

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION

IN RE:	)	
	)	
SIEGERT PROPERTIES, INC.,	)	Case No. 00-11184C-11G
	)	
Debtor.	)	
_____	)	
	)	
SIEGERT PROPERTIES, INC.,	)	
	)	
Plaintiff,	)	
	)	Adv. Pro. No. 00-2074
v.	)	
	)	
RANDY WADE SMITH d/b/a/	)	
SMITH HEATING &	)	
AIRCONDITIONING and	)	
PIEDMONT NATURAL GAS	)	
COMPANY,	)	
	)	
Defendants.	)	
_____	)	

**ORDER DENYING PLAINTIFF'S REQUEST FOR TREBLED DAMAGES**

This matter came on for hearing before the undersigned Bankruptcy Judge on February 27, 2001, in Greensboro, North Carolina, after due and proper notice, upon the Plaintiff's motions for default judgment against Defendant, Randy Wade Smith, and Defendant, Smith Heating & Air Conditioning. Eric A. Richardson appeared on behalf of the Plaintiff.

This court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334 and 157(a) and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (E) and (O) which this court may hear and determine.

The Plaintiff's Complaint set forth five claims for relief against Defendants Randy Wade Smith and Smith Heating & Air Conditioning: (1) Breach of Contract; (2) Implied Warranty of Workmanlike Construction; (3) Implied Warranty of Habitability; (4) Negligence; and (5) Unfair and Deceptive Trade Practices. At the hearing, the Plaintiff presented evidence as to damages resulting from the Defendants' breach of contract and breach of implied warranties. The Plaintiff further argued that the Defendants' acts were in violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §75-1.1 requiring an award of trebled damages pursuant to N.C. Gen. Stat. §75-1.16.

After reviewing the file and considering the arguments of counsel and the testimony presented, this court entered separate default judgments against Defendant, Randy Wade Smith, and Defendant, Smith Heating & Air Conditioning, in the amount of \$77,809.00 for breach of contract and breach of warranties damages, plus interest from the date of judgment, and \$38,160.00, for negligence plus interest from the date of judgment.

However, the court finds that the allegations in the Complaint do not, as a matter of law, support a claim under the Unfair and Deceptive Trade Practices Act. When a court determines that a defendant is in default, the well-pleaded factual allegations of the complaint, except those relating to the amount of damages, will be taken as true. Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2<sup>nd</sup> Cir. 1992); Geddes v. United Financial Group, 559 F.2d 557, 560 (9<sup>th</sup> Cir. 1977) (citing Pope v. U.S., 323 U.S. 1 (1944)). Although the facts are deemed admitted, a defaulting defendant does not admit the legal conclusions in the complaint, and the court is required to consider whether the plaintiff's allegations are sufficient to state a claim for relief. Weft, Inc. v. G.C. Investment Associates, 630 F. Supp. 1138, 1141 (E.D.N.C. 1986). The determination of whether an act is a violation of the Unfair and Deceptive Trade

Practices Act is a question of law for the court. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert. denied, 311 N.C. 751, 321 S.E.2d 126 (1984). Thus, in the present case, the issue is whether the allegations in the Complaint, if taken as true, constitute an unfair or deceptive act as a matter of law in violation of the statute. The court finds no such violation.

N.C. Gen. Stat. § 75-1.1 provides that “unfair or deceptive acts or practices in or affecting commerce are declared unlawful.” N.C. Gen. Stat. § 75-16 provides that if the business of any person, firm or corporation is injured by any act done in violation of Chapter 75, such person, firm or corporation shall have a right of action and “if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.” Although the Act does not define an unfair or deceptive act, courts have held that:

“A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” Specifically, “[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.” “An act or practice is deceptive . . . if it has the capacity or tendency to deceive.” “In determining whether a representation is deceptive, its effect on the average consumer is considered.”

Opsahl v. Pinehurst Inc., 344 S.E.2d 68, 76 (N.C. App. 1986) (citations omitted).

The court does not believe that the allegations in the Complaint set forth the kind of “substantial aggravating circumstances” that must be attendant to a breach of contract to sustain an action for unfair and deceptive practices. See, Computer Decisions, Inc. v. Rouse Office Mgt. of N.C., Inc., 124 N.C. App. 383, 477 S.E.2d 262 (1996). The only allegations in the Complaint that appear to have been intended to support a claim for unfair and deceptive trade practices are as follows:

49. Defendants Smith and SHAC, in agreeing to the Installation Contracts, knowingly lacked the ability to complete a commercial project like the one undertaken.
50. Defendants Smith and SHAC falsely represented that they completed two stages of the Installation Contracts and that such work was done in accordance with the contract and up to the North Carolina State Building Code.

These allegations do not compel a conclusion of law that the Defendants engaged in unfair or deceptive acts or practices. In Opsahl v. Pinehurst Inc., 344 S.E.2d at 77, the court noted as follows:

It is common knowledge that projected completion dates in the construction industry are often missed for a variety of reasons and may be impossible or impractical to fulfill. In light of this common knowledge and the capacity of consumers to contract with reference thereto, we do not believe the legislature intended that the representation of such dates as firm when in fact they are not, standing alone, should rise to the level of immoral, unethical, oppressive, or unscrupulous conduct, or amount to an inequitable assertion of power or position. We thus hold that the court did not err in failing to find a violation of N.C. Gen. Stat. 75-1.1 and to award plaintiffs treble damages. Plaintiffs' remedy lies in contract for material breach only.

Moreover, the testimony offered at the hearing and in the Affidavit filed with the Plaintiff's motion did not demonstrate to the court that the Defendants' actions were in violation of the Act.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff is limited to the relief granted in the Default Judgments entered against Roy Wade Smith and Smith Heating & Air Conditioning and is not entitled to trebled damages for violation of the North Carolina Unfair and Deceptive Trade Practices Act.

This the 7 day of March, 2001.

CATHARINE R. CARRUTHERS

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Catharine R. Carruthers  
United States Bankruptcy Judge