



Court: Shawnee County District Court
Case Number: 2018-CV-000865
Case Title: State of Kansas ex rel Derek Schmidt Atty General
vs. Funk Fest Concerts Inc
Type: Order of Summary Judgement

SO ORDERED.

A handwritten signature in black ink, reading "M.E. Christopher". The signature is written in a cursive, flowing style with a long horizontal flourish at the end.

/s/ Honorable Mary E Christopher, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

STATE OF KANSAS, <i>ex rel.</i>)	
DEREK SCHMIDT, Attorney General,)	
)	
Plaintiff,)	
)	
v.)	
)	CASE NO. 2018-CV-865
FUNK FEST CONCERTS, INC.)	
)	
Defendant.)	
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(Pursuant to K.S.A. Chapter 60))	

ORDER FOR SUMMARY JUDGMENT

NOW ON this date, there comes before the Court Plaintiff’s *Motion and Memorandum in Support for Summary Judgment Against Defendant Funk Fest Concerts, Inc.* Plaintiff, State of Kansas, *ex. rel.* Derek Schmidt, Attorney General, appears by and through counsel, Assistant Attorney General Sarah M. Dietz. There are no other appearances.

After careful consideration of the motion, supporting documents, the stipulations of the parties, the court file and the premises, the Court finds Plaintiff’s motion should be granted.

ANALYSIS

Standard of Review

Under Kansas law, summary judgment is appropriate “if the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” K.S.A. 60-256(c)(2); *see also Bank v. Parish*, 298 Kan. 755, 759, 317 P.3d 750 (2014); *Farha v. City of Wichita*, 284 Kan. 507, 511, 161 P.3d 717, 721 (2007).

To defeat a properly supported motion for summary judgment, the non-moving party “must come forward with evidence to establish a dispute as to a material fact.” *Estate of Bryant v. All Temperature Insulation, Inc.*, 22 Kan. App.2d 387, 390, 916 P.2d 1294, 1297 (1996) (quoting *Mitzner el rel. Bishop v. State*, 257 Kan. 258, 260, 891 P.2d 435, 437 (1995)). When the non-moving party fails to make any attempt to controvert the statement of uncontroverted facts set forth in the moving party’s motion for summary judgment, the facts must be deemed admitted. *Dexter v. Brake*, 38 Kan. App. 2d 1005, 1020-21, 174 P.3d 924 (2008) (citing Supreme Court Rule 141). When a party against whom summary judgment is sought “fails to make a showing sufficient to establish the existence of an element essential to [their] case,” there can be no genuine issue as to a material fact and the moving party is entitled to a judgment as a matter of law.” *Matter of Estate of Brodbeck*, 22 Kan. App. 2d 229, 234, 915 P.2d 145, 150 (1996).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Derek Schmidt is the duly elected, qualified and acting Attorney General for the State of Kansas.
2. The Attorney General has authority under the law of the State of Kansas to bring this action, more specifically, the Kansas Consumer Protection Act, K.S.A. 50-623, *et seq.*
3. Defendant Funk Fest Concerts, Inc. (“Defendant” or “Funk Fest”) is a North Carolina corporation with a primary place of business at 3020-I Prosperity Church R. Ste, 272, Charlotte, NC 28269, with a registered office at the same address.
4. Defendant Funk Fest Concerts, Inc. promoted a concert in Bonner Springs, KS, for which Kansas consumers purchased tickets. Five thousand nine hundred and eighty-two (5,982) tickets were sold for the event. The prices for the tickets ranged from \$25.50 to \$225. In June 2017, Defendant held a concert in Bonner Springs, Kansas. The event was advertised on their website

as held “rain or shine.” Due to thunderstorms, the event was cancelled about halfway through. No refunds were given by Defendant.

5. On November 16, 2018, Plaintiff filed its petition alleging Funk Fest Concerts, Inc. (“Defendant”) acted as a “supplier,” as that term is defined by K.S.A. 2018 Supp. 50-624(1), and willfully failed to state material facts, or willfully concealed, suppressed or omitted material facts, in violation of K.S.A. 2018 Supp. 50-626(b)(3). The allegations contained in the petition were based on evidence gathered from an investigation in response to complaints received from consumers. The petition recited five thousand nine hundred and eighty two (5,982) statutory violations of the KCPA.

6. The petition and summons were sent via return receipt delivery on December 26, 2018 to Leo Bennett, Chief Executive Officer of Defendant at Defendant’s principal office, 3020-I Prosperity Church R. Ste, 272, Charlotte, NC 28269. The petition and summons were refused by the addressee on January 2, 2019. Upon the return of the unopened envelope evidencing refusal, Plaintiff mailed the petition and summons via first-class mail on January 16, 2019. Service of the Petition is deemed properly obtained on January 19, 2019, pursuant to K.S.A. 60-304 and K.S.A. 60-303.

7. On February 21, 2019, Plaintiff filed a Notice of Damages pursuant to Supreme Court Rule 118. Plaintiff served the Notice of Damages upon Leo Bennett, Chief Executive Officer of Defendant at Defendant’s principal office, 3020-I Prosperity Church R. Ste, 272, Charlotte, NC 28269 on February 25, 2019. Service is proper under K.S.A. 60-304 and K.S.A. 60-303.

8. On March 14, 2019, Defendant filed its Answer, admitting the allegations in paragraphs 1, 2, 3, 5, 11, 12, 13, and 15 of Plaintiff’s Petition, and admitting in part and denying in part the allegations in paragraphs 10 and 14 of Plaintiff’s Petition. *See* Answer filed 3-14-19.

9. On May 8, 2019, a Case Management Order was entered by the Court and discovery began. The Case Management Order included the following agreed stipulations:

“a. Defendant Funk Fest Concerts, Inc., is a North Carolina corporation with a primary place of business at 3020-I Prosperity Church Rd. Suite 272, Charlotte, North Carolina 28269 with a registered office at the same address. Def.’s Answer at ¶ 1.

b. Funk Fest admits that it promoted a concert in Bonner Springs, Kansas on June 17, 2017, which would commence ‘rain or shine’ and for which no refunds were to be given for any reason and that the concert was forced to end early due to safety concerns for the attendees. Def’s Answer at ¶ 6.

c. Five thousand nine hundred and eighty-two (5,982) tickets were sold for the event. The price for the tickets ranged from \$25.50 to \$225. Def.’s Answer at ¶ 7.

d. As of August 2018, three hundred and thirty-six (336) of the tickets have been subject to credit card chargebacks due to the cancelled concert. Def’s Answer at ¶7.

e. On June 22, 2017, the website for Defendant stated, “this event is held rain or shine. There are NO REFUNDS and NO EXCHANGES for ANY reason whatsoever.” Def.’s Answer at ¶7.

f. As of November 15, 2018, the website for Funk Fest stated, “this event is held rain or shine. OUTDOOR EVENT, BUYER ASSUMES ALL RISK ASSOCIATED WITH INCLEMENT WEATHER. NO REFUNDS, NO EXCHANGES.” Def.’s Answer at ¶7.”

Case Management Order filed May 8, 2019, p. 2.

10. On June 27, 2019, Plaintiff served Defendant with *Request for Admissions and Request for Production of Documents*. Answers to Plaintiff's discovery requests were due July 30, 2019. See Ct. file, Notice of Service of discovery requests.

11. On July 22, 2019, counsel for Defendant, Mark Murphy, sent Plaintiff an email stating he had been informed by his client that "it is no longer in business," he had been directed to withdraw from the case, and it was his understanding "that Funk Fest will not be making any response to the outstanding discovery request." See Ex. C, attached to Plaintiff's *Motion and Memorandum in Support for Summary Judgment*.

12. Defendant failed to respond to Plaintiff's *Request for Admissions* or other outstanding discovery requests; pursuant to K.S.A. 60-236(a)(3), Plaintiff's *Request for Admissions* are deemed admitted for purposes of this case.

13. Mr. Murphy's Motion for Leave to Withdraw as counsel for Defendant was Granted on July 31, 2019; there has been no subsequent entry of appearance of counsel on behalf of Defendant. See Court file.

14. On August 16, 2019, Plaintiff filed its *Motion and Memorandum in Support for Summary Judgment Against Defendant Funk Fest Concerts*. See Ct. File, MSJ filed 8-16-19.

15. Plaintiff attempted service of its summary judgment motion upon Defendant via return receipt delivery to Leo Bennett, Chief Executive Officer, at Defendant's principal office, 3020-I Prosperity Church R. Ste, 272, Charlotte, NC 28269 on August 16, 2019. The delivery service attempted to deliver the item but there was refusal of receipt on August 26, 2019. See Ct. File, *Return on Service* filed 9-16-19.

16. Upon the return of the unopened envelope evidencing refusal, Plaintiff mailed the motion and memorandum for summary judgment to Defendant via first-class mail on September 16,

2019; pursuant to K.S.A. 60-304 and K.S.A. 60-303, service of Plaintiff's *Motion and Memorandum in Support for Summary Judgment* upon Defendant is proper and deemed obtained on September 19, 2019.

17. Defendant Funk Fest Concerts, Inc. was properly served with copies of Plaintiff's *Motion and Memorandum in Support for Summary Judgment* on September 19, 2019, and Defendant's deadline to respond was October 11, 2019.

18. Defendant has failed to file any response to Plaintiff's motion for summary judgment and has not contacted the Court to request an extension of time.

19. Because Defendant Funk Fest Concerts, Inc. failed to file a response to Plaintiff's motion for summary judgment, the statement of facts in Plaintiff's *Motion and Memorandum in Support for Summary Judgment* is deemed admitted. K.S.A. 60-256; Kansas Supreme Court Rule 141.

20. The Kansas Consumer Protection Act was enacted in 1973 in part "to protect consumers from suppliers who commit deceptive and unconscionable practices." K.S.A. 50-623(b). In order to promote this policy, the "KCPA is to be construed liberally." *Tufts v. Newmar Corp.*, 53 F. Supp. 2d 1171, 1177 (D. Kan. 1999).

21. In Count I of the Petition, Plaintiff alleges Defendant willfully failed to state material facts, or willfully concealed, suppressed or omitted material facts in violation of K.S.A. 2018 Supp. 50-626(b)(3). *See* Pet. filed 11-16-18, p. 3.

22. By failing to respond to Plaintiff's Request for Admissions, Defendant admitted to acting as a supplier in the State of Kansas, pursuant to K.S.A. 50-624(1). Defendant also admitted to engaging in consumer transactions as that term is defined by K.S.A. 2018 Supp. 50-624(c). *See also Ellibee v. Aramark Correctional Services, Inc.*, 37 Kan. App 2d 430, 432, 154 P.3d 39 (2007) (defining supplier); *see also* ¶ 12 *supra*.

23. Intent is an element of a deceptive practices claim under K.S.A.2012 Supp. 50–626(b)(2) and (b)(3). *See Crandall v. Grbic*, 36 Kan.App.2d 179, 196, 138 P.3d 365 (2006).
24. A willful act under the KCPA is one performed with a purpose or intent on the part of a person to do wrong or to cause injury to another. *Tufts v. Newmar Corp.*, 53 F.Supp.2d 1171, 1178 (D.Kan.1999), quoting *Heckard v. Martin*, 25 Kan.App.2d 162, 165, 958 P.2d 665 (1998), PIK Civ. 4th 103.04.
25. The Defendant’s website was silent as to what would happen in the event of severe weather conditions.
26. Defendant failed to include any disclosures or disclaimers stating the circumstances for severe weather.
27. By failing to make any disclosures or disclaimers on its website stating the circumstances for severe weather, Defendant willfully failed to state material facts, or willfully concealed, suppressed or omitted material facts, in violation of K.S.A. 2018 Supp. 50-626(b)(3).
28. As of August 2018, three hundred and thirty-six (336) of the tickets have been subject to credit card chargebacks due to the cancelled concert.
29. Each of the 5,982 tickets sold for the June 2017 concert event – which was cancelled prior to completion due to thunderstorms despite being advertised as held “rain or shine” and no refund given – constitutes a deceptive act or practice under K.S.A. 2018 Supp. 50-626(b)(3).
30. Defendant’s deceptive or unconscionable acts or practices are distinct violations for which the court should assess a civil penalty in the amount of \$50.00 per violation, pursuant to K.S.A. 50-636(a), in this case amounting to \$299,100.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

- A. Defendant's acts and practices, as set forth above, are found to be in violation of the Kansas Consumer Protection Act, pursuant to K.S.A. 50-632(a)(1);
- B. Defendant is permanently enjoined from these and other practices in violation of the Kansas Consumer Protection Act, pursuant to K.S.A. 50-632(a)(2);
- C. The Defendant is assessed a \$299,100.00 civil penalty for violations of the Kansas Consumer Protection Act.
- D. Defendant pay \$364,492.50 in consumer restitution with the understanding that certain consumers have received refunds or chargebacks and the total amount of restitution may need to be reduced upon evidence of such refunds or chargebacks.
- E. Defendant is ordered to pay reasonable expenses and investigative fees, in the amount \$1,950.00 to the Office of the Kansas Attorney General as provided by K.S.A. 50-636(c).
- F. Defendant is ordered to pay court costs in the amount of \$195.00 and all costs associated with distributing and executing on any judgment made by this Court.

This order is effective as of the date and time of the electronic file stamp.

IT IS SO ORDERED.

HON. MARY E. CHRISTOPHER
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically, and placed in the U.S. Mail if required, on the date stamped on the order, providing notice to the following:

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Funk Fest Concerts
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/s/ Anson Pruneda
Administrative Assistant
Division 8
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