeem the mail piece in person or via U.S. postal mail, and their name and address must match the information on file with Grand Prize Promotions. Original number on mail piece must match a randomly pre-selected winning number to win corresponding prize. Winning number(s) will be displayed during normal business hours between contest dates at participating location. Winning number(s) may not be released over the phone."

¶ 6 The plaintiff traveled to the defendant's car dealership to claim the prize displayed in box one of the scratch-off game, that being the 2015 Malibu or \$25,000 cash. However, the defendant claimed that the plaintiff did not win the listed prize as the activation code on the mailer did not match the randomly preselected winning number as set forth in the disclaimer. The plaintiff followed up with letters to the defendant asserting his claim for the prize. The defendant maintained its position that the plaintiff was not entitled to the grand prize because his activation code did not match the preselected number.

¶ 7 On November 5, 2014, the plaintiff filed a complaint against the defendant seeking to recover damages under section 30 of the Illinois Prizes and Gifts Act (815 ILCS 525/30 (West 2014)). In the complaint, the plaintiff alleged that the defendant failed to provide the plaintiff with the represented prize within 30 days of the representation as required under section 30 of the Prizes and Gifts Act.

¶ 8 On July 21, 2015, the defendant filed a motion for summary judgment, arguing that there was no genuine issue of material fact as to whether the plaintiff had won the

grand prize identified in the prize box of the promotional mailer. The defendant asserted that the plaintiff had not won the grand prize because the activation code on the plaintiff's mailer did not match the randomly preselected number for the grand prize. The defendant noted that the plaintiff was required to satisfy the following two conditions to win the grand prize: (1) the picture in the scratch box had to match one of the pictures contained in the boxes below the scratch box and (2) the activation code listed on the mailer had to match the randomly preselected number for the grand prize. The plaintiff failed to satisfy the second requirement as the randomly preselected number was 863802. Thus, the plaintiff did not win the grand prize.

¶ 9 The plaintiff filed a response to the motion for summary judgment. In his response, the plaintiff raises an argument that was not brought in his complaint, that the defendant had violated section 25 of the Prizes and Gifts Act (815 ILCS 525/25 (West 2014)) in that the mailer failed to make a clear and conspicuous statement of any restriction upon the announced prize. In combination with the response, the plaintiff filed a motion for summary judgment, arguing that the mailer "clearly violated" section 25 of the Prizes and Gifts Act as the disclosure was not clear and conspicuous. Thereafter, on November 10, 2015, the circuit court entered an order granting summary judgment in favor of the defendant. The plaintiff appeals.

¶ 10 On appeal, the plaintiff argues that the circuit court erred in granting summary judgment in favor of the defendant because the promotional offer mailed to the plaintiff was in clear violation of the Prizes and Gifts Act.

¶ 11 Summary judgment is appropriate only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517-18 (1993). In determining whether summary judgment is appropriate, the trial court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Id.* at 518. "A triable issue of fact exists where there is a dispute as to material facts or where the material facts are undisputed but reasonable persons might draw different inferences from those facts." *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993). Summary judgment is a drastic means of disposing of litigation and should be granted only where the right to it is clear and free from doubt. *Robinson v. Builders Supply & Lumber Co.*, 223 Ill. App. 3d 1007, 1013 (1991). We review a summary judgment ruling *de novo*. *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 909 (1994).

¶ 12 Section 20(b)(3) of the Prizes and Gifts Act (815 ILCS 525/20(b)(3) (West 2014)) prohibits "false, deceptive, or misleading" representations that a person has won or will unconditionally be the winner of a prize by sponsors of promotional prize offers. Where the receipt of the prize is subject to a restriction, the promotional material must describe the restriction in a "clear and conspicuous statement at the onset of the offer." 815 ILCS 525/25(7) (West 2014). A sponsor who represents that a person has been awarded a prize shall provide the person with the following not later than 30 days after making the representation: a prize; a voucher, a certificate, or other document giving the person the

prize; or the retail value of the prize, as stated in the written prize notice. 815 ILCS 525/30 (West 2014). A consumer who suffers a loss by reason of an intentional violation of the provisions of the Prizes and Gifts Act may bring a civil action to enforce that provision. 815 ILCS 525/40(b) (West 2014).

¶ 13 Here, the plaintiff's complaint alleged that the defendant had failed to provide him with the represented prize within 30 days of the representation as required under section 30 of the Prizes and Gifts Act. According to the rules of the promotional prize offer, the plaintiff had to satisfy the following two requirements to be awarded the grand prize: the picture in the scratch box on the plaintiff's mailer had to match one of the pictures in the boxes shown below the scratch box on the mailer and the activation code on the plaintiff's mailer had to match the randomly preselected number for the grand prize. The plaintiff failed to satisfy the second requirement in that the activation code on the plaintiff's mailer was 240485 and the randomly preselected number for the grand prize was 863802. Thus, there was no genuine issue of material fact as to whether the plaintiff had won the grand prize identified in his mailer's scratch-off box.

¶ 14 In addition, the plaintiff argues that the mailer violated section 25(7) of the Prizes and Gifts Act because the promotional mailer did not contain a clear and conspicuous statement at the onset of the offer that described any restrictions on the receipt of the prize. 815 ILCS 525/25(7) (West 2014). The defendant counters that this argument is outside the scope of the plaintiff's pleadings as it was not raised in the plaintiff's complaint. The plaintiff first raised this argument in his motion for summary judgment. In the alternative, the defendant argues that the promotional mailer did contain a clear

and conspicuous statement describing the restrictions on the prize. Although we recognize that the plaintiff's argument is outside the scope of the allegations contained in his complaint, we will still address the merits of this argument.

¶ 15 After carefully reviewing the record, we find that there is no genuine issue of material fact as to whether the mailer clearly and conspicuously described the restrictions on the receipt of the grand prizes. The promotional mailer indicated that where the scratch-off matched one of the prize boxes, the recipient of the mailer had won the grand prize. However, the bottom of the mailer described the restrictions that the prizes were subject to, which included the condition that the original number on the mailer must match a randomly preselected winning number. The restrictions were in all capital letters and readable font. Thus, there is no genuine issue of material fact as to whether the restrictions on the prizes were clearly and conspicuously set forth at the onset of the representation. Accordingly, we affirm the circuit court order granting summary judgment in favor of the defendant.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Jackson County.

¶ 17 Affirmed.