[Cite as *Dawson v. Giant Eagle, Inc.*, 2010-Ohio-1060.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93337

CAROL J. DAWSON

PLAINTIFF-APPELLANT

vs.

GIANT EAGLE, INC.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-677661

BEFORE: McMonagle, J., Kilbane, P.J., and Boyle, J.

RELEASED: March 18, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief, per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Plaintiff-appellant Carol J. Dawson appeals from the trial court's judgment granting summary judgment in favor of defendant-appellee Giant Eagle, Inc. We affirm.

{¶ 2} On December 1, 2008, Dawson filed a complaint for class action against Giant Eagle. In her complaint, she alleged that Giant Eagle advertised, by circular mailed to her home and by advertisement located in the Lyndhurst Giant Eagle store, a low-cost generic drug program available through the Giant Eagle Pharmacy. Attached to her complaint was Exhibit A, a weekly circular, which read as follows:

> **"Using mail order for your prescriptions?**
>
> **Giant Eagle Pharmacy may be able to save you money!**
>
> Get a 90-day supply on many generic medications for only $10.
>
> *Visit GiantEagle.com for a complete list of medications and quantities that qualify for the $4 and $10 programs."*

{¶ 3} To the left of this wording, in large, bold font were the words "30-DAY SUPPLY $4 each" and "90-DAY SUPPLY $10."

{¶ 4} Dawson alleged in her complaint that, based upon this circular and an undescribed advertisement in the grocery store itself, she went to Giant Eagle to fill a prescription for Furosemide, 20 mg. tablets, 1 tablet two times per day for 30 days. She alleged that she was charged $8 for her purchase, not the $4 she expected. Store employees explained to her that a "30-day supply" of 20 mg. Furosemide would be 30 tablets; accordingly they calculated that a 60-tablet prescription was $8.

{¶ 5} Also attached to Dawson's complaint as Exhibit D was a brochure supplied by Giant Eagle that listed medications that qualified for the program (Furosemide was one of them) and information that 30 tablets of Furosemide would qualify as a 30-day supply. (Accordingly, pursuant to Exhibit D, the charge of $8 for 60 Furosemide tablets was correct.)

{¶ 6} In Count 1 of her complaint, Dawson alleged violations of the Ohio Consumer Sales Practices Act, R.C. 1345.02(A), 1345.02(B)(1) and (B)(6), and Ohio Adm. Code 109:4-3-02(A) (Exclusions and Limitations in Advertisements Rule). She referenced Exhibit A regarding this claim and argued that the "words stating the offer, any material exclusions, reservations, limitations, modifications, or conditions" were not clearly and conspicuously in close proximity "to the words stating the offer." She further alleged within this count, again referencing Exhibit A, that the "advertisement did not set forth any material exclusions, reservations,

limitations, modifications, or conditions with respect to the quantity of medication that a consumer w[ould] receive when filling a prescription for a 30-day or 90-day prescription."

{¶ 7} The trial court granted summary judgment in favor of Giant Eagle on this claim. Upon de novo review,[1] we concur. As to the first part of Dawson's claim, the "exclusions, reservations, limitations, modifications and conditions" (i.e., "*medications and quantities that qualify*") is in italicized print directly both below and above the prices. There is no way the words could be in closer proximity to the alleged offer.

{¶ 8} Further, the trial court properly found as a matter of law that the referenced circular was not an offer. The trial court cited *G. Herschman Architects, Inc. v. Ringco Mfg. Co., Inc.* (May 11, 1995), 8th Dist. No. 67758, which held in pertinent part that "[g]enerally, an 'offer' is defined as 'the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" Id., citing *Leaseway Distrib. Centers, Inc. v. Ohio Dept. of Adm. Serv.* (1988), 49 Ohio App.3d 99, 105, 550 N.E.2d 995, citing

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[1]Summary judgment is appropriate when: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. Civ.R. 56(C). We review the trial court's judgment de novo using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241.

Restatement of the Law 2d, Contracts (1981) 71, Section 24. The trial court found, and we concur, that the statements complained of cannot be construed as offers because necessary terms are omitted (the types of medicines that qualify and the quantities that qualify). At most, the advertisements only gave notice as to where to locate Giant Eagle's offer to sell certain drugs at certain prices (the brochure or Giant Eagle's website).

{¶ 9} In Count 2 of her complaint, Dawson alleged that Giant Eagle "committed unfair, unconscionable, or deceptive acts or practices in violation of the Bait Advertising Rule, Ohio Adm. Code 109:4-3-03(B)(1) and (B)(3)(a) and the Ohio Consumer Sales Practices Act, R.C. 1345.02(A), (B)(1), and (B)(6) "by making an offer for the sale of goods when such offer is not a bona fide effort to sell such goods." Once again, the trial court found that the advertisements complained of (though not specifically referenced in this count as in Count 1) did not constitute offers, for the same reasons as outlined above. Again, we concur.

{¶ 10} In Count 3, Dawson again alleged violations of the Ohio Consumer Sales Practices Act, R.C. 1345.03(A) and (B)(6), this time contending that it is a "deceptive or unconscionable act or practice in connection with a consumer transaction" to fail to state "material exclusions, reservations, limitations, modifications, or conditions" in close proximity to an offer. Again, and for the same reasons articulated with respect to Count

1, we concur with the trial court in its granting of summary judgment in favor of Giant Eagle.

{¶ 11} In Count 4, Dawson alleged a violation of R.C. 4165.02(7),[2] i.e., that Giant Eagle "intentionally, maliciously and with reckless disregard for the truth, advertise[d] its Rx Program knowing full well that it intend[ed] not to provide all potential consumers the required quality of a prescribed '30-day supply' of a qualifying generic medication for four dollars ($4.00) or a '90-day supply' of a qualifying generic medication for ten dollars ($10.00). The false representation made and the fraud committed by the Defendant were so egregious that the Plaintiff incurred economic injury * * *." We find no evidence in this record of intentional, malicious, or reckless behavior by Giant Eagle. Accordingly, the trial court's order granting summary judgment in favor of Giant Eagle and against Dawson was not in error.

{¶ 12} In Count 5, Dawson alleged a violation of R.C. 4165.02(11),[3] which states that "[a] person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person * * * advertises goods or services with intent not to sell them as advertised."

{¶ 13} The notices at issue in Count 5 consist of (1) a circular which states in pertinent part that "Giant Eagle may be able to save you money on

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[2]Should read R.C. 4165.02(A)(7).

[3]Should read R.C. 4165.02(A)(11).

many generic medications" (Exhibit A of the complaint); (2) a pamphlet titled "400+ generic drugs" that outlines which drugs are part of the program, and how many pills constitute 30- or 90-day prescriptions; and (3) (supplied in summary judgment but not attached to the complaint) a poster on the wall at Giant Eagle that stated:

> "OUR PROGRAM JUST GOT BETTER!
>
> 400+ Generic Drug[s]
>
> 30-DAY SUPPLY $4 ea. or 90-DAY SUPPLY $10
>
> Don't forget that you earn fuelperks! on most of your prescription purchases!"

{¶ 14} We are instructed in this matter by *Alligood v. Proctor and Gamble Co.*, (1991), 72 Ohio App.3d 309, 594 N.E. 668. *Alligood* involved a suit against Proctor and Gamble alleging a breach of contract "arising from a catalog promotion advertised on boxes of Pampers diapers." A statement on each box of Pampers indicated that by saving teddy bear symbols from the packages of diapers, a customer could order items from the Pampers Baby Catalogue at reduced prices. The plaintiffs claimed that each package of Pampers containing that statement was an "offer" to enter into a unilateral contract that was completed by purchasing the Pampers and saving the teddy bear symbols.

{¶ 15} The First District, citing Ohio Supreme Court law in *Litsinger Sign Co. v. American Sign Co.* (1967), 11 Ohio St.2d 1, 227 N.E.2d 609, disagreed, finding that "[i]t is settled law that if the parties' manifestations taken together as making up the contract, when reasonably interpreted in the light of all the circumstances, do not enable the court to determine what the agreement is and to enforce it without, in effect, 'making a contract for the parties,' no enforceable obligation results." Id. at 14.

{¶ 16} Here, neither the circular nor the poster in the store told which of 400+ generic drugs were involved in this program, nor did they indicate the size or number of tablets a 30-day or 90-day supply might involve. The circular itself directed the consumer to a website where these questions might be answered; the wall poster did not. However, at Dawson's Exhibit D, we have a pamphlet produced by Giant Eagle and available at their store that indeed spelled all this out. We concur with the trial court in its finding that neither the circular nor the wall poster were "offers" such that acceptance would conclude the transactions; they were at best notices as to where to locate Giant Eagle's offer (pamphlet or website) of a prescription drug program. As it was not contended by Dawson that the pamphlet or website were anything but complete, accurate, and not misleading, and that she was correctly charged for her $8 purchase of a covered generic drug, we conclude

that the trial court properly granted summary judgment in favor of Giant Eagle.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR