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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3664-10T1

JUDE ULOKAMEJE and
REGINA ULOKAMEJE,

Plaintiffs-Appellants,

v.

STEVEN CONTENT, individually and
trading as SC HOME IMPROVEMENTS,

Defendant-Respondent.

Argued October 19, 2011 - Decided January 11, 2012

Before Judges Cuff and Lihotz.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-9690-08.

Henry Gurshman argued the cause for appellants.

Michael D. Baer argued the cause for respondent.

PER CURIAM

This matter involves a contract dispute. Following a bench trial, the Law Division judge dismissed all parties' pleadings, concluding the evidence was insufficient to support plaintiffs' claims of breach and defendant's counterclaim for payment due.

Plaintiffs' appeal asserts dismissal of their complaint was error. We affirm.

Plaintiffs, Jude Ulokameje and Regina Ulokameje,[1] own a three-unit apartment building in Newark, which suffered significant fire damage on December 28, 2005. Plaintiffs contracted with defendant Steven Content, trading as SC Home Improvements, to repair and restore the structure.

The parties' agreement,[2] signed April 13, 2006, stated defendant would rebuild the structure for which plaintiffs agreed to pay the total contract price of $150,800 in five payments at various stages of deconstruction and construction as follows:

	Description	Price
STAGE 1	**Demolition: Permits & planning fees included.**	$ 7,500
	Demolition of the entire property, remove all debris caused by fire. Break down wall, etc. to begin construction with (4) 20 yard dumpster[s] for rubbish removal.	
STAGE 2	**Title Carpentry:**	$ 14,800
	Frame left side of property included 3 floors and re-frame interior roof damage from fire. Installation of approx. 35 windows.	

[1] To distinguish between the two party plaintiffs, we use their first names in our opinion.

[2] At trial, plaintiff Jude testified the contract contained eight pages. The document in the record only consists of four pages: two delineating the thirteen stages and two stating general terms applicable to the parties' agreement.

STAGE 3	**Electrical Work:**	$ 15,000
	Roughing of electric outlets, receptacles, light fixtures, emergency light fixtures required by building code and appliance hook ups.	
STAGE 4	**HVAC:**	$ 13,000
	Provide and install 3 separate units for each floor to service all 3 thermostats install on all floors.	
STAGE 5	**Plumbing:**	$ 18,000
	Provide all new plumbing for each apartment, kitchen, bathroom which includes all fixtures and water heater with all new copper lines.	
STAGE 6	**Fiber Glass Insulation:** All three floors	$ 6,000
	Install R19 exterior wall and R30 in roof rafter. Insulation in basement exterior walls only in between floor joints as code.	
STAGE 7	**Hallway Stairs:**	$ 4,000
	Repair and replace stairs damaged from fire on all three levels.	
STAGE 8	**Sheet rock:**	$ 12,900
	Wall & ceiling on all 3 floors, spackling of 3 coat 5x8 sheetrock and green boards in bathrooms.	
STAGE 9	**Molding & Trimmings:**	$ 9,000
	Provide molding and trimming for 3 apartments and exterior doors.	
STAGE 10	**Painting:**	$ 6,405
	Painting of interior apartments, hallways, flat on ceiling egg shell on walls and semi-gloss on trims products Benjamin Moore paint.	
STAGE 11	**Kitchen Finishing:**	$ 13,600
	Provide & install kitchen cabinets countertops for 3 Kitchens and all standard white appliance[s] by GE, dishwasher, oven and refrigerators.	
STAGE 12	**Flooring:**	$ 12,600
	All the apartments will be provided with carpet in all 5 bedrooms, per go in hallways and ceramic tiles in kitchen and bathroom. Bath will have tiles on floors and tiles in shower areas.	

STAGE 13	**<u>Exterior</u>:**	$ 18,000
	Installation of all new royal crests siding [w]rapped around windows and soffit. Roofing shingles 30 year products timberline. Mason scratch coat foundation and re-do side walk measuring 22 X 10 ft. In front of house: re-do steps, brick front and fence.	
	1st payment stage 1	15,000
	2nd payment stages 2-5	50,000
	3rd payment stages 6-9	35,000
	4th payment stages 10-13	30,000
	5th Final payment	20,800
	Total	**$150,800**

It was undisputed that defendant failed to complete the stages of construction in the order listed in the contract or that plaintiffs paid him in a manner variant with the stated payment schedule. In July 2007, following a disagreement, defendant stopped working on the structure. At that time, defendant had completed some stages and started portions of others, and plaintiffs had remitted $115,000 of the total contract price.

Plaintiffs assert defendant breached the agreement by failing to complete the work within the agreed upon time frame. On August 17, 2007, plaintiffs sent a letter demanding defendant complete performance by August 31, 2007. Defendant responded by outlining what he had completed and requesting plaintiffs pay

$7,500 for the architectural drawings he obtained in order to request construction permits and advised additional payment was necessary to purchase materials for the next stages of construction. Defendant asserted he could not finish the work if payment was not provided.

Plaintiff filed their complaint alleging breach of contract and consumer fraud. Defendant filed an answer and counterclaim seeking payments claimed due and owing under the contract.

At trial, three witnesses were presented: Jude in support of plaintiffs' complaint; defendant, in support his counterclaim; and Regina, in rebuttal. Jude and defendant each described their respective versions of what occurred during construction.

Reviewing the contract provisions relating to completion of the project, Jude identified paragraph seven as requiring the work to be completed by June 23, 2006. Clause seven states: "[defendant] will take about 2 months to complete the job in accordance with the Building [d]epartment[']s approval and requirements." He maintained defendant failed to abide by this requirement.

Jude also described the work he believed defendant completed and the work left unfinished, testifying: stage one was completed except for removal of some debris and the removal

of a dumpster; stage two was completed; stage three was partially completed as the electrical outlets were roughed out but only some receptacles were installed; stage four "[w]asn't done"; stage five was partially completed as the plumbing was roughed out, but the fixtures were not installed; stage six was completed except "the basement was not done"; stage seven "was not done"; stage 8 the first of the three floors was completed; stages 9 through 12 were "not done"; and stage 13 only three of the four sides of the structure were sided.

Plaintiffs asserted that in late spring or early summer 2007, defendant "abandoned the job," requiring them to hire a different contractor, Business of Development (BOD), to complete the work. The BOD agreement specified plaintiffs would pay $65,000 for "renovations for a three[-]family house" and "plumbing and electrical work." Jude paid BOD $39,715 and asserted he accumulated additional expenses after purchasing materials using his credit card. Jude identified copies of credit card bills, which were admitted over defendant's objection; however, no testimony was given explaining the content of the documents or how they related to purchases for the project.[3]

[3] The documents are not included in the appellate record.

On cross-examination, Jude admitted paragraph twelve of the agreement with defendant included a provision for the commencement date of the work, but no date was inserted. He also acknowledged the agreement required him to supply architectural plans to defendant in order to obtain building permits, which he never secured. Jude conceded the agreement with defendant was not identical to the contract with BOD, because BOD was to install five kitchens rather than three, as stated in the agreement with defendant.

Because of the unavailability of a DVD player, plaintiffs could not conclude their case and defendant started the presentation of his case. Defendant discussed his efforts to aid plaintiffs' understanding of what is required to perform a construction project, including the need to obtain site plans and architectural drawings to apply for the requisite building permits. Plaintiffs naively believed defendant would just start the work. Defendant engaged Carl Mackey's Architectural & Planning firm to perform these services at the cost of $4,250. While the plans were being drawn, defendant removed debris from the structure. The municipality's review took approximately four months and the construction permits were finally issued on September 19, 2006. Defendant began demolition on October 11, 2006.

Defendant presented thirteen photographs depicting the scope of work. The photographs included the structure prior to any rebuilding and the structure at various stages of completion.[4] Defendant testified that stage one demolition and stage two framing of the new structure were completed. Next, he completed most of stage thirteen by installing the windows, doors, roof and aluminum siding on three of the four walls of the structure. Defendant maintained he next completed stages three (rough electrical), four (HVAC), and five (plumbing) sufficiently to obtain initial rough inspections and approvals by the building inspector. A rough inspection and approval was also obtained for stage six (insulation). Defendant also asserted he completed stage seven because the stairs were repaired to access to upper floors. Further, defendant maintained the first and second floors were completely sheetrocked (stage eight), but the third floor was not finished when problems developed in the parties' relationship.

Defendant asked plaintiffs for the fourth installment payment, but "they just said no." Later, Regina, who defendant regularly dealt with, paid him $15,000. Defendant continued working and in June 2007 obtained the next building approval from the municipal code official allowing the structure to be

[4] These photographs are not included in the record on appeal.

finished. Defendant again requested payment of the next installment. Regina purportedly told him her husband would not work with him because he believed she "had a crush" on defendant and mentioned plaintiffs were suffering financial difficulties so payment would not be made until all work was completed. At this point, defendant asserted he was thrown off the job.

By defendant's estimate, about seventy percent of the work was completed and only finishing work remained. Defendant's counterclaim sought more than $40,000, representing reimbursement of the architectural plans, his time to secure these drawings, and payment for work on the structure that he completed.

On cross-examination, defendant acknowledged the kitchen cabinets and appliances were not installed (stage eleven), the bathroom fixtures were not installed (stage five), the basement windows were not installed (state two), some sheetrocking for the third floor remained undone (stage eight), the front steps, brick front and fence were not provided (stage thirteen), and final inspections and approvals were not secured. He also agreed plaintiffs made certain change orders to the agreement, such as increasing the number of bathrooms from three to five, which he had not reduced to writing, but for which he had not intended to increase the contract price.

On the second day of trial, plaintiffs played a video of their property, which Jude recorded in December 2007. Regina testified in rebuttal, denying she told defendant that plaintiffs were having financial problems or that her husband felt she had a crush on defendant.

Lastly, defendant rebutted the video evidence offered by plaintiffs, stating it did not accurately depict the premises as he left it. He stated no garbage or debris was left in the rear yard as shown on the video. Further, defendant testified the front door shown in the video had been broken into. Also, insulation had been ripped from the walls and scattered throughout the rooms, an act he attributed to vandals.

At the close of evidence, the trial judge rendered an oral opinion. He found plaintiffs provided "not a scintilla of evidence, that . . . described the nature, quality and extent of the work that was actually performed by [BOD,]" and the credit card bills submitted did not allow the court "to glean and conclude . . . that sums were paid for the purchase of material for the use in the rehabilitation of the premises." On the other hand, defendant's documentary proof, including photographs of the structure before and during reconstruction; the permits obtained approving the electrical, plumbing, HVAC, and general construction; and defendant's testimony that he performed

approximately seventy percent of the work contracted for showed "a significant amount of work was performed."

The court found defendant had not completed the scope of the work outlined in the contract, and plaintiffs did not comply with their contractual obligation to remit payment. The trial judge found that when the parties parted company, approximately seventy percent of the work was completed and approximately seventy percent of the price was remitted, stating:

> The plaintiff did testify that there was some work in the original contract that was not -- that was undone. Presumably that . . . would be equivalent to the amount of money that he would seek to recover . . . to be made whole . . . .
>
> But nobody testified -- or at least there's been insufficient evidence to enable the [c]ourt to reach the conclusion that the work completed by the second contractor did not represent a completion of the work done under the terms of the original agreement. And the [c]ourt cannot find that as a fact, merely because there was insufficient evidence to enable the court to reach that conclusion by a preponderance of the evidence.
>
> And in that regard plaintiff fails to meet his burden of proof. Similarly, the [c]ourt is unable to determine what exactly it is that the second contractor did and . . . what he didn't do . . . and what the value is of that service performed.
>
> To what degree to -- to which he performed the same versus different work than the work that was left undone, when the plaintiff and the defendant parted ways,

> this [c]ourt has simply not been provided sufficient information, credible testimony to enable the [c]ourt to reach that conclusion.
>
> The [c]ourt only is able to reach conclusion that the parties parted -- parted company in July with 30 percent of the work not having been done, and 30 percent of the work not having been paid for[.]

The trial judge rejected plaintiffs' assertion that the work would be completed within two months of the contract's execution, and plaintiffs' performance reflected no such expectation of completion of such "extensive work" within two months. He found plaintiffs were well aware by June 2006 they had not even secured architectural plans or necessary building permits to commence construction and determined there was no contractual time frame for completion, as claimed. Finally, the trial judge concluded defendant had acted reasonably in performing the work. As to the alleged breach of contract because defendant left the job, the judge determined the parties' split was mutual, stating plaintiffs paid for the work defendant performed. Next, in reviewing the consumer fraud violations, the trial judge denied recovery, characterizing the allegations as "technical," and finding plaintiff failed to demonstrate an ascertainable loss. Finally, the court concluded defendant failed to demonstrate a basis for recovery on his

counterclaim for payment, again stating the parties mutually agreed to end their relationship.

Plaintiffs appealed. Defendant did not file a cross-appeal.

Plaintiffs first argue the trial judge erred in determining they had not suffered an ascertainable loss for purposes of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 (the CFA). Plaintiffs maintain defendant violated the regulatory provisions governing home improvement contracts because: the contract lacked specificity in describing the work to be performed and failed to include a start or completion date, N.J.A.C. 13:45A-16.2(a)(12)(iv); the contract failed to include the make and model numbers of certain appliances and fixtures, N.J.A.C. 13:45A-16.2(a)(12)(ii); defendant's request for final payment was wrongfully made before the home improvement was completed, N.J.A.C. 13:45A-16.2(a)(6)(v); and changes in the agreement were not reduced to writing, N.J.A.C. 13:45A-16.2(a)(12). Defendant counters by arguing the trial judge correctly dismissed plaintiffs' complaint as it stated no cause of action, finding the assertion of technical violations of the CFA were unaccompanied by a proved ascertainable loss.

Our review of the factual findings made by the trial judge in a non-jury trial is quite limited. Estate of Ostlund v.

Ostlund, 391 N.J. Super. 390, 400 (App. Div. 2007). "'[W]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence.'" Mountain Hill, LLC v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (quoting State v. Barone, 147 N.J. 599, 615 (1997)). In general, the judge's factual "findings . . . should not be disturbed unless they are so wholly insupportable as to result in a denial of justice[.]" Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974) (internal quotation marks omitted). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Of particular relevance here is that "[t]he question whether the regulatory violations [under the CFA] subject[s] defendant[] to treble damages and attorneys' fees is one of law, in respect of which no special deference is to be accorded to the trial court's determinations." Roberts v. Cowgill, 316 N.J. Super. 33, 37 (App. Div. 1998).

A violation of the CFA can arise in three different settings. See Gennari v. Weichert Co. Realtors, 148 N.J. 582, 605 (1997) (stating an offense under the CFA can result from a violation of an administrative regulation). An affirmative

misrepresentation, even if unaccompanied by "knowledge of its falsity" or an intention to deceive, is sufficient. Ibid. (citing Strawn v. Canuso, 140 N.J. 43, 60 (1995)). Also, an omission or failure to disclose a material fact, if accompanied by knowledge and intent, is a sufficient violation of the CFA. Ibid. (citing Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994)). "The third category of unlawful acts consists of violations of specific regulations promulgated under the [CFA]. In those instances, intent is not an element of the unlawful practice, and the regulations impose strict liability for such violations." Cox, supra, 138 N.J. at 18.

The CFA "makes no distinction between 'technical' violations and more 'substantive' ones." BJM Insulation & Constr., Inc. v. Evans, 287 N.J. Super. 513, 518 (App. Div. 1996). However, to succeed on a claim for treble damages under the CFA, "a private litigant must allege specific facts that . . . establish the following: (1) unlawful conduct by the defendant[]; (2) an ascertainable loss . . . ; and (3) a causal relationship between the defendant's unlawful conduct and the [] ascertainable loss." Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 113 (App. Div. 2009) (citations and quotations omitted).

Although various alleged regulatory violations were cited in their brief, plaintiffs' argument in support of a suffered ascertainable loss is limited to repetition of the trial testimony, which had been found insufficient by the trial judge. The regulations cited by plaintiffs provide:

> (a) Without limiting any other practices which may be unlawful under the [CFA], utilization by a seller of the following acts and practices involving the sale, attempted sale, [] or performance of home improvements shall be unlawful [].
>
> . . . .
>
> 12. Home improvement contract requirements-writing requirement: All home improvement contracts for a purchase price in excess of $500.00, and all changes in the terms and conditions thereof shall be in writing. Home improvement contracts which are required by this subsection to be in writing, and all changes in the terms and conditions thereof, shall be signed by all parties thereto, and shall clearly and accurately set forth in legible form and in understandable language all terms and conditions of the contract, including, but not limited to, the following:
>
> . . . .
>
> ii. A description of the work to be done and the principal products and materials to be used or installed in performance of the contract. The description shall include, where applicable, the name, make, size, capacity, model, and model year of principal products or fixtures to be installed, and the type, grade, quality, size or quantity of principal building or construction materials to be used. Where specific

> representations are made that certain types of products or materials will be used, or the buyer has specified that certain types of products are to be used, a description of such products or materials shall be clearly set forth in the contract;
>
> . . . .
>
> iv. The dates or time period on or within which the work is to begin and be completed by the seller;
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> . . . .
>
> [N.J.A.C. 13:45A-16.2(a).]

Simply stated, the trial court found Jude's generalized comments that he expended money for supplies using his credit card lacked substance to show damages to support recovery for CFA violations. As to the temporal nature of the agreement, the trial court rejected as incredible Jude's assertion he believed the contract would be completed within two months of its execution, and also, that the provision requiring the homeowner to supply the architectural plans meant defendant would do so was "included in the price." The judge also accepted defendant's testimony, as verified by plaintiffs' conduct, that plaintiffs were fully informed of the process and defendant directed them to the municipal building inspector to inquire why the permits were delayed. The judge found Jude's testimony insufficient to prove defendant failed to commence and complete the work in a timely fashion, rather he found defendant acted

reasonably. See Branigan v. Level on the Level, Inc., 326 N.J. Super. 24, 30 (App. Div. 1999) (requiring causal link between lack of starting and completion dates in contract and actual damage to consumer).

The record also supports defendant's omission of each the appliance model numbers was of no consequence because the parties agreed to "part ways" before that stage of construction was reached. The court concluded plaintiff spent approximately $155,000 and could not show their contract with BOD was limited to only work within the scope contracted for with defendant. The two agreements materially differed in that BOD may have completed all renovations outlined in defendant's agreement but also installed two additional kitchens.

The record also contains no evidence defendant demanded final payment before completing the work, rather he asked for enough money to purchase the materials needed to start the next phase. We concur with the judge's determination defendant did not violate the regulation in this regard and that plaintiffs suffered no ascertainable loss as a result. See Cowgill, supra, 316 N.J. Super. at 41 (stating to successfully prove a CFA claim, the plaintiff must demonstrate "a causal relationship . . . between the ascertainable loss and the unlawful practice").

Finally, contrary to plaintiffs' assertions, the evidence did not prove they suffered a loss of $48,100.36. Jude's testimony that he used his credit card to purchase supplies never discussed details of what was purchased or linked the proffered invoices to project purchases. Accordingly, plaintiffs could not show they expended sums in excess of the original contract price of $150,800. Although the total sum expended by plaintiffs was approximately $155,000, BOD's contract included extra work not included in defendant's agreement.

Following our review, we conclude the judge's implicit factual findings, taken together with relevant case law, supports the dismissal of plaintiffs' complaint under the CFA.

Plaintiffs also challenge the trial court's conclusion as against the weight of the evidence. The parties agreed the work was not completed; defendant suggested he performed approximately seventy percent of the work; plaintiffs suggest he was paid seventy-six percent of the total contract price; plaintiffs maintain they hired BOD to finish the renovations; and plaintiffs argue sufficient proof of damages was shown. We are not persuaded.

First, defendant's assertion was merely an estimate. It also did not account for the $7,500 he expended to secure the

architectural drawings, which were plaintiffs' responsibility under the contract. Second, defendant never asserted he completed the work; he unequivocally stated plaintiffs refused to provide the next installment payment he believed was due. This testimony is supported by his August 20, 2007 letter. Third, plaintiffs did not prove defendant's breach prior to this request. The court found neither party sustained their burden of proof of a breach as they both breached. We cannot say the trial court's finding -- that the parties' evidence was in equipoise -- was "so manifestly unsupported by or inconsistent with the reasonable credible evidence as to offend the interests of justice." Rova Farms, supra, 65 N.J. at 484. Accordingly, we will not disturb with the trial court's conclusion.

Affirmed.