

COURT FILE NO.: SC-18-10121-00

DATE: 20200629

ONTARIO
SUPERIOR COURT OF JUSTICE

TORONTO SMALL CLAIMS COURT

B E T W E E N:

SKYMARK FINANCE CORPORATION

Plaintiff

-and-

KADIR TORAMAN and AYSEGUL TORAMAN

Defendants

Appearances:

Michelle L. Haigh, Plaintiff's Licensed Paralegal

Brendan van Niejenhuis, Zachary Al-Khatib, Defendants' Counsel (assisted by *Attila Ataner*)

Heard at Toronto

Day 1: Tuesday, February 4, 2020 (Courtroom 300)

A second (continuation) trial date was scheduled at the end of Day 1. At the parties' request, this date was vacated on the day before. Instead, the parties agreed that co-defendant Aysegul Toraman (who would have needed an interpreter) would not be called as a witness. The parties also agreed, in lieu of oral submissions, to file written submissions according to a proposed timetable, which I permitted by order. The parties each filed written submissions. While permitted, no Plaintiff's Reply was filed.

REASONS FOR JUDGMENT

His Honour Deputy Judge Gannage

OVERVIEW

[1] The plaintiff Skymark Finance is suing the non-paying defendants homeowners/consumers for rental arrears (\$8,648.48) plus interest for a water filter under a contract between the homeowners and the seller, which assigned the contract to Skymark. In their defence, the homeowners successfully rely on Part III of the *Consumer Protection Act, 2002*,¹ which prohibits “unfair practices” in consumer transactions. In my view, the door-to-door salesman engaged in both false, misleading or deceptive representations and unconscionable representations. Thus, the contract is unenforceable and rescinded and Skymark’s claim is dismissed.

PARTIES

[2] The plaintiff, Skymark Financing Corp. (“Skymark”), an Ontario company based in Mississauga, offers financial services to individuals. Skymark purchased from Progressive Home Services (“Progressive”) the water filter contract (“the contract”) between Progressive and the defendants in 2017.

[3] The defendants Kadir and Aysegul Toraman (“the Toramans”), a married couple, are homeowners living in Scarborough. As consumers,² they entered into the contract (“a consumer agreement”³) with Progressive.

ISSUES and SUMMARY OF CONCLUSIONS

[4] For the reasons articulated further below, the issues and my short conclusions, based on the evidence and applying the applicable law and the civil standard of proof (balance of probabilities), follow.

1. Did the salesman engage in unfair practices?

¹ S.O. 2002, c. 30, Sch. A (the “CPA”) <https://www.ontario.ca/laws/statute/02c30>.

² This fact is indisputable. Under the CPA, section 1,

“consumer” means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes; ...

³ This fact is also indisputable. Under the CPA, section 1,

“consumer agreement” means an agreement between a supplier and a consumer in which, (a) the supplier agrees to supply goods or services for payment, ...
...

“consumer transaction” means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;

Yes.

2. Is Skymark a bona fide purchaser for value of the contract from Progressive and therefore an innocent party?

No.

3. What is the appropriate remedy?

Rescind the contract.

EVIDENCE and FACTUAL FINDINGS

Chronology

[5] Based on the evidence, I summarize the sequence of principal events below.

September 23, 2016 – Uninvited, two door-to-door Progressive salesmen knock on the Toramans' door and speak with Mr. Kadir Toraman.

February 2, 2017 – The Toramans sign an “Agreement for Lease Program” (3pp) (“the contract”) with Progressive for a “water filter”. [Ex 1-1]

February 6, 2017 – The filter is delivered and installed. The installer signs a Certificate of Completion (one-page, plus a photo of the filter) [Ex 1-2] confirming this fact. The named dealer is Progressive. The named customer is (Mrs.) Asyegul Toraman. The proviso at the bottom reads in small print:

I hereby acknowledge the installation of the equipment as described on the Skymark Finance Corporation Credit Application and Agreement between Skymark Finance Corporation and customer dated 02 06 2017.

I hereby acknowledge the goods and services provided are satisfactory and suitable for my purpose and I authorize Skymark Finance Corporation to pay the Dealer above the amount financed as disclosed on the Skymark Finance Corporation Credit Application and Agreement.

October 20, 2017 – The Toramans make their last lease payment (to Skymark) for the filter.

September 12, 2018 – This is the date of Skymark's Notice of Security Interest [Ex 1-5] containing a statement for discharge purposes addressed to Kadir Toraman with the total lease payout amount of \$8,648.48.

Witnesses

[6] The three witnesses were:

Mr. Nick Vetro, a Skymark employee, for the plaintiff;

Mr. Kadir Toraman and the Toramans' daughter, **Ms Sumerya Toraman**, for the defendants.

Their evidence is addressed sequentially below.

Nick Vetro

[7] Mr. Vetro has worked for Skymark for seven years in consumer financing of home equipment. He is one of about 12-15 employees in Skymark's office. Skymark receives applications from vendors like Progressive, which sell and install the equipment, then seek financing for consumers.

[8] The general practice is that Skymark receives the agreement, then does due diligence by communicating with the customer. There are cooling off periods under the *CPA*. Skymark purchases the agreement from the vendor. If the lending criteria are not met, Skymark does not proceed. Skymark does not sell the equipment.

[9] Under the agreement, the consumer has lifetime service and replacement. If the vendor is still around, Skymark contacts it and tells it to service the equipment. If the vendor goes out of business, Skymark finds a local technician to do the servicing, for which Skymark pays.

[10] Mr. Jonathan Slattery or Mr. Vetro underwrite the agreements. Mr. Vetro thinks Mr. Slattery may have attempted to contact the Toramans.

[11] Skymark had been dealing with the vendor (Progressive) for about one or two years. Then Progressive stopped sending Skymark business.

[12] Mr. Vetro described the Plaintiff's documents [Ex 1] as follows.

[13] The contract [Ex 1-1, also Ex 4] for a water filtration unit priced at \$59.99 plus HST per month for 120 months (10 years) was signed by the defendants on February 2, 2017. The Terms and Conditions [Schedule A] include paragraph 2 regarding assignment (from Progressive to Skymark) and paragraph 5 regarding security registration. Skymark registered the security interest. The registration charge (\$150) and discharge fee (\$150) are payable by the customer at the end. There is a 3½% per year increase for inflation. Page 1 says "Your 'Consumer Rights' can be found on the third page of this Agreement". Page 3 is headed "Your Rights under the *Consumer Protection Act, 2002*" and includes a reference to a ten-day cooling off period.

[14] The Certificate of Completion [Ex 1-2] contains the customers' acknowledgment, the installer's name, the vendor's name, the installation date of February 6, 2017, a photo of the installed equipment and Kadir Toraman's confirmation signature.

[15] Mr Vetro described the sound recordings of the five telephone calls with the Toraman family. These sound recordings of phone calls were adduced [Ex 2 – memory stick] and played in court. No transcript was produced.

[16] The first call was a typical verification call. Its purpose is to ensure that the CPA is complied with and that the consumer understands the agreement. This call was made on the afternoon of February 2nd or the morning of February 3rd, after the contract was executed and before the equipment was installed. Mr. Slattery of Skymark called Mr. Toraman about the contract for the water filter for Mrs. Toraman. Her name is on title to the house and therefore she is the registered homeowner. Mr. Toraman said Mrs. Toraman's English was poor and that he had authority to speak for her. Mr. Toraman was told and agreed that the sales agent left a copy of the lease agreement signed by the Toramans, that the monthly cost was \$59.99 plus HST and that the length of the contract was 120 months. Mr. Slattery told Mr. Toraman about the ten-day cooling off; that payment is due on the 1st of the month; and that Skymark and Progressive are separate and independent companies. Mr. Toraman replied "OK".

[17] In the second call, Mr. Vetro was heard asking for Mrs. Toraman.

[18] In the third call, on February 6, 2017, Mr. Vetro asked Mr. Toraman if he was satisfied with the installation, to which Mr. Toraman replied "yes". Mr. Vetro added that Skymark's telephone number is at the bottom of the contract.

[19] Then Skymark sent the paperwork to be entered and registered. Skymark paid the seller Progressive \$4,554 based on a formula. Then Skymark received the consumers' monthly payments.

[20] The Finance Statement dated September 11, 2018 [Ex 1-3] shows the Toramans' missed payments and an unpaid balance, including interest and NSF charges, of \$957.74.

[21] Mr. Vetro testified that if the consumer wants to get out of the contract after ten days, Skymark will let them if it is up to one month. "After one month, the contract is in place." Mr. Vetro said he did not recall if the Toramans contacted Skymark to cancel.

[22] Mr. Vetro testified: "At the beginning [March 2017], payments were not being made. Then we spoke to a family member and brought payments up to date".

[23] In October 2017, the Toramans paid \$543.06. [Ex 1-4 - Customer Balance Detail (September 12, 2018)]

[24] About eight months after the contract was executed, in the last of five calls, the Toramans' daughter Sumeyra Toraman called Mr. Vetro and identified herself as "Aysgul Toraman" (her mother). Mr. Vetro offered to remove five of six missed payment NSF fees, totaling \$282. Sumeyra Toraman said she could pay \$400. Mr. Vetro responded that the remaining balance would be \$143.06, to which Sumeyra Toraman replied:

To cancel?

Mr. Vetro explained:

You have to buy out the whole system because it's past the cooling off, unless Progressive can do something.

[25] In cross-examination, Mr. Vetro added:

There was no call back. So we assumed everything was OK. I can't confirm that I sent the defendants a follow up note.

[26] Two payments identified in the call [totalling \$543.06] were received. The last payment was made on October 20, 2017.

[27] Mr. Vetro testified about the Notice of Security Interest Statement (September 12, 2018) [Ex 1-5]. This payout statement for discharge purposes was prepared for the plaintiff's representative for this court case and was not previously sent to the Toramans. The statement shows an outstanding balance of \$8,648.48, plus interest at 6.99%/year from September 12, 2018. This is the damages sought by Skymark in this action.

[28] Mr. Vetro testified that Skymark owes no credits to the Toramans. He said the Toramans never told Skymark there was a problem with the equipment and never gave any reason for cancelling, not even when they spoke about payments. Neither Skymark nor he ever received a written complaint from the Toramans.

[29] In cross-examination, Mr Vetro said he did not know if Progressive is still in business. While I generally found Mr. Vetro's testimony to be straightforward, this statement seems dubious, especially given Mr. Vetro's seven years' experience in the industry.

[30] He acknowledged that the equipment maintenance that is included in the consumer's monthly payments are to be done by the dealer (Progressive), not Skymark.

[31] When shown a copy of photos of the actual water filtration system [Ex 3], he agreed that the filter installed in the Toramans' house was Austin Springs Model #AS-1000. Then when shown a printout from Costco Canada's website listing the price of this model at \$979.99 (including shipping), he replied:

I don't know how much it costs in the market. I'm not an expert in this.

[32] Mr. Vetro was asked about specific instances of sales reps' misrepresentation and forged signatures reported in the media in 2016 and 2017. Mr. Vetro said in those cases the vendor cancelled the contract, removed the equipment and refunded the consumer. He conceded that door-to-door salespeople present a risk to Skymark if they say something that is unconscionable or deceptive.

Kadir Toraman

[33] Mr. Toraman immigrated to Canada from Turkey in 2003. In Turkey he completed high school and his wife completed grade 5. He works as a house painter and is the sole income earner for his family.

[34] Mr. Toraman credibly testified as follows.

[35] He did not initiate contact with Progressive. Two Progressive salesmen came to his house twice. At these times, his wife was pregnant and was in another room. She did not speak with the salesman. Mr. Toraman spoke with two salesmen the first time on September 23, 2016. Mr. Toraman continued:

Because of my English, I did not understand very well. One salesman did all the talking. I asked where they came from. They said they came from the city. After 15 minutes, I invited them into the house. He told me it's not healthy to drink water from the system. I told him back home we drink from the river.

I did not purchase a filter that day. I did not ask them to come back. My wife had our third daughter the next day, on September 24, 2016.

They came back after a couple of months, in February 2017. I told them about my newborn. I was worried about my baby's health and drinking the water because of my wife's two previous miscarriages. The salesman said the city's tap water is not safe. I always ask where they came from. They said Toronto city recommended them to install equipment in my house.

[36] On February 2, 2017, after Mr. Toraman's discussion with the salesman, Mr. Toraman signed the contract, then his wife signed it. Mr. Toraman testified:

I was to pay \$59.99/month. I don't remember being told that the number would increase every year. I signed because we thought it would be easy cancellation if we're not happy with this product. I thought we'd be able to call them and cancel. I don't recall being told how long we could cancel. I don't recall being told the cost of canceling.

[37] Mr. Toraman said the salesman did not explain page two of the contract. Mr. Toraman said he could not understand it because of his poor English and because the font is too small to read.

[38] He said he did not notice any positive change with the new filter. The water pressure was less than before and he could not take a good shower. He decided to change the filter for two reasons: (1) it was too big and took up a lot of space in their

basement; and (2) they did not need it. His Turkish-Canadian community confirmed the second point, assuring him “the Toronto water is not that bad”.

[39] He continued his narrative, which I accept as truthful and accurate:

I told my daughter to call the company and ask them what we need to cancel this contract and we didn't want this product anymore. My wife agreed with me. I found out from my daughter that it's not easy to cancel the contract. We have to pay \$10,000 or come to court. The salesman said it was easy. If you are not happy, you can cancel the contract.

I called the bank. I made stop payment. Bank put stop payment in place.

My daughter spoke with someone from Skymark. After stop payment, collection agency called me. I said my psychological situation -- depression, anxiety, seizure last March, see a psychologist every month -- was such that I couldn't handle the pressure. This debt situation has made this worse. \$10,000 is a lot of money to me. Even my car is not worth \$10,000.

[40] His daughter made the phone calls. He did not want to deal with this situation because of his psychological condition. At the time he did not understand that Progressive and Skymark were two different companies.

[41] When he noticed the water pressure got weaker, Mr. Toraman said he called a plumber. He did not call either Skymark or Progressive. Sometime in 2017 the plumber told him that this equipment causes a decrease of 30% in water pressure.

Sumeyra Toraman

[42] Ms Toraman, the defendants' 24-year-old daughter, testified they were not satisfied with the filter. She found out about the water filter when her mother complained about how big it was. They did not notice any difference in taste. They noticed that the water pressure went down.

[43] They could not pay for it. She remains confused about which company is which. The overall price was \$10,000 which she said was surprising and unnecessary. Until they got the filter, they never looked at prices. At Canadian Tire she saw a similar filter for \$400-\$500 and heard that the same one costs \$1,000. The same filter as that installed in their home cost \$979.99 at Costco Canada [Exhibit 5 - Costco Canada web page printout].

[44] She made calls for her mother because her mother does not speak English.

[45] When Ms Toraman called Skymark in around September 2017, Skymark said it would not cancel the contract because ten days had passed. The only option was to buy out the filter. This put a lot of stress on her family as they could not afford to buy out the filter.

[46] The Toramans received a lot of calls from Progressive about missed payments. Ms Toraman told them they could not pay for it. She spoke to the collection agency once about canceling the contract.

[47] I accept Ms Toraman's testimony as credible.

ANALYSIS

1. Did the salesman engage in unfair practices?

[48] As explained below, I find that the salesman engaged in unfair practices. They are prohibited by subsection 17(1) of the *CPA*. Under subsection 17(2), a person who performs even just *one* act referred to in section 14, 15 or 16 is deemed to be engaging in an unfair practice.⁴ In fact, while one act is enough, this case abounds with such practices.

[49] The contract came about largely because of the persistence of a Progressive door-to-door salesman. Unsolicited, he landed on the Toramans' doorstep and convinced them to buy a water filter.⁵ This elusive agent did not testify, and no explanation was given for this fact, thus supporting an adverse inference against the plaintiff.

[50] In my view, the agent's representations⁶ to the Toramans were (i) false, misleading or deceptive and (ii) unconscionable, as elaborated below.

⁴ *CPA*, section 17 reads:

Unfair practices prohibited

17 (1) No person shall engage in an unfair practice.

One act deemed practice

(2) A person who performs one act referred to in section 14, 15 or 16 shall be deemed to be engaging in an unfair practice.

⁵ The Ontario government banned unsolicited, door-to-door sales (known as "direct agreements") of certain household appliances, including water purifiers, to better protect consumers in legislation (specifically, section 43.1 of the *CPA*) that took effect March 1, 2018. Mr. Vetro acknowledged this fact in cross-examination. The applicability/retroactivity of section 43.1 was not argued.

⁶ Under the *CPA*, section 1:

"representation" means a representation, claim, statement, offer, request or proposal that is or purports to be,

(a) made respecting or with a view to the supplying of goods or services to consumers, or

(b) made for the purpose of receiving payment for goods or services supplied or purporting to be supplied to consumers;

(i) Section 14

[51] Under the *CPA*, “PART III - UNFAIR PRACTICES”,⁷ subsection 14(1) says:

False, misleading or deceptive representation

14 (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

[52] Subsection 14(2) provides inclusive examples of such representations. Applying subsection 14(2) to the present case, I find that the agent made false, misleading or deceptive representations as follows (emphasis added).

[53] 2. A representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection the person does not have.

Progressive’s agent represented that the filter was recommended by the City of Toronto. This is false.

[54] 10. A representation that a service, part, replacement or repair is needed or advisable, if it is not.

Progressive’s agent represented that the filter was needed because the City’s water was unsafe. This is false.

[55] 14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

Progressive’s agent implied that Mr. Toraman needed to buy the filter to safeguard his new baby. This representation deceived the Toramans.

[56] Hence, Progressive’s agent, and therefore Progressive, breached section 14. Thus, Progressive engaged in an unfair practice, which subsection 17(1) prohibits.

(ii) Section 15

[57] Also under the *CPA*, “PART III - UNFAIR PRACTICES”, section 15(1) says:

Unconscionable representation

15 (1) It is an unfair practice to make an unconscionable representation.

[58] Subsection 15(2) states that the court may take into account what the person making the representation knew or ought to have known. Applying subsection 15(2) to the instant case, and considering the context of the transaction, I find that the agent made an unconscionable representation as follows (emphasis added).

⁷ <https://www.ontario.ca/laws/statute/02c30#BK17>.

[59] (a) that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;

I accept Mr. Toraman's testimony that he did not read English well and that he did not understand the terms of the contract. Also, as the parties have agreed, Mrs. Toraman did not speak or read English well. The salesman exploited the Toramans' patent language and cultural disadvantages. The Toramans' inability to understand the contract was compounded by its absurdly minuscule print, requiring the eyes of an eagle to be read.

[60] (b) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;

The price was exorbitant. It was multiple times the price of the same or a similar filter in retail stores like Home Depot or Costco (about \$1,200) (Defendants' Exhibit – Home Depot, Costco, Aquasana, and other price comparisons). [Ex. 5], even considering any added value of delivery, installation and repair services and a ten-year warranty offered by Skymark. Thus, the evidence establishes that the price at which the filter was offered exceeded the market price to the level of unconscionability. In this context, I find that the agent made an unconscionable representation.⁸

[61] (e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

The transaction excessively favoured Progressive. It drafted the contract and profited from it. The beleaguered Toramans were saddled with an expensive piece of equipment they neither wanted nor needed.

[62] (f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

I find that the terms of the contract, including the grossly excessive price, to be so adverse to the Toramans as to be inequitable.

[63] (g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment;

As addressed above regarding section 14, the Toramans were misled. They detrimentally relied on the agent's misleading statements about their needing the filter,

⁸ Regarding price gouging, see, e.g., *Moore v. Capital Cyclonic Systems*, 1996 CarswellOnt 922, [1996] O.J. No. 966 at para. 24 (SCJ – SmCC), cited by the defendants' counsel. There the court took judicial notice of the fact that many superior products were available for a fraction of the price that the consumer paid for her vacuum cleaner. On the facts, a different result (favouring the seller construction company) was achieved in *Renaud v Endurowe Enterprises Inc.*, 1997 CarswellOnt 5883, [1997] O.J. No. 6054 (Gen. Div.). This case concerned a similar provision in the former *Business Practices Act*, which was the predecessor to the *CPA*. See also *Memorial Gardens Ontario v Ontario*, 6 O.R. (3d) 720 (C.A.).

the potability/safety of the city's water, the alleged recommendation by the City of Toronto and the risk to their baby's health if they did not use a filter.

[64] (h) that the consumer is being subjected to undue pressure to enter into a consumer transaction.

The Toramans never wanted a water filter. They never looked for one. They never asked for one. They never even thought about it. Why would they? "Back home we drink from the river" recalled Mr. Toraman. When a Progressive agent first popped up on the Toramans' doorstep, they sent him away. He returned anyway. The Toramans ultimately catapulted to his high-pressure tactics.

[65] Hence, Progressive's agent, and therefore Progressive, breached section 15. Thus, Progressive engaged in an unfair practice, which subsection 17(1) prohibits.

2. Is Skymark a bona fide purchaser for value of the contract from Progressive and therefore an innocent party?

[66] For the reasons that follow, I reject Skymark's argument that it is a bona fide purchaser for value and an innocent party.

[67] Skymark says in part:

If it is found that the Agreement ought to be set aside for either unfair trade practices or unconscionability, the Agreement is still valid as between the homeowners and Skymark. Skymark is a bona fide purchaser for value of the Agreement from Progressive. The law is clear that a contract will not be set aside as against a bona fide purchaser for value without notice.

...

Skymark purchased the Agreement from Progressive for \$4,550.00. Skymark, not Progressive, took on all the risk that the Toramans may default under the Agreement, which they have, and as a result Skymark has currently lost most of its investment on this deal.

[68] At law, an assignee takes both the benefits and the liabilities of the contract. Here, an assignee's rights to enforce the contract are subject to any remedies of the consumer. Whether at common law or under statute, the consumer's remedies are not extinguished by an assignment. Specifically, subsection 7(1) of the CPA says:

No waiver of substantive and procedural rights

7 (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

[69] This means the Toramans' substantive and procedural rights (and accompanying remedies) remain. These rights cannot be contracted out of or waived. Neither Progressive nor Skymark can unilaterally deprive the Toramans of their ability to escape an unfair bargain through a legal ruse based on the assignment of the contract. Skymark can have no greater rights than those of the assigning party (Progressive).

[70] The plaintiff claims to be an arm's length bona fide purchaser for value without notice.⁹ On the evidence I find that Skymark as the assignee either had actual "notice" of such possible liabilities or could have had "notice" of them with proper due diligence.

[71] I accept the submission of the defendants' counsel that Skymark is hardly an innocent and unaware victim of Progressive's wrongs. Indeed, Skymark acknowledged that it buys risky contracts and previously had issues with and/or knew about door-to-door sales agents' engaging in unfair practices. Further, fundamental facts like Skymark's business relationship with Progressive and Skymark's financing of Progressive's equipment leases with homeowners, cast doubt on Skymark's submission that it is an "arm's length" purchaser.

[72] While Skymark made some cursory verification inquiries with the Toramans,¹⁰ I am not satisfied that it exercised sufficient due diligence to ensure that the salesman did not breach the CPA and that the contract was valid. Skymark's measures were not enough. As the assignee of this contract, Skymark failed to take objectively reasonable safeguards. On the evidence, Skymark did not probe what the salesman told Mr. Toraman and what Mr. Toraman said in response. Skymark did not investigate the circumstances surrounding those communications and the subsequent resulting transaction.

[73] In addition, for instance, Skymark did not verify what was the fair market value of the filter sold to the Toramans.¹¹ Then Skymark did not follow up with the Toramans when, within one year, they communicated a desire to cancel the contract for the reasons I have stated.

Notice of cancellation

[74] Subsection 18(3) of the CPA reads:

Notice

(3) A consumer must give notice within one year after entering into the agreement if,

⁹ The governing legal principles are discussed in *i Trade Finance Inc. v. Bank of Montreal*, 2011 SCC 26. There, unlike in the instant case, the Court determined the nature of competing interests under Ontario's *Personal Property Security Act*, R.S.O. 1990, c. P.10. In the case at bar, the plaintiff's representative cited the Ontario Court of Appeal decision, *Bank of Montreal v. iTrade Finance Inc.*, 2009 ONCA 615, which the Supreme Court of Canada affirmed. Notably, this case did not deal with a situation governed by consumer protection legislation. Rather, the case involved sophisticated parties who were both deceived by a long-departed fraudster.

¹⁰ When Mr. Slattery of Skymark phoned the Toramans, he asked Mr. Toraman rudimentary things, like whether the Progressive agent was properly identified, whether they knew the basic payment terms, and whether they were satisfied with the installation of the purifier. Mr. Slattery did not fully explore what the salesman told Mr. Toraman.

¹¹ Mr. Vetro, Skymark's only witness, has been with the company for seven years in consumer financing of home equipment. As noted, he frankly conceded: "I don't know how much it costs in the market. I'm not an expert in this."

- (a) the consumer seeks to rescind an agreement under subsection (1); or
- (b) the consumer seeks recovery under subsection (2), if rescission is not possible.

[75] On the evidence, I accept that the Toramans took steps to try to rescind the contract within one year of executing it. They tried to pay Skymark, but were struggling financially. The evidence, including the telephone conversations and the six NSF payments [Ex 1-3], demonstrates that Skymark was well aware of this fact.

[76] When Sumeysra Toraman called Skymark in around September 2017 on her mother's behalf, Mr. Vetro declined to cancel the contract because ten days had passed. He told her the only option was to buy out the filter. Mr Vetro offered to remove five of six missed payment NSF fees. Sumeysra Toraman asked him whether paying the remaining balance of \$143.06 would be sufficient "to cancel [the contract]".

[77] Mr. Vetro did not accept this final phone call as notice that the contract was being cancelled. He told Ms Toraman it would be difficult to cancel the contract, if it were possible at all, and that someone would get back to them. No one did. Mr. Vetro testified that he could not find a follow-up email to Ms Toraman.

[78] I find the Toramans' wanted to cancel the contract because of financial hardship and the large expense for equipment that they later discovered they did not need, that took up space in their basement and that considerably reduced their water pressure.

[79] In my view, the Toramans gave effective notice of cancellation under subsections (4) and (5), which provide:

Form of notice

(4) The consumer may express notice in any way as long as it indicates the intention of the consumer to rescind the agreement or to seek recovery where rescission is not possible and the reasons for so doing and the notice meets any requirements that may be prescribed.

Delivery of notice

(5) Notice may be delivered by any means.

[80] Their notice to cancel was expressed orally. The evidence of their words and actions clearly shows that the Toramans could not afford the filter and that this fact grounded their desire to cancel the contract.

[81] Even if this notice were not compliant with subsections (4) and (5), the following saving provision in subsection (15) is engaged:

Waiver of notice

(15) If a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in

the interest of justice to do so. [Emphasis added.]

[82] In my view, disregarding the notice requirements is in the interests of justice in the circumstances of this particular case.

[83] My conclusion is fortified by the *Courts of Justice Act*,¹² section 25, which reads:

25. The Small Claims Court shall hear & determine in a summary way all questions of law & fact and may make such order as is considered just & agreeable to good conscience. [Emphasis added.]

[84] This principle is reinforced by the common law doctrine of unconscionability and conduct that “shocks the conscience”.¹³

3. What is the appropriate remedy?

[85] I hold that the appropriate remedy for Progressive’s engaging in unfair practices in this particular case is rescission.

[86] Subsection 18(1) of the *CPA* reads:

Rescinding agreement

18 (1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

[87] The remedy under the *CPA* reflects that at common law.¹⁴

[88] Skymark’s representative argues that the hurdle to set aside a contract for unfair practices and unconscionability is high.¹⁵ Yet, it is elemental that the main objective of

¹² R.S.O. 1990, c. C.43.

¹³ See *Halsbury's Laws of Canada* (Toronto: LexisNexis Canada), Restitution (2017 Reissue), Kevin P. McGuinness, HRE-30.

¹⁴ At common law, the rescinding party may treat the contract as if it were void *ab initio* (from the beginning); that is, the contract is terminated and the parties, as between them, are put in the position in which they stood before they entered the contract. See, e.g., *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CarswellOnt 3171 at paras. 39–45; *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773 at 781 (U.K. H.L.).

¹⁵ Citing *Centennial Windows Ltd. v. Le*, 2015 CarswellOnt 16273 at para. 42 (SCJ – SmCC) and *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573.

consumer protection legislation, such as the *CPA*, is to protect consumers.¹⁶ Thus, however strict is the test to set aside a contract, in these particular circumstances I find that the evidence is sufficiently strong to meet that test.

[89] Subsection 18(14) reads in pertinent part:

Effect of rescission

(14) When a consumer rescinds an agreement under subsection (1), such rescission operates to cancel, as if they never existed,

(a) the agreement;

(b) all related agreements;

...

(d) all security given by the consumer ... in respect of money payable under the agreement;

[90] Therefore, as applied to the present case, the contract and all related agreements, including the assignment agreement and any financing agreement,¹⁷ and the registered security interest,¹⁸ are cancelled.

[91] In the result, the Toramans are entitled to be reimbursed for the money they paid to lease the filter. In return, Skymark, as assignee, is entitled to take possession of the filter.

How much did the Toramans pay?

[92] Based on Skymark's Customer Balance Detail (September 12, 2018) [Ex 1-4], the Toramans paid **\$678.64** consisting of the following cleared payments:

<i>Date</i>	<i>Amount paid</i>
May 1, 2017	\$67.79
August 1, 2017	\$67.79
October 13, 2017	\$400.00
October 20, 2017	\$143.06

¹⁶ *Richard v. Time Inc.*, [2012 SCC 8](#) at para. 50; *Weller v. Reliance Home Comfort Limited Partnership*, [2012 ONCA 360](#) at para. 15; see also *Wilson v. Semon*, 2011 CarswellOnt 15953 at paras. 10, 14 (SCJ).

¹⁷ The acknowledgment at the bottom of the Certificate of Completion [Ex 1-2] refers to "Skymark Finance Corporation Credit Application and Agreement between Skymark Finance Corporation and customer". Documents so-named were neither adduced at trial nor addressed in oral testimony.

¹⁸ As referred to in paragraph 5 of the contract.

Total	\$678.64

DISPOSITION

[93] For the above reasons, Skymark's claim is dismissed and the contract is cancelled. Skymark is to reimburse the Toramans the money they paid to lease the water filter in the sum of **\$678.64** in exchange for the Toramans' making the filter available to Skymark to take possession within 30 days.

[94] In my view, based on the evidence, legal authorities and parties' submissions, and applying the civil standard of proof (balance of probabilities), this order is "just and agreeable to good conscience."¹⁹

COSTS

[95] I would urge the parties to come to an agreement on costs. If there were any pertinent Rule 14 settlement offers, and/or the parties cannot agree on a costs resolution, the parties may make written submissions. They are to be emailed to my attention to torontosmallclaimscourt@ontario.ca by Friday, July 17, 2020. Otherwise, my below costs order stands.

[96] My discretion to award costs²⁰ is based on several factors, including those listed under Rule 57.01 of the *Rules of Civil Procedure*²¹, and those provided at common law. They include the result, the principles of indemnity and proportionality, the amount claimed and recovered, complexity, the importance of the issues, the amount of costs that an unsuccessful party could reasonably expect to pay, and any party's conduct.

[97] In Small Claims Court a successful party is generally entitled to costs on a partial indemnity basis. Here, the Toramans were entirely successful. The trial took one day, followed by carefully-crafted written submissions, and raised genuine issues. Bearing in mind such considerations as the success, the above factors, the governing legislation, the duration of the trial, and the utility of the written submissions, the Toramans are entitled to their reasonable disbursements²² (including court costs) and a reasonable legal representation fee.²³

¹⁹ *Courts of Justice Act*, R.S.O. 1990, c. C.43, section 25.

²⁰ *Ibid*, section 131(1).

²¹ R.R.O. 1990, Reg. 194.

²² Under rule 19 of the *Small Claims Court Rules*, O. Reg. 258/98 under the *Courts of Justice Act*.

²³ The general limit on costs for legal representation is 15% of the amount claimed under section 29 of the *Courts of Justice Act*.

[98] I have received no costs submissions from the defendants. Accordingly, I set reasonable disbursements (including court costs) at \$300 and representation fee at \$1,000.

[99] In sum, Skymark is to pay costs of **\$1,300** to the Toramans. In my opinion, this is fair and reasonable in the circumstances.

[100] I thank the plaintiff's representative and the defendants' counsel for their assistance, diligence and professionalism.

A handwritten signature in dark ink, appearing to read "Gannage DJ".

Deputy Judge Gannage

June 29, 2020