

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2850-09T3

ALEX PEREZ and CATHY PEREZ,

Plaintiff-Appellants,

v.

PROFESSIONALLY GREEN, LLC, BRIAN
HERE, individually, NORMAN TARANTO,
individually, WEISSMAN
ENGINEERING CO., P.C., ROBERT J.
WEISSMAN, individually, VCA SONS,
INC., t/a FREEDOM FENCE, INC., and
VINCENZO ANELLO, individually,

Defendants,

and

SWIM-WELL POOLS, INC.,

Defendant-Respondent.

Argued December 1, 2010 - Decided October 13, 2011

Before Judges Gilroy and Nugent.

On appeal from the Superior Court of New
Jersey, Law Division, Bergen County, L-880-
07.

Edward R. Grossi argued the cause for
appellants (Anthony P. Ambrosio, attorney;
Mr. Grossi, on the brief).

Jerald J. Howarth argued the cause for
respondent (Howarth & Associates, LLC,
attorneys; Mr. Howarth and Purnima D.
Ramlakhan, on the brief).

PER CURIAM

Plaintiffs Alex Perez and Cathy Perez appeal from a January 13, 2010 Law Division order that denied their application for an award of attorneys' fees and costs under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, against defendant Swim-Well Pools, Inc. (Swim-Well). We reverse.¹

The combined statement of facts and procedural history is as follows. Plaintiffs own a residence in Franklin Lakes, New Jersey. On March 8, 2004, they contracted with defendant Weissman Engineering Co., P.C., to prepare plans for the installation of an in-ground swimming pool, and on March 15, 2004, they contracted with Swim-Well to install the pool. Plaintiffs subsequently contracted with defendant Professionally Green, LLC, to perform paving and landscaping around the pool,

¹ Although the underlying action was tried to a jury and dismissed at the conclusion of plaintiffs' case, plaintiffs did not provide a copy of the trial transcripts as part of the appellate record. Accordingly, we gather the facts from the scant record provided that includes: a copy of the amended complaint, the trial court's order of July 21, 2009, granting plaintiffs' motion for partial summary judgment, the transcript of plaintiffs' motion seeking an award of attorneys' fees and costs, the January 13, 2010 order denying plaintiffs' motion for an award of attorneys' fees and costs, and portions of the underlying cross-motions for summary judgment and motion for fees and costs leading to the orders of July 21, 2009 and January 13, 2010.

and defendant VCA Sons, Inc., to construct a fence to enclose the pool.

After construction disputes arose among the parties, plaintiffs filed a complaint against defendants. They amended the complaint on March 2, 2009, and alleged causes of action for breach of contract, negligence, breach of warranty, breach of implied warranty of fitness for a particular use, and consumer fraud.² The consumer fraud claims against Swim-Well were based on the following allegations: (1) Swim-Well's contract with plaintiffs did not include the start and end dates for construction of the pool; (2) the contract did not include a statement of guarantee or warranty with respect to labor and services provided and a provision allowing plaintiffs to cancel the contract (the warranty allegations); and (3) the contract did not include a mandatory cancellation warning (the cancellation allegation). Plaintiffs alleged they suffered an ascertainable loss by losing the use of the pool for the summer.

On May 27, 2009, plaintiffs moved for partial summary judgment against Swim-Well, Professionally Green, VCA, and their principals, seeking a judgment that those defendants violated

² The amended complaint named as defendants the entities and their principals: Brian Here of Professionally Green, Norman Taranto of Swim-Well, Robert J. Weissman of Weissman Engineering, and Vincenzo Anello of Freedom Fence.

the CFA and that plaintiffs suffered an ascertainable loss caused by the violations. Swim-Well opposed the motion on the ground that plaintiffs failed to establish a prima facie showing of an ascertainable loss, or, alternatively, that the ascertainable loss issue "must be determined at trial." Swim-Well also filed a cross-motion for partial summary judgment seeking dismissal of the consumer fraud claims based on the warranty and cancellation allegations. Swim-Well did not move to dismiss the CFA claim based on the absence of a start and end date in the contract.

On July 21, 2009, the trial judge granted partial summary judgment to plaintiffs on the CFA claim that alleged Swim-Well and Professionally Green did not include start and end dates in their contracts. The judge ruled that N.J.A.C. 13:45A-16.2(a)(12) required that the contracts "clearly and accurately set forth in legible form and in understandable language . . . [t]he dates or time period on or within which the work is to begin and be completed by the seller" Finding the Swim-Well and Professionally Green contracts contained no such dates, the judge explained that the omissions "constitute[d] technical violations of the [CFA]" and that plaintiffs were "entitled to recover attorneys' fees and costs in accordance with the holding in Cox[v. Sears Roebuck & Co., 138 N.J. 2 (1994)]." The judge

stated that Cox required an award of treble damages and attorneys' fees if a CFA plaintiff proved both an unlawful practice and an ascertainable loss. The judge explained:

In the instant matter, Plaintiff[s] claim that they suffered an ascertainable loss because by not knowing when Defendants were going to complete their work, the Plaintiff[s] could not use their patio and/or pool during the summer of 2004, which was the time period in which the Plaintiff[s] expected the patio to be complete. Defendants contend that the Plaintiff[s] failed to prove that the failure to include start and completion dates in the contract were either material to the contract or proximately caused Plaintiffs' alleged damages. Defendants further argue that because the Plaintiffs' pool plan was not approved until July 1, 2004, and the work did not commence until after the permits were issued on July 16, 2004, a jury could conclude that Plaintiffs' expectation of enjoying the pool in the summer of 2004 was unrealistic and therefore does not amount to an ascertainable loss. Consequently, a question of fact remains as to whether the Defendants' failure to include start and completion dates in the contracts caused an ascertainable loss by the Plaintiff[s]. Therefore, whether Plaintiff[s] suffered an ascertainable loss and are entitled to treble damages is a question that should be decided by the jury at trial.³

On July 22, 2009, the trial judge entered an order that granted Swim-Well's cross-motion for partial summary judgment

³ Because the parties have not raised in this appeal the question of whether the temporary loss of use of the pool constitutes an ascertainable loss under the CFA, we do not address that issue.

and dismissed with prejudice plaintiffs' consumer fraud claims based on the warranty and cancellation allegations. Plaintiffs' remaining consumer fraud and negligence claims against Swim-Well proceeded to trial.

Following the close of plaintiffs' proofs at trial, Swim-Well moved for an involuntary dismissal of the CFA claim pursuant to Rule 4:37-2(b), arguing that plaintiffs failed to establish they suffered an "ascertainable loss" caused by the "technical violation" of failing to include start and end dates in the contract. The trial judge granted the motion, finding that plaintiffs failed to establish a prima facie showing of an ascertainable loss. The jury subsequently returned a no cause for action verdict in favor of Swim-Well on plaintiffs' negligence claim.⁴

Plaintiffs filed a post-trial motion seeking counsel fees and costs pursuant to the CFA. The trial judge denied their application in an order dated January 13, 2010, supported by a statement of reasons. The judge rejected plaintiffs' argument that Weinberg v. Sprint Corp., 173 N.J. 233 (2002), permits recovery of attorneys' fees and costs when the issue of

⁴ According to Swim-Well's brief, plaintiffs settled with Professionally Green, LLC before trial, and the jury returned a verdict of no cause for action against Robert Weissman and Weissman Engineering Co.

ascertainable loss is dismissed as a matter of law. The judge ruled that Pron v. Carlton Pools, Inc., 373 N.J. Super. 103 (App. Div. 2004), was dispositive of the counsel fee issue, quoting the following language from Pron:

[W]here the defendant obtains a motion for involuntary dismissal at the end of the plaintiffs' case for failure to prove an ascertainable loss, and the defendant is not required to present its defense to the plaintiff's claim, and the factfinder, whether judge or jury is not called upon to decide whether an ascertainable loss has been proved, plaintiff is not entitled to recover attorneys' fees.

[Id. at 113.]

On appeal, plaintiffs contend that the trial court's reliance on Pron led to the wrong result. They argue that Pron relied on technical reasoning rather than legislative intent. Acknowledging that N.J.S.A. 56:8-19 requires that a plaintiff suffer an ascertainable loss to recover attorneys' fees, plaintiffs argue that Pron's extension of Weinberg undermines the CFA's objectives of expanding protection for New Jersey consumers and enabling them to pursue consumer fraud actions without experiencing financial hardship.

Swim-Well argues that the trial court's decision should be affirmed for procedural and substantive reasons. As to the procedural reasons, Swim-Well contends that plaintiffs did not argue in the trial court nor include in their Notice of Appeal

or Civil Case Information Statement the issue now raised in their brief, and did not provide copies of the trial transcripts. As to the substantive reasons, Swim-Well contends that to have standing under the CFA to recover counsel fees, a plaintiff must present sufficient evidence of an ascertainable loss to reach the factfinder. Swim-Well also argues that plaintiffs did not defeat a summary judgment motion on the issues of the absence of start and end dates in the contract, and ascertainable loss, because it never filed such a motion, and therefore Pron is dispositive of the parties' dispute.

This appeal requires us to decide whether a plaintiff who proves a technical violation of the CFA and demonstrates a triable issue of ascertainable loss on a summary judgment motion, but fails to present sufficient proofs to avoid an involuntary dismissal at the close of his or her proofs at trial, has standing to recover attorneys' fees. Our review of this legal issue is de novo. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Preliminarily, we address Swim-Well's argument that plaintiffs did not survive a summary judgment motion. Swim-Well concedes that the Supreme Court defined "bona fide claim of ascertainable loss to mean one which is supported by sufficient evidence to withstand a motion for summary judgment[,]"

Weinberg, supra, 173 N.J. at 254, but maintains that because it did not move for summary judgment on the CFA claim based on the absence of start and end dates in its contract, plaintiffs cannot be deemed to have survived such a motion. We disagree.

Plaintiffs moved for and were awarded partial summary judgment on that very issue. Swim-Well has offered no reason for distinguishing the situation where a CFA plaintiff survives a summary judgment motion on the issue of ascertainable loss, from the situation where the plaintiff successfully moves for partial summary judgment on a technical violation of the CFA and demonstrates a triable issue as to ascertainable loss. In the latter situation the threshold is arguably higher for a CFA plaintiff because under the summary judgment standard the trial judge must view the competent evidential materials presented in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Here, Swim-Well opposed plaintiffs' partial summary judgment motion on the basis of ascertainable loss and argued, alternatively, that the issue of ascertainable loss required resolution by the jury. Had the judge determined there was no triable issue as to whether plaintiffs suffered an ascertainable loss, plaintiffs would not have been granted partial summary judgment. Swim-Well's argument is therefore unpersuasive.

That said, we turn to plaintiffs' argument concerning the trial judge's denial of an award of attorneys' fees and costs. The CFA was enacted in 1960 "'to permit the Attorney General to combat the increasingly widespread practice of defrauding the consumer.'" Cox, supra, 138 N.J. at 14 (quoting Senate Committee, Statement to the Senate Bill No. 199 (1960)). In 1971, the CFA "was amended to permit individual consumers to bring private actions" Weinberg, supra, 173 N.J. at 248.

The addition of a private cause of action . . . promoted several purposes[] [by] . . . creat[ing] an efficient mechanism to: (1) compensate the victim for his or her actual loss; (2) punish the wrongdoer through the award of treble damages; and (3) attract competent counsel to counteract the community scourge of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual.

[Id. at 249 (internal citations and quotations omitted).]

The CFA has been characterized as one of the strongest consumer protection laws in the nation, see Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 555 (2009), with a history "of constant expansion of consumer protection." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997). Because the CFA is remedial, it should be construed liberally in favor of consumers. Cox, supra, 138 N.J. at 15. Nonetheless, a

consumer's standing to recover under the CFA is not without limits.

The statutory provision circumscribing private causes of action, N.J.S.A. 56:8-19, provides that in order to have standing a consumer must suffer an "ascertainable loss of moneys or property" as a result of a violation of the CFA. Weinberg, supra, 173 N.J. at 250. See also Laufer v. U.S. Life Ins. Co., 385 N.J. Super. 172, 186 (App. Div. 2006). Given the enhanced remedies of treble damages and counsel fees available under the CFA, "[t]he ascertainable loss requirement operates as an integral check upon the balance struck by the CFA between the consuming public and sellers of goods." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 251 (2005). However, "[t]o say that a plaintiff must present a claim of ascertainable loss to have standing under the [CFA] does not require that the claim ultimately prove successful." Weinberg, supra, 173 N.J. at 251. "A claim may be unsuccessful for any number of reasons even though it was brought in good faith and has support in the facts." Ibid.

In Weinberg, the Supreme Court rejected the plaintiff's invitation "to eliminate the statutory distinction between the standing of the Attorney General and a private plaintiff, and to allow a private injunctive action for consumer fraud

irrespective of the plaintiff's ability to claim ascertainable loss." Id. at 237. Instead, the Court concluded "that to have standing . . . a private party must plead a claim of ascertainable loss that is capable of surviving a motion for summary judgment." Ibid.

The only prerequisite for maintenance of a private action to remedy a violation of the Consumer Fraud Act is that "[the] plaintiff must present a claim of ascertainable loss." Weinberg v. Sprint Corp., 173 N.J. 233, 251 (2002). . . . The [CFA] does not require a private plaintiff's claim of ascertainable loss to "ultimately prove successful." Ibid. The plaintiff is only required to "plead a claim of ascertainable loss that can survive a motion for summary judgment." Id. at 253. Once this threshold standing requirement is satisfied, the plaintiff can pursue "all available remedies, including an injunction, . . . even if the plaintiff ultimately loses on his damage claim but does prove an unlawful practice under the [CFA]." Ibid.

[Laufer, supra, 385 N.J. Super. at 186.]

In Pron, we explained that "[t]he standard for granting summary judgment and the standard for granting an involuntary dismissal at the end of the plaintiff's case are the same and functional equivalents." Pron, supra, 373 N.J. Super. at 112. Plaintiffs urge that we overrule Pron as an unwarranted extension of Weinberg. We decline to do so. Pron is distinguishable from both Weinberg and this case.

In Weinberg, the plaintiff failed to meet the summary judgment standard in demonstrating a triable issue as to an ascertainable loss. Weinberg, supra, 173 N.J. at 253. Pron did not involve a summary judgment motion. Instead, the plaintiff's claim of ascertainable loss was first tested when the defendant moved for an involuntary dismissal at trial. Unlike the plaintiff in Weinberg and plaintiffs here, the plaintiff in Pron had neither opposed nor filed a summary judgment motion.

Swim-Well argues that Weinberg and Pron require that to have standing under the CFA, a plaintiff must establish a prima facie case that is ultimately decided by the factfinder. We reject that argument. Weinberg required only that a CFA plaintiff demonstrate a bona fide claim of ascertainable loss. Weinberg, supra, 173 N.J. at 253. The Supreme Court reasoned that "if [a] plaintiff ultimately loses on his damage claim but does prove an unlawful practice under the [CFA,] [t]he [CFA's] remedial purposes are promoted thereby and the Legislature's requirement of ascertainable loss for a private cause of action is respected." Ibid. We do not read Weinberg as requiring a CFA plaintiff to overcome the double hurdle of surviving both a summary judgment and a motion for involuntary dismissal to demonstrate a bona fide claim of ascertainable loss. Although the Court more than once referred to resolution of a CFA

plaintiff's claim by the factfinder, such references were made in the context of the Court's discussion of the summary judgment motion standard.

Defendant does not challenge the trial court's determination that plaintiffs established by their summary judgment motion a violation of the CFA as well as a triable issue for the factfinder. That determination satisfied the requirement that plaintiffs demonstrate a bona fide claim of ascertainable loss. Accordingly, we reverse the January 13, 2010 order denying plaintiff's application for attorneys' fees and costs and remand for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION