

**FILED**

**MAY 22 2013**

NANCY S. REINBOLD  
STARK COUNTY, OHIO  
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO**

STATE OF OHIO, ex rel. )  
 Attorney General Michael DeWine )  
 615 W. Superior Ave. )  
 Cleveland, OH 44113-1899 )  
  
 Plaintiff, )  
  
 v. )  
  
 DURABILT INC. )  
 9854 Cleveland Ave. NW )  
 Greentown, Ohio 44630 )  
  
 and )  
  
 ALLWOOD STRUCTURES INC. )  
 9854 Cleveland Ave. NW )  
 Greentown, Ohio 44630 )  
  
 and )  
  
 TIMOTHY SWALLEN )  
 1718 Kimball Rd SE )  
 Canton, Ohio 44707-3618 )  
  
 Defendants. )

CASE NO.

JUDGE

201730707382

Harner

COMPLAINT FOR DECLARATORY  
JUDGMENT, INJUNCTIVE RELIEF,  
RESTITUTION AND CIVIL  
PENALTIES

**JURISDICTION**

1. Michael DeWine, Attorney General of Ohio, having reasonable cause to believe that violations of Ohio's consumer protection laws have occurred, brings this action in the public interest and on behalf of the State of Ohio under the authority vested in him by R.C. 1345.01 et seq. (the Ohio Consumer Sales Practices Act).
2. The actions of Defendants, hereinafter described, have occurred in the State of Ohio, including in Stark County, in various other counties and across the United States, and, as set forth below, are in violation of the Consumer Sales Practices Act, R.C. 1345.01

et seq.

3. Jurisdiction over the subject matter of this action lies with this Court pursuant to R.C. 1345.04 of the Ohio Consumer Sales Practices Act.
4. This Court has venue to hear this case pursuant to Ohio Civ. R. 3(B)(3), in that some of the transactions complained of herein, and out of which this action arose, occurred in Stark County.

### **DEFENDANTS**

5. Defendant Durabilt Inc., (hereinafter “Durabilt” or “Defendants”) is an Ohio corporation with its principal place of business located at 9854 Cleveland Ave. NW Greentown, Ohio 44630.
6. Defendant Allwood Construction Inc., (hereinafter “Allwood” or “Defendants”) is an Ohio corporation with its principal place of business located at 9854 Cleveland Ave. NW Greentown, Ohio 44630.
7. Defendant Timothy Swallen (hereinafter “Swallen” or “Defendants”) is the owner of Durabilt and Allwood. On information and belief, Defendant Swallen dominated, controlled and directed the business activities and sales conduct of Defendants Durabilt and Allwood, causing, personally participating in, or ratifying the acts and practices of Defendants Durabilt and Allwood as described in the Complaint.
8. Defendants are "suppliers," as that term is defined at R.C. 1345.01(C), as Defendants are engaged in the business of effecting "consumer transactions" by offering services for the design and construction of pole buildings, pole barns, cabins, houses, garages, and storage buildings, within the meaning of R.C. 1345.01(A).

## STATEMENT OF FACTS

9. Defendants have solicited consumers for services including the design and construction of pole buildings, pole barns, cabins, houses, garages, and storage buildings across the United States and in Stark County, Ohio.
10. Defendants advertise that that they build structures referred to as “pole buildings” and that their “area in Ohio was a pioneer in pole building development and we have had experience and innovations that every other builder emulates.”
11. Defendants also advertise that they are able to “customize your building to your specific needs.”
12. Defendants hold themselves out as contractors/builders. However upon receipt of a contract, consumers learn that they are expected to act as “general contractor” of the building.
13. Defendants’ standard contract contains fine print which states “Construction will begin 4-5 weeks after permit is obtained, with our print, by customer, a copy of the permit must be mailed/faxed/emailed as soon as it’s obtained, along with the print letter okaying the building. If the permit and print letter aren’t sent, the customer holds the builder harmless for any time delays.”
14. Defendants’ standard contract also contains fine print which states “Owner General Contractor, is responsible to get all permits in his name, with Durabilts’ prints. If owner puts our name on permit and requires our registration, owner must pay all registration fees + \$250 to Durabilt.”
15. Defendants’ standard contract contains a liquidated damages clause which states “10% of contract price is non-refundable after receipt of deposit. Once the materials are ordered and the prints are done, 10% more is non-refundable. Once materials are

delivered, no monies are refundable, under circumstances. Any customer deciding not to have Durabilt build the building agrees that monies were paid for services rendered and is non refundable.”

16. Defendants have enforced or attempted to enforce their liquidated damages clause whether or not they have performed under the contract. Defendants have enforced or attempted to enforce the liquidated damages clause prior to entering into a binding contract with consumers.
17. Defendants’ contract is illusory in that it requires payments from consumers but does not require any performance on Defendants’ part in order to keep the payments.
18. Defendants’ representations, both oral and in writing are illusory in that consumers are required to act as their own general contractor, including staking out the corners of the building, a task which is normally performed by a professional contractor.
19. Defendants’ building plans routinely do not conform to applicable standards of local building departments. Defendants routinely charge consumers an “upcharge” in order to send building plans which do comply with standards of local building departments. If a consumer is unwilling to pay the upcharge they are informed that their deposit will be forfeited.
20. When Defendants have delivered product and/or services, it has been in an unprofessional, unworkmanlike, and shoddy manner.

**PLAINTIFF’S CAUSE OF ACTION**

**VIOLATIONS OF THE OHIO CONSUMER SALES PRACTICES ACT**

**COUNT I**

**DEPOSIT RULE**

21. Plaintiff incorporates by reference, as if completely rewritten herein, the allegations

set forth in paragraphs One through Twenty (1-20) of this Complaint.

22. Defendants have committed unfair or deceptive acts or practices in violation of the Deposits Rule, Ohio Admin. Code 109:4-3-07(B), and the Consumer Sales Practices Act, R.C. 1345.02(A), by accepting a deposit from consumers in connection with home improvement services to be performed and failing to provide a dated receipt stating a description of the goods, the cash selling price, whether the deposit was refundable and under what conditions, or whether there were any additional costs.
23. Defendants have committed unfair or deceptive acts or practices in violation of the Deposits Rule, Ohio Admin. Code 109:4-3-07(B), and the Consumer Sales Practices Act, R.C. 1345.02(A) by failing to honor the terms and conditions stated on deposit receipts.
24. The act or practice described in paragraph twenty two has been previously declared to be deceptive by rule adopted pursuant to division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which this action is based occurred.

## **COUNT II**

### **FAILURE TO DELIVER**

25. Plaintiff incorporates by reference, as if completely rewritten herein, the allegations set forth in paragraphs One through Twenty (1-20) of this Complaint.
26. Defendants have committed unfair or deceptive acts or practices in violation of the Failure to Deliver Rule, Ohio Admin. Code 109:4-3-09(A)(1) and the Consumer Sales Practices Act, R.C. 1345.02(A), by accepting payments from consumers for services including the design and construction of pole buildings, pole barns, cabins, houses, garages, and storage buildings, then failing to deliver the goods and/or services purchased or to return payments to consumers.

27. The act or practice of accepting payments from consumers, then failing to deliver the goods and/or services purchased or to return down payments to consumers has been previously declared to be deceptive by rule adopted pursuant to division (B)(2) of R.C. 1345.05 before the consumer transaction on which this action is based occurred.

### **COUNT III**

#### **UNFAIR AND DECEPTIVE CONSUMER SALES PRACTICES**

28. Plaintiff incorporates by reference, as if completely rewritten herein, the allegations set forth in paragraphs One through Twenty (1-20) of this Complaint.
29. Defendants have committed unfair or deceptive acts or practices in violation of the Consumer Sales Practices Act, R.C. 1345.02(A), by maintaining a pattern of incompetence and inefficiency by failing to ensure that building plans were in compliance with local building codes or alternatively to promptly respond to consumers' requests for refund when plans did not comply with local building codes.
30. Defendants have committed unfair or deceptive acts or practices in violation of the Consumer Sales Practices Act, R.C. 1345.02(A) by stalling and evading legal obligations by failing to refund money due to consumers under the terms of their contracts.
31. Defendants have committed unfair or deceptive acts or practices in violation of the Consumer Sales Practices Act, R.C. 1345.02(A) by including unconscionable liquidated damages clauses in their contracts.
32. Defendants have committed unfair or deceptive acts or practices in violation of the Consumer Sales Practices Act, R.C. 1345.02(A) by failing to include in the written contract all material statements, representations, or promises prior to the execution of

the contract by holding themselves out as general contractors and then requiring consumers to act as “Owner General Contractor” of building projects.

33. The acts and practices described in paragraphs 29 through 32 have been previously determined by Ohio courts to violate the CSPA, R.C. 1345.01 et seq.
34. Defendants have committed unfair or deceptive acts or practices in violation of the Consumer Sales Practices Act, R.C. 1345.02(A) by violating a permanent injunction issued in Stark County Case No. 2010 CV 03325 prohibiting Defendants from engaging in unfair, deceptive and unconscionable acts and practices that violate the CSPA.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff respectfully requests that this Court:

1. **ISSUE** a permanent injunction enjoining Defendants, under the names listed in this Complaint, or any other names, their agents, servants, representatives, salesmen, employees, successors and assigns and all persons acting in concert or participating with Defendants, directly or indirectly, from engaging in the acts or practices of which Plaintiff complains, or violating the Ohio Consumer Sales Practices Act, and the Substantive Rules contained in the Ohio Administrative Code, and from engaging in consumer transactions in the State of Ohio until full restitution is made to all consumers harmed by Defendants’ actions.
2. **ISSUE** a declaratory judgment declaring that each act or practice complained of in this Complaint violates the Ohio Consumer Sales Practices Act, and the Substantive Rules contained in the Ohio Administrative Code in the manner set forth in this Complaint;
3. **IMPOSE** upon Defendants civil penalties in the amount of Twenty-Five Thousand Dollars (\$25,000.00) for each appropriate violation of the Ohio Consumer Sales Practices Act pursuant to R.C. 1345.07(D);
4. **ORDER** Defendants to reimburse consumers who have been injured by the acts and

practices of which Plaintiff complains;

5. As a means of insuring compliance with this Court's Order and with the consumer protection laws of Ohio, **ORDER** Defendants, their successors or assigns, under these or any other names, to maintain in their possession and control for a period of five (5) years all business records relating to Defendants' solicitation or effectuation of business in Ohio and to permit the Ohio Attorney General or his representative, upon reasonable twenty-four (24) hour notice, to inspect and/or copy any and all of said records and further **ORDER** that copies of such records be provided at Defendants' expense to the Ohio Attorney General upon request of the Ohio Attorney General or his representatives;
6. **GRANT** Plaintiff his costs in bringing this action;
7. **GRANT** such further relief as justice and equity require.

Respectfully submitted,

MICHAEL DEWINE  
Attorney General



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