NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-5595-09T1
A-5916-09T1

SHARON SAUMS,

Plaintiff-Respondent,

v.

ESTATE OF WALTER B.
FOSTER, JR.,

Defendant-Appellant.

SHARON SAUMS,

Plaintiff-Appellant,

v.

ESTATE OF WALTER B.
FOSTER, JR.,

Defendant-Respondent.

Argued March 22, 2011 – Decided April 15, 2011

Before Judges Parrillo, Yannotti and Roe.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2071-08.

Bruce I. Afran argued the cause for appellant (A-5595-09T1)/respondent (A-5916-09T1) Estate of Walter B. Foster, Jr.

Lawrence F. Gilman argued the cause for appellant (A-5916-09T1)/respondent (A-5595-09T1) Sharon Saums.

PER CURIAM

In these consolidated appeals, plaintiff Sharon Saums (Saums) and defendant Estate of Walter B. Foster, Jr. (Estate) challenge an order entered by the Law Division on June 10, 2010, which entered judgment for Saums on her claims and for the Estate on its counterclaims but found that neither party was entitled to damages. We affirm.

I.

Here, Saums alleged that she performed general contractor services and had renovations performed on property in the Borough of Rocky Hill (Borough), which was originally bought and owned by Walter B. Foster, Jr. (Foster) and his wife. Saums sought recovery of $33,185.25 in expenses for the renovation to the property. Saums also sought the recovery of $6000 she paid Foster towards the purchase of the property, as well as $41,894 in so-called "in lieu of rent payments" she gave to him.

The Estate denied that Saums was entitled to any of the monies she sought in her complaint, and filed a counterclaim seeking $33,400 for damage to the property and lost rent in an amount between $67,400 and $78,800 due to its inability to lease apartments on the first and second floor of the house. The Estate also sought treble damages, attorneys' fees and costs

based on Saums's alleged violation of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -45 (CFA). The matter was tried before Judge Linda Feinberg, sitting without a jury.

At the trial, evidence was presented which established that, in the relevant time period, the home on the property was more than one hundred years old and was in a state of disrepair. Foster had purchased the house to provide a residence for his son, Walter Kim Foster (Kim), who was unemployed and suffered from a history of alcoholism and drug addiction. In 2002, Kim began dating Saums, who was at the time the principal creative director of Saums Interiors, a licensed New Jersey home improvement contractor.

In 2003, the Borough issued a notice to Kim that the house would be condemned because it was in a state of disrepair. Saums and Kim discussed the matter with Foster and offered to restore the house, with the intention that they would ultimately purchase the property. They negotiated a sale price and Foster prepared a written contract but Saums did not sign it because of her concern about Kim's condition, which had apparently deteriorated. Nevertheless, Saums gave Foster two deposit checks, totaling $6,000.

Saums said that, although she did not enter into a formal contract to purchase the property, she and Foster entered into a

contract, under which Foster agreed to keep the property off the market, not evict Kim, and hold the price at $180,000, provided Saums paid him about $1400 per month to cover his mortgage payments. From June 2004 to November 2006, Saums made payments to Foster that totaled $41,894, and he kept the property off the market.

In August 2003, Saums solicited a proposal from Princeton Design and Installation, LLC (PDI) for the renovation of the house. In September 2003, PDI submitted a proposal, which estimated that complete renovation of the house would cost $164,351. Dennis O'Neill (O'Neill) of PDI began work on the house shortly thereafter.

O'Neill testified that, as part of the renovations, PDI's workers removed a partition wall in the second floor apartment to create a larger, single bedroom. O'Neill said the wall that was removed was not a load-bearing wall. He also said that PDI's workers finished the floors, kitchen and bathroom and painted the unit. O'Neill stated that PDI's staff began work on the first floor apartment but was forced to leave with the work uncompleted because Kim had engaged in erratic behavior by removing asbestos, causing O'Neill to pull his workers off the job for their safety. Saums testified that she paid $33,185.25 for the work performed on the house.

In 2005, Foster's wife suffered a stroke, and title to the property was conveyed from Foster and his wife to Foster. Foster died in May 2007, and Kim moved in with his mother in Princeton. Kim rented the upstairs apartment of the Rocky Hill residence and kept the rent money. Kim's health rapidly deteriorated and he died in January 2008.

Foster's will was probated, and his daughter Penelope Foster (Penelope) became the executrix of the Estate. Penelope said that she tried to rent the upstairs apartment of the Rocky Hill house but learned that she could not do so because it was not structurally safe.

At the trial, the Estate presented testimony from an expert, E. Harvey Myers (Myers), who stated that it would cost the Estate $33,400 to restore the home to a habitable state. This amount included $8500 for the first floor bathroom; $13,800 for the first floor entry and front room; and $11,100 for repairs to the ceiling and roof on the second floor.

Myers testified that removal of the load-bearing wall had caused the ceiling in the second floor bedroom to sag and bow. He opined that damage to the downstairs bathroom had resulted from the improper installation of gutters, which caused water to seep into and rot the outer wall.

In June 2008, Penelope entered into an agreement listing the property for sale at a price of $355,000, although it had been appraised at $395,000. She received offers that were substantially less than that amount and rejected them as insufficient. Penelope did not list the property for sale after the listing agreement expired. She testified that she did not believe a prospective buyer would have been able to obtain a mortgage on the property, since it would not have passed a home inspection. Saums never communicated to Penelope any interest in purchasing the property.

Judge Feinberg filed a written opinion dated June 10, 2010, in which she concluded that plaintiff was not entitled to recovery on her claim for the costs she incurred in renovating the house or the monies paid to Foster pursuant to the option agreement. The court noted that Saums did not have a contractual right to such monies, and relief was not warranted on the basis of quantum meruit or quasi-contract.

The court found that Saums never had an expectation that she would be paid for the renovations. The court noted that there was no evidence that the renovations had increased the value of the property or what that enhanced value was. The court found that Saums's contractor had inappropriately removed a load-bearing wall in the upstairs apartment.

Judge Feinberg also found that the evidence did not warrant the award of damages to the Estate on its claim for damage to the premises. The court noted that Myers and O'Neill had disagreed as to the cause of the damage to the first floor bathroom. The court further found that any alleged damage would be offset by the value of any renovations completed by Saums.

In addition, the court found that the Estate's claim under the CFA was barred because it had not been pled, and the Estate did not seek to amend the complaint in a timely manner. The court further found that the Estate's claim for lost rent failed because Kim, not Saums, had rendered the first floor front rooms unfit to rent, and "there [was] a real issue as to whether the second floor apartment can be rented."

The court entered a judgment dated June 10, 2010, memorializing its decision. These appeals followed.

II.

In her appeal, Saums argues that: 1) she is entitled to recover under the doctrines of quasi-contract and unjust enrichment the value of materials and services she provided to renovate the property, as well as the monies she paid to Foster in reliance on his promise to keep the sales price at $180,000; and 2) the Estate should be estopped from repudiating the

agreement that she entered into with Foster. We reject these arguments and affirm.

We are satisfied that Judge Feinberg properly rejected Saums's claim for the monies she spent to renovate the property, and her claim for the return of the payments she paid to Foster to purchase the property and to keep the property off the market. The court properly determined that Saums had not presented sufficient evidence to warrant an award of damages on these claims under the doctrines of quasi-contract or unjust enrichment.

"Courts generally allow recovery in quasi-contract when one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 437 (1992). "Quasi-contractual liability 'rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.'" Ibid. (quoting Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108 (App. Div. 1966)).

Applying this principle, courts have permitted quasi-contractual recovery for services rendered when a party confers a benefit on another with the reasonable expectation of payment. Ibid. Under these circumstances, the performing party is

entitled to recover, on a quantum meruit basis, the reasonable value of the services rendered. Id. at 437-38.

Courts may also grant relief on the basis of unjust enrichment if a plaintiff establishes that he conferred a benefit upon the defendant and it would be unjust to allow the defendant to retain it. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Liability will only be imposed if the "'plaintiff expected remuneration from the defendant, or if the true facts were known to [the] plaintiff, he would have expected remuneration from [the] defendant, at the time the benefit was conferred.'" Castro v. NYT Television, 370 N.J. Super. 282, 299 (App. Div. 2004) (quoting Callano, supra, 91 N.J. Super. at 109).

Here, the trial court rejected Saums's claim for reimbursement of the monies she spent to renovate the property. Based on the evidence presented at trial, the court found that Saums did not have a reasonable expectation she would be paid for the work. The court noted that there was no evidence that Foster had ever authorized or agreed to pay for the renovations. The court also noted that, during the trial, Saums acknowledged several times that she had not "considered what would happen if she did not purchase" the home.

With regard to unjust enrichment, the court noted that, although Saums had presented proof that she had paid for certain renovations, there was no evidence that the renovations had increased the value of the property, or the amount of any such enhanced value. The court also noted that some of the repairs were then seven years old, and the residence remained "in a state of disrepair."

The court wrote that, although Saums claimed that the upstairs renovations had improved the value of the house, "no evidence was offered to identify the value of such improvements." The court pointed out that some of the costs incurred related to maintenance or "temporary decorative measures that provide[d] no permanent benefit" to the Estate. The court also credited Myers's testimony and found that Saums's contractor had damaged the premises by improperly removing the load-bearing wall from the upstairs bedroom, causing the ceiling to bow and sag.

In addition, the court found that Saums failed to establish a basis for return of the $41,894 she paid to Foster. The court determined that Saums and Foster agreed that, in exchange for the monthly payments, Foster would keep the property off the market and Foster would have an option to purchase it for $180,000. The court found that Saums could not recover the

monthly payments because Foster had kept his part of the bargain, and because Saums ultimately chose not to exercise the option.

Saums contends that the record does not support the court's findings. We disagree. Findings of fact of a trial court sitting without a jury are "binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). Indeed, our "[d]eference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Cesare v. Cesare, 154 N.J. 394, 412 (1998) (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)).

We are satisfied from our review of the record that there is sufficient credible evidence to support the court's findings on Saums's claims, and therefore affirm the court's judgment refusing to award her damages.

III.

In its appeal, the Estate argues that the trial court erred by: 1) refusing to permit it to amend the complaint at trial so that it could assert a claim under the CFA ; 2) finding that Saums would have been prejudiced by amending the complaint to add the CFA claim; 3) failing to award damages to the Estate for the damage to its property and lost rent; and 4) finding that

the lost rent was caused by Kim, not plaintiff. We find no merit in these arguments.

We reject the Estate's contention that the court erred by refusing to permit it to amend its complaint at trial in order to permit it to raise a CFA claim. Rule 4:9-2 permits a court to amend pleadings at trial to conform with the evidence, but the rule only permits such an amendment when evidence related to issues beyond the pleading is introduced at trial without objection. Pressler & Verniero, Current N.J. Court Rules, comment on R. 4:9-2 (2011).

Here, the Estate did not assert a CFA claim in its pleading and never moved to amend its complaint prior to trial. Although the Estate mentioned the CFA in its summary judgment motion, which was made after the discovery end date, the court never addressed those claims. Furthermore, Saums never consented to the amendment and, because she had not been afforded the opportunity for discovery on the CFA claims, would have been prejudiced if the Estate's complaint was amended at trial.

Indeed, the Estate's CFA claim was premised on its allegation that Saums had operated as a home improvement contractor, and was therefore subject to the home improvement regulations promulgated by the Division of Consumer Affairs, specifically N.J.A.C. 13:45A-16.1 to -16-2. Although Saums

alleged she had provided "general contractor" services to the Estate, there was a genuine issue of material fact as to whether she acted as a home improvement contractor when she had the renovations undertaken at the house. We are satisfied that, under the circumstances, the trial court did not abuse its discretion by denying the Estate's application to amend the pleadings at trial.

We are also satisfied that the trial court correctly found that the Estate had not presented sufficient evidence to support its claims for damage to the property and lost rent. As the court pointed out, there was conflicting testimony about who or what caused damage to the property. In his testimony, Myers acknowledged that damage to the downstairs bathroom may not have been caused by the improper installation of the gutters. He conceded that there could have been other sources of water infiltration.

In addition, the cross-examination of Myers made clear that his estimates of the cost of repair had been inflated by the assumption that the property would be occupied during the repair work. Myers said that he would have submitted a substantially different estimate if he knew that the property would be unoccupied while the work was performed.

Moreover, Myers testified that his repair estimate for the second floor apartment included the cost of raising the ceiling from six feet, one inch, to seven feet, one inch. The Estate did not present evidence as to the cost of repairing the second floor apartment without this enhancement, which Myers had proposed because he believed that a six foot, one inch, ceiling would be claustrophobic.

Furthermore, the repair estimate for the first floor bathroom did not include a breakdown of costs, and included items that were unrelated to the water damage purportedly caused by the gutters. In our view, the record fully supports the trial court's determination that the evidence presented by the Estate was insufficient to warrant the award of damages on the claim for repair costs.

The same may be said of the Estate's claim for lost rent. The Estate sought rent in the amount of $1400 per month for the period from January 2008 to May 2010, for a total of $39,200. The Estate claimed that it could not rent the first and second floor apartments because of the damage caused by Saums.

The court found, however, that Kim, not Saums, had rendered the first floor unfit for rent, because his erratic and dangerous conduct led to the cessation of the work. Testimony was presented that Kim began to remove asbestos from the

property, without taking appropriate protective measures, and PDI's workers were ordered to leave the worksite due to concerns about asbestos exposure.

In addition, the Estate claimed that the second floor apartment could not be rented because of the sagging, unsupported ceiling, but Penelope acknowledged that she lived in the apartment during the summer of 2008. Penelope's testimony on this point fully supported the court's finding that there was a substantial question as to whether, in fact, the second floor apartment could not be rented, as the Estate claimed.

In short, the trial court's findings on the Estate's claims are binding on appeal because, like the findings on Saums's claims, they are supported by adequate, substantial and credible evidence in the record. Rova Farms, supra, 65 N.J. at 484. We accordingly affirm the court's judgment refusing to award the Estate damages on its claims.

The judgment under review in A-5595-09 and in A-5916-09 is therefore affirmed.

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

CLERK OF THE APPELLATE DIVISION