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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-o

MARY PEZZUTO,

Plaintiff-Respondent,

v.

MURPHY PAVING COMPANY

and JEFF MURPHY,

Defendants-Appellants.

May 14, 2014

Submitted April 29, 2014 –
Decided

Before Judges Fisher and
Espinosa.

On appeal from Superior Court of
New Jersey, Law Division, Special
Civil Part, Monmouth County,
Docket No. DC-7390-10.

Jeff Murphy, appellant pro se.

George E. Veitengruber, III,
attorney for respondent.

PER CURIAM

Defendant Jeff Murphy, who operates Murphy Paving Company, (collectively, "defendant") appeals from a judgment entered in favor of plaintiff Mary Pezzuto after a jury found defendant liable for damages of \$2680 for breach of contract. Citing the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -195, the trial court ordered defendant to pay treble damages in the amount of \$5360 in addition to ordering \$2680 in actual damages. The trial court denied plaintiff's request for fees and costs.

Defendant argues that the jury's verdict was against the weight of evidence and that the trial court erred in ordering treble damages pursuant to the CFA. Because the record does not show that defendant moved for a new trial, we will not consider the argument that the jury's verdict was against the weight of evidence. See R. 2:10-1; Fiore v. Riverview Med. Ctr., 311 N.J. Super. 361, 362-63 (App. Div. 1998). However, for reasons to be discussed, we vacate the award of treble damages and direct that the trial court's judgment be modified to reduce the amount of damages to \$2680.

The facts of the case can be summarized as follows. Defendant was hired by plaintiff to pave the driveway at her home in October 2009. Before work began, plaintiff paid \$3200 of the

total estimated cost of \$6550. When the paving was complete, plaintiff noticed several deficiencies in the work performed. Specifically, the paving elevated the level of the driveway so that a gate between the driveway and plaintiff's backyard could no longer swing open freely. In addition, damage had been done to plaintiff's sprinkler system. The parties dispute the extent to which defendants attempted to correct the deficiencies but do not dispute that plaintiff refused to pay the invoice balance of \$3350.

In March 2010, plaintiff filed a pro se complaint against defendant in the Special Civil Part, seeking an award of \$3304.57, plus interest and costs, as reimbursement for her deposit and property damage. Defendant filed an answer and counterclaim that included a demand for the balance owed by plaintiff under the invoice.

In August 2010, plaintiff obtained counsel and filed a motion for summary judgment, seeking both actual and treble damages. In her supporting letter brief, plaintiff stated, conclusorily, that defendant had violated the CFA by failing to comply with the requirements of N.J.S.A. 56:8-151. Defendant, who was also represented by counsel at that point, opposed the motion, arguing, inter alia, that no violations of the CFA were alleged in the complaint. The motion was denied, and the case proceeded to trial in November 2010.

At the trial's outset, the court explained to the jurors that the case before them was "a contract claim." When plaintiff's attorney began to elicit testimony that would be relevant to a CFA claim, the judge stopped him and clarified at sidebar that "the issue before the jury was whether there was a breach of an agreement," and that the judge would charge the jury "with regard to contracts, breach of contracts and damages that flow from a breach. That's it." However, at the charge conference, the judge stated if the jury found defendants liable for breach of contract, she would hear additional argument and consider ordering treble damages under the CFA.

After the jury found defendant liable for breach of contract, the trial court heard oral argument and ordered briefing on the CFA's application to the calculation of damages in the case. Thereafter, the trial court entered judgment in favor of the plaintiff for "treble damages under the Consumer Fraud Act" in a total amount of \$8040. Defendant appeals from that order.

We recite appellant's points of argument exactly as they appear in his brief:

POINT I

THE LOWER COURT ERRED AS
A MATTER OF LAW BY
ALLOWING PLAINTIFFS
COUNSEL TO CONFUSR THE
JURY AND TURN THIS INTO A
CONSUMER FRAUD CASE
RATHER THAN DAMAGES DONE.

POINT II

THE LOWER COURT ERRED IN
ALLOWING THE SUMMARY
JUDGEMENT AS TO CONSUMER
FRAUD BE KNOWN EVEN
THOUGH IT WAS DIENED.

POINT III

THE LOWER COURT ERRED IN
NOT ALLOWING MR. MURPHY TO
BE GIVEN HIS BALANCE DUE FOR
THE JOB HE DID FOR THE JOB
HE DID FOR MARY.

The argument raised in Point III lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). However, we agree that the trial court erred in awarding treble damages in a case in which the plaintiff did not allege a violation of the CFA in her complaint.

A fundamental error in the judgment is evident based upon the relevant statute, which provides in pertinent part:

In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

[N.J.S.A. 56:8-19 (emphasis added).]¹

Thus, it is clear that for treble damages to be available, the action must be brought "under this section."

Rule 4:2-2 states, "A civil action is commenced by filing a complaint with the court." Because the plaintiff in this case never alleged a CFA violation in her initial complaint or in an amended complaint, she never commenced an action under the CFA. See R. 4:2-2. Therefore, plaintiff was not entitled to treble damages under the CFA. See N.J.S.A. 56:8-19; see also Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 4:5-2 (2014) ("[I]t is fundamental that the pleading must fairly apprise the adverse party of the claims and issues raised . . .").

Accordingly, we reverse the award of treble damages and direct that the trial court's judgment be modified to reduce the amount of the judgment to \$2680.

Reversed in part and remanded. We do not retain jurisdiction.

¹ In addition, N.J.S.A. 56:8-20 requires a party who asserts a violation of the CFA to provide the Attorney General written notice of the claim within ten days. We note that in this case, there is no indication in the record that plaintiff complied with the requirements of N.J.S.A. 56:8-20 by notifying the Attorney General of her CFA claim.

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