

STATE OF NORTH CAROLINA
WAKE COUNTY

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 18 CVS 012725

2019 SEP -3 | A 11: 11

STATE OF NORTH CAROLINA *ex rel.* WAKE COUNTY)
JOSHUA H. STEIN, Attorney General,)

Plaintiff,)

v.)

NICHOLAS KYLE DOWNEY, Individually,)
ACTION TREE PROS, INC., JEREMY RYAN)
BUGG, Individually, PREMIER)
LANDSCAPING & LAWN CARE, LLC.,)
TONY BRADLEY ANDERSON, Individually,)
and TRICO TREE SERVICE, LLC,)

Defendants.)

JUDGMENT BY DEFAULT

**AGAINST DEFENDANTS
NICHOLAS KYLE DOWNEY,
Individually, and ACTION TREE
PROS, INC.**

PURSUANT TO RULE 55 OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE, the undersigned Judge presiding over the September 3, 2019, civil session of Wake County Superior Court grants the Motion for Judgment by Default Against Defendants Nicholas Kyle Downey, individually, and Action Tree Pros, Inc. filed by Plaintiff State of North Carolina, *ex rel.* Joshua H. Stein, Attorney General. From the record herein, the Court finds as follows:

I. PARTIES

1. The Plaintiff in this case is the State of North Carolina, acting through its Attorney General, Joshua H. Stein, pursuant to authority granted in Chapters 75 and 114 of the North Carolina General Statutes to protect the consuming public from unlawful business practices.

2. Defendant Nicholas Kyle Downey resides at 1424 Adams Lane, Henderson, Kentucky. At all times relevant to this action, he engaged in the tree cutting and removal business through Action Tree Pros, Inc.

3. Defendant Action Tree Pros, Inc. is a Kentucky corporation, with its principal place of business at 312 1st Street, Henderson, Kentucky. Defendant Downey is the sole owner, and is managing agent, of Action Tree Pros, Inc.

II. FINDINGS OF FACT

4. The State filed its Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunction, with supporting affidavits, on October 17, 2018.

5. The Court entered a Temporary Restraining Order in the action on October 18, 2018.

6. The Court entered a Preliminary Injunction against defendants Downey and Action Tree Pros, Inc. on November 2, 2018.

7. On November 16, 2018, the State filed its Amended Complaint, which alleges, *inter alia*, that defendants Downey and Action Tree Pros, Inc.:

a. Violated North Carolina's price gouging law, N.C. Gen. Stat. § 75-38, by:

- i. demanding payment of \$10,565.00 for tree removal work done at 930 Hunting Ridge Road, Wilmington, North Carolina, with the knowledge and intent to charge for services used during a state of emergency as a result of the emergency at an unreasonably excessive price under the circumstances;
- ii. demanding payment of \$23,500.00 for tree removal work done at 3260 Camden Circle, Wilmington, North Carolina, with the knowledge and intent

- to charge for services used during a state of emergency as a result of the emergency at an unreasonably excessive price under the circumstances; and
- iii. demanding payment of \$15,300.02 for tree removal work done at 1002 Hunting Ridge Road, Wilmington, North Carolina, with the knowledge and intent to charge for services used during a state of emergency as a result of the emergency at an unreasonably excessive price under the circumstances;
- b. Violated the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, by:
- i. performing—or directing others to perform—tree removal services at the following properties when they had no authority to do so and after being specifically instructed not to do so:
 1. 3260 Camden Circle, Wilmington, North Carolina
 2. 512 N. 10th Street, Wilmington, North Carolina
 3. 230 W. Bedford Road, Wilmington, North Carolina
 4. 513 Diane Drive, Wilmington, North Carolina
 5. 2110 Creecy Avenue, Wilmington, North Carolina
 - ii. Engaging in “bait-and-switch” schemes whereby defendants Downey and Action Tree Pros, Inc.:
 1. lured a property manager to agree to allow defendants Downey and Action Tree Pros, Inc. to perform tree removal services at 930 Hunting Ridge Road for \$5,000.00, then later demanded payment for \$10,565.00 for the work, and

2. lured a homeowner to agree to allow defendants Downey and Action Tree Pros, Inc. to perform tree removal services at 1002 Hunting Ridge Road for \$4,500.00, then later demanded payment for \$15,300.20 for the work.

iii. Making threats and other unfair or deceptive representations aimed at inducing the owners or their agent to pay an inflated price for tree removal work, which they would otherwise not agree to;

8. The Amended Complaint further alleges that defendant Action Tree Pros, Inc. violated N.C. Gen. Stat. § 55-15-01 by conducting business in North Carolina without registering with the North Carolina Secretary of State as a foreign corporation.

9. The Amended Complaint requests permanent injunctive relief; assessment of civil penalties; consumer restitution; and cancellation of all express, implied, or constructive contracts or *quantum meruit* rights, as authorized by N.C. Gen. Stat. § 75-1.1, *et seq.*

10. On July 10, 2019, the State filed (1) a Motion for Entry of Default against defendants Downey and Action Tree Pros, Inc. pursuant to Rule 55(a) of the North Carolina Rules of Civil Procedure; and (2) an Affidavit of Service of Summons and Complaint establishing that defendants Downey and Action Tree Pros, Inc. accepted service of the Summons and Complaint.

11. On July 11, 2019, the Wake County Clerk of Court entered Entry of Default against defendants Downey and Action Tree Pros, Inc. upon the State's motion.

12. On July 25, 2019, the State filed a Motion for Judgment by Default with this Court, moving that this Judgment by Default against defendants Downey and Action Tree Pros, Inc. be granted pursuant to Rule 55(b)(2) of the North Carolina Rules of Civil Procedure.

13. On September 3, 2019, the State filed an affidavit establishing that defendants Downey and Action Tree Pros, Inc. received timely notice of this hearing.

III. CONCLUSIONS OF LAW

14. This Court has jurisdiction over defendants Downey and Action Tree Pros, Inc. and the subject matter of this action because these defendants conducted business in the State of North Carolina.

15. Defendants Downey and Action Tree Pros, Inc. accepted service of the complaint and summons.

16. Defendants Downey and Action Tree Pros, Inc. have failed to file a responsive pleading either to the original Complaint filed on October 17, 2018 or the Amended Complaint filed on November 16, 2018, and thus all of the allegations made by the State in the Amended Complaint against defendants Downey and Action Tree Pros, Inc. are deemed admitted.

17. From the record in this case, the State has made a sufficient showing that defendants Downey and Action Tree Pros, Inc. violated North Carolina's prohibition on price gouging during a state of emergency, under N.C. Gen. Stat. § 75-38, and North Carolina's Unfair and Deceptive Trade Practices Act, under N.C. Gen. Stat. § 75-1.1, and that Action Tree Pros, Inc. violated N.C. Gen. Stat. § 55-15-01 by conducting business in North Carolina without registering with the North Carolina Secretary of State as a foreign corporation.

18. The Amended Complaint states a claim upon which relief may be granted against defendants Downey and Action Tree Pros, Inc. The conduct alleged in the Amended Complaint is in or affecting commerce.

19. Defendants Downey and Action Tree Pros, Inc. are not infants, incompetent persons, or otherwise under a disability.

20. Defendants Downey and Action Tree Pros, Inc. are liable to the State for the relief requested by reason of the facts shown in the Amended Complaint filed in this action.

21. This Court concludes that good and sufficient cause exists for entry of this Judgment by Default against defendants Downey and Action Tree Pros, Inc. pursuant to N.C. Gen. Stat. § 75-1.1 *et seq.* and Rule 55(b) of the North Carolina Rules of Civil Procedure.

IV. RELIEF

IT IS THEREFORE ORDERED THAT:

22. Defendants Downey and Action Tree Pros, Inc., together with their agents, employees, representatives, subcontractors, successors and assigns, and any persons acting in concert with these defendants, are hereby permanently restrained and enjoined from:

- i. engaging in unfair or deceptive acts or practices in violation of N.C. Gen. Stat. § 75-1.1, including but not limited to the acts and practices listed in paragraph 7(b) of this Judgment;
- ii. engaging in price gouging in violation of N.C. Gen. Stat. § 75-38;
- iii. advertising, offering, soliciting, or entering into contracts, or receiving payment for any tree or bush trimming or removal services, debris removal, or storm damage recovery or restoration services in North Carolina;
- iv. performing or providing any tree or bush trimming or removal services, debris removal, or storm damage recovery or restoration services in North Carolina; and
- v. requesting or receiving payment for any tree or bush trimming or removal services, debris removal, or storm damage recovery or restoration services performed in North Carolina after September 7, 2018.

23. Pursuant to N.C. Gen. Stat. § 75-15.1 defendants Downey and Action Tree Pros, Inc., jointly and severally, shall pay to the State \$2,500.00 in consumer restitution.

24. Pursuant to N.C. Gen. Stat. § 75-15.1, all express, implied, or constructive contracts, between defendants Downey and Action Tree Pros, Inc., their agents, employees, and corporate successors or assigns, and any person acting in concert with them, and the owners (or their property manager or insurers) of the properties described in paragraph 7 of this Judgment are cancelled, and all *quantum meruit* rights that defendants Downey and Action Tree Pros, Inc. may have in work done at those properties are extinguished.

25. The State, pursuant to N.C. Gen. Stat. § 75-15.2, shall have and recover from defendants Downey and Action Tree Pros, Inc., jointly and severally, a civil penalty of 1000.00 for each of the 11 violations of N.C. Gen. Stat. §§ 75-1.1 and 75-38 enumerated above, in the amount of 11,000.00. Accordingly, the total amount of this Judgment against defendants, joint and severally, including the restitution specified in paragraph 22, is \$13,500.00.

SO ORDERED, this the 3rd day of Sept 2019.



SUPERIOR COURT JUDGE

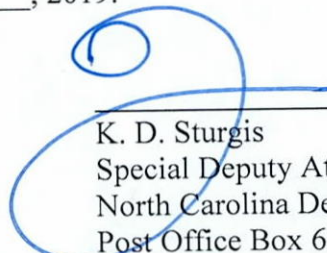
CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing **JUDGMENT BY DEFAULT AGAINST DEFENDANTS NICHOLAS KYLE DOWNEY, Individually, and ACTION TREE PROS, INC.** on defendants by U.S. Mail, postage prepaid, addressed as follows:

Nicholas Kyle Downey
3039 Fieldstone Drive
Henderson, KY 42420

Action Tree Pros, Inc.
c/o Nick Downey, Registered Agent
312 1st Street
Henderson, KY 42420

This the 3rd day of Sept, 2019.



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