

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY, ATTORNEY GENERAL,

Plaintiff,

v.

Civil Action No. 18-C-1253
Judge Kaufman

CHAD AKERS d/b/a
XPERT TILE AND HARDWOOD INSTALLATION,

Defendant.

Final ORDER GRANTING SUMMARY JUDGMENT (Jgk)

On the 25th of March, 2019, came the Plaintiff, State of West Virginia ex rel. Patrick Morrissey, Attorney General (“the State” or “Attorney General”), by counsel, for the hearing on State’s Motion for Judgment by Default and for Summary Judgment that was duly served upon the Defendant and returnable to this date and time before the undersigned Judge. The Defendant did not appear in person or by counsel for the hearing. Inasmuch as this court has granted State’s motion for judgment by default by separate order, the remaining issue before the court is State’s motion for summary judgment. Whereupon, the court proceeded to consider the pleadings of record, including the exhibits and affidavits attached thereto, and the representations of counsel, upon the basis of which this court finds as follows:

1. The State filed a Complaint for Injunction, Consumer Restitution, Disgorgement, Civil Penalties, and Other Appropriate Relief (“Complaint”) against the

Defendant on October 2, 2018, for violation of the West Virginia Consumer Credit and Protection Act (“WVCCPA”), W.Va. Code §§ 46A-1-101 *et seq* .

2. The Summons and Complaint were personally served upon the Defendant by Bennie D. Cogar, the State’s investigator, at his residence at 120 Holiday Road, Fraziers Bottom, West Virginia, on October 3, 2018. Mr. Cogar’s affidavit confirming personal service upon the Defendant is filed of record herein.

3. The Defendant failed to answer or otherwise assert a defense in response to the Complaint filed in the above-styled civil action and, therefore, this court granted a judgment for default on liability against the Defendant by separate order entered herein.

4. Having already ruled on liability, the court now considers whether the State is entitled to a judgment in its favor and an order granting an injunction, consumer restitution and disgorgement, civil penalties, and other equitable relief, including reimbursement of costs and attorney’s fees, as requested in the Complaint and the State’s motion for summary judgment.

5. In its Complaint, the State represented that the Defendant entered into written contracts on at least four instances to provide home improvement contracting services to residents of Kanawha, Putnam, and Cabell counties. In each instance, the State alleged that the work performed by the Defendant was substandard. When the consumers complained, the Defendant either failed to return at all or, when he did return, he failed to take satisfactory steps to remedy the substandard work. *See generally* Complaint paragraphs 29-50, pp. 6-8.

6. In each instance, the State alleged that the Defendant failed to furnish consumers with proper notice of the unconditional three-day right to cancel the transaction as required in “door-to-door sales” by the Federal Trade Commission Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (“FTC Rule”), 16 C.F.R. § 429.0(a).

7. The State also alleged that the Defendant's contracts failed to conform with requirements of the Attorney General's Legislature Rule Governing Prevention of Unfair or Deceptive Acts or Practices in Home Improvement and Home Construction Transactions ("Home Improvement Rule"), 142 C.S.R. § 5, *et al.*

8. As a result of the actions of the Defendant as alleged in the Complaint, the State represents that the consumers did not receive the services they paid in good faith to receive. Consequently, they were or are now required to hire new contractors to repair or redo the substandard work performed by the Defendant. As such, the State asserts that these consumers are entitled to a full refund of all amounts paid to Defendant.

9. In its Complaint and Summary Judgment Motion, the State represents that the consumer complainants were aggrieved as follows:

(a) Matthew T. Durrent of Saint Albans, West Virginia, made a payment of \$3,275.00 to the Defendant on October 23, 2016, to install a shower, to install tile on his bathroom floor, and to hang drywall at his home. The work was substandard and the Defendant failed to provide Mr. Durrent with the three-day right to cancel as required by state and federal law. *See* Affidavit of Mr. Durrent attached as Exhibit A to State's motion for summary judgment.

(b) Haley Williams of Saint Albans, West Virginia, Kanawha County, made a payment of \$2,229.54 to the Defendant on August 4, 2017, to perform a variety of home improvement services, including tub replacement, tiled tub surround, bathroom floor covering installation, backsplash installation, tile and drywall, and plumbing and electrical services. The work was substandard and the Defendant failed to furnish Mr. Williams with notice of the unconditional three-day right to cancel as required by state and federal law. *See* Affidavit of Ms. Williams attached as Exhibit A to State's motion for summary judgment.

(c) Velma Wine of Leon, Mason County, made a payment of \$600.00 to Defendant on April 8, 2016 to remove the existing carpet and install hardwood flooring in her kitchen. The work was substandard and the Defendant failed to furnish Ms. Vine with notice of the unconditional three-day right to cancel as required by state and federal law. The Defendant also caused \$200.00 damage to her refrigerator. *See* Affidavit of Ms. Wine attached as Exhibit A to State's motion for summary judgment.

(d) Craig and Cindy Mays of Milton, West Virginia, made a payment of \$4,000.00 on January 18, 2017 to install tile and to make other improvements to their bathroom. The work was substandard and the Defendant failed to furnish them with notice of the unconditional three-day right to cancel as required by state and federal law. *See* Affidavit of Craig Mays attached as Exhibit D to State's motion for summary judgment.

10. The West Virginia Contractor Licensing Board ("Board") issued a contractor license to Defendant on November 5, 2015, to perform specialty work in the classifications of floor coverings, tile installation, and finished carpentry. However, Defendant's license to perform such work expired on November 7, 2017, and has not been renewed as of this date. *See* Affidavit of Kathy Rucker, Licensing Director for the Board, attached as Exhibit E to State's motion for summary judgment.

11. Upon the basis of all of the foregoing, the court finds that there is no genuine issue as to any material fact and the State is entitled to summary judgment as a matter of law as authorized by Rule 55(a) of the West Virginia Rules of Civil Procedure.

12. The State is entitled as a matter of law to a permanent injunction prohibiting Defendant from engaging in home improvement contracting or related fields as a business, employee, agent, or subcontractor of others.

13. The court finds that the Defendant has engaged in a course of repeated and willful violation of the WVCCPA as alleged in the Complaint and the State is entitled to an Order assessing civil penalties of up to \$5000.00 for each violation against the Defendant as authorized by W.Va. Code § 46A-7-111(2).

14. The court further finds that the State is entitled to a judgment for consumer restitution against Defendant in the amount constituting all payments made to Defendant by the four aggrieved consumers, Matthew T. Durrent, Haley Williams, Velma Wine, and Craig Mays.

15. The court further finds that the State is entitled to a judgment against Defendant for the State's costs, including reasonable attorney's fees, incurred in the investigation and prosecution of this action.

ORDER

WHEREFORE, it is therefore ORDERED as follows:

(a) The Defendant, Chad Akers, is permanently ENJOINED AND PROHIBITED from engaging in the provision of home improvement contracting services in West Virginia as the owner of a business, or as an agent, employee, or subcontractor of others;

(b) The State is awarded a judgment against Defendant in the amount of \$10,304.54 as equitable relief authorized by W.Va. Code § 46A-7-108, to be distributed to the four aggrieved consumers complainants as follows:


- | | | |
|------|--------------------|----------------|
| i. | Matthew T. Durrent | \$ 3,275.00; |
| ii. | Haley Williams | \$ 2,229.54; |
| iii. | Velma Wine | \$ 800.00; and |
| iv. | Craig Mays | \$ 4,000.00; |

(c) The State is awarded summary judgment against the Defendant in the amount of \$ 4000.00, representing a civil penalty as authorized by W.Va. Code § 46A-7-111(2) for each instance in which the Defendant violated the WVCCPA as alleged in the State's Complaint and motion for summary judgment; and,

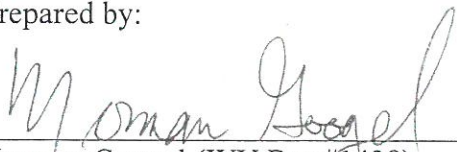
(d) The State is awarded a judgment against Defendant for the State's costs, including reasonable attorneys' fees, incurred in the investigation and prosecution of this action, said amount to be ~~determined~~ ^{considered (task)} by this court upon petition by the State following entry of this Order. possibly (task)

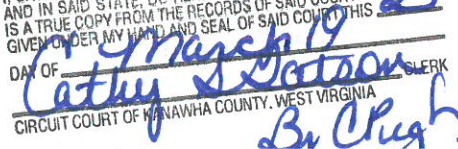
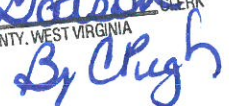
The Clerk is directed to forward an attested copy of this Order after entry to counsel for the State and to the Defendant, Chad Akers, at 120 Holiday Road, Fraziers Bottom, West Virginia, 25082.

ENTER this 25 day of March, 2019.


Hon. Tod J. Kaufman, Judge
Circuit Court of Kanawha County

Prepared by:


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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 25
DAY OF March 2019.

Cathy S. Gatson, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

By Clugh