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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2059-12T1

FRANCIS X. VESPA,
MARY VESPA, DANIEL
VESPA AND DENISE VESPA,

Plaintiffs-Appellants/
Cross-Respondents,

v.

O.L.G. LAND, INC.,
t/a HOLLY VILLAGE,

Defendant-Respondent/
Cross-Appellant.

Submitted February 11, 2014 – Decided August 6, 2014

Before Judges Messano, Hayden and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-0572-08.

Spector, Gadon & Rosen, P.C., attorneys for appellants/cross-respondents (Barry S. Brownstein and George M. Vinci, of counsel and on the brief).

Giordano, Halleran & Ciesla, attorneys for respondent/cross-appellant (James M. Andrews, of counsel and on the brief; Jaclyn B. Kass, on the brief).

PER CURIAM

Defendant O.L.G. Land, Inc. sold factory-manufactured homes and leased property for the placement of the homes at Holly

Village, a development in Millville. Two brothers and their wives, Francis X. and Mary Vespa, and Daniel and Denise Vespa (collectively, plaintiffs), purchased new homes at Holly Village. In September 2006, several months after having moved into their new homes, plaintiffs began experiencing medical problems including "difficulty swallowing, sneezing, sore throat[s], coughing, nose bleeds and choking." Plaintiffs attributed these ailments to excessive formaldehyde emissions in their new homes.

On June 16, 2008, plaintiffs filed a complaint against defendant alleging fraud, negligent misrepresentation and violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. In August 2012, the parties cross-moved for summary judgment. Plaintiffs also moved to amend their complaint to include a count alleging negligence.

The motion judge concluded that, contrary to defendant's argument, plaintiffs' claims as contained in the initial complaint were not preempted by federal law or subsumed under the Products Liability Act, N.J.S.A. 2A:58C-1 to -11 (the PLA). Nevertheless, for reasons expressed in his written opinion that we discuss below, on December 13, 2012, the judge entered two orders that granted defendant summary judgment and denied plaintiffs' motion to amend their complaint. On January 3,

2013, the judge entered a separate order denying plaintiffs' cross-motion for summary judgment.

Plaintiffs now appeal the denial of their motion for summary judgment on the CFA count of their complaint, as well as the grant of summary judgment to defendant. Defendant cross-appeals, arguing that plaintiffs' complaint was preempted under federal law or otherwise subsumed under the PLA. Having considered these arguments in light of the record and applicable legal standards, we affirm summary judgment dismissing plaintiff's complaint. We decline to address the issues raised by defendant and dismiss the cross-appeal.

I.

We confine our review to the evidence in the record before the motion judge. Lombardi v. Masso, 207 N.J. 517, 542 (2011).

Carol Truxton was the manager of Holly Village. Plaintiffs met with her regarding the purchase of new mobile homes beginning in March 2005. In October, each couple signed an agreement with defendant for the purchase of a mobile home to be manufactured by a company known as Redman. The materials necessary to assemble the mobile homes were delivered to Holly Village in December 2005. Defendant's representatives assembled the homes and inspected them.

Beginning in 1984, the United States Department of Housing and Urban Development (HUD) required that every manufactured home must have a formaldehyde emissions "Important Health Notice" (IHN) prominently displayed "in a temporary manner in the kitchen (i.e., [on a] countertop or exposed cabinet face)." 24 C.F.R. § 3280.309. According to Truxton, when plaintiffs' mobile homes were assembled, the IHN was prominently displayed because it had been affixed to the kitchen countertops by the manufacturer.

Defendant's policy was not to allow purchasers to enter a home until after it had been cleaned so as not to interfere with the workers assembling the home. Truxton conceded that during that cleaning process, she would typically remove the IHN and place it in a kitchen drawer. However, Truxton also stated that she had taken plaintiffs into each home while the IHN was still affixed to the countertop. By the time plaintiffs took possession of the mobile homes in March 2006, the IHN had been removed from the kitchen countertop and placed in the drawer.

Francis claimed to have discovered the IHN for the first time in a kitchen drawer in August 2006, and Daniel claimed he

found his shortly thereafter.[1] However, both households acknowledged that they temporarily removed the IHNs from the drawers when they first moved in, along with other documents, including warranties on appliances, in order to set up their respective homes. Plaintiffs stated that they unaware of formaldehyde dangers prior to August 2006 when they first read the IHNs, and that defendant had never advised them that the IHNs were removed during cleaning.

In any case, the owner's manual furnished to plaintiffs included the IHN, and plaintiffs do not allege that defendant failed to provide them with owner's manuals. Plaintiffs asserted that they would not have purchased the homes if they had known about the potential danger from formaldehyde emissions.

As already noted, in September 2006, plaintiffs began experiencing various ailments. On March 24, 2007, Edward Olmsted, of Olmsted Environmental Services, Inc., performed an indoor environmental survey of plaintiffs' homes. He found that formaldehyde emissions ranged from .061 to .090 parts per million (ppm) for one of the homes, and .048 to .053 ppm for the other. Those ranges were within permissible limits according to

[1] To avoid confusion, we sometimes refer to the individual plaintiffs by their first names; we apologize for this informality.

federal regulations governing mobile homes. 24 C.F.R. § 3280.308(a). Olmstead did opine, however, that the levels in one of the homes might "cause symptoms in sensitive persons[,]" and the levels in both homes exceeded other agencies' standards.

Dr. Iris G. Udasim, of the Department of Environmental and Occupational Medicine of UMDNJ Medical School, examined each plaintiff, and produced a report for the litigation. According to Udasim, symptoms of formaldehyde emissions generally do not occur when the emissions levels are below .1 ppm, which was the case in plaintiffs' homes. Nevertheless, she concluded:

> Based on our review of [plaintiffs'] records, . . . we conclude that their original symptoms were more likely than not due to formaldehyde exposure.
>
> However, according to the literature, formaldehyde levels decline over time and are not likely to persist for this long[. C]onsidering the persistence of [plaintiffs'] symptoms, there may be other indoor air quality issues that should be assessed and ruled out as contributing to these symptoms.[2]

II.

In reviewing a grant of summary judgment, we apply the same standard as the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). We first determine whether the moving

[2] Udasim reached identical conclusions for each plaintiff although her language varied slightly from report to report.

party has demonstrated there were no genuine disputes as to material facts. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006).

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

We then decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co., supra, 387 N.J. Super. at 231. In so doing, we owe no deference to the motion judge's conclusions on issues of law and review those de novo. Ibid.; see also Zabilowicz v. Kelsey, 200 N.J. 507, 512 (2009) (citations omitted) ("We review the law de novo and owe no deference to the trial court . . . if [it has] wrongly interpreted a statute.").

Initially, plaintiffs argue a procedural point, i.e., that defendant's prior summary judgment was denied earlier by a different judge, and therefore defendant's renewed motion should

have been denied pursuant to the law-of-the-case doctrine. We disagree.

"The law of the case doctrine teaches us that a legal decision made in a particular matter 'should be respected by all other lower or equal courts during the pendency of that case.'" Lombardi, supra, 207 N.J. at 538 (quoting Lanzet v. Greenberg, 126 N.J. 168, 192 (1991)). We have said, however, that "an order denying summary judgment is not subject to the law of the case doctrine because it decides nothing and merely reserves issues for future disposition." Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 356 (App. Div. 2004), certif. denied, 182 N.J. 427 (2005). Thus, the motion judge was not prohibited from considering defendant's motion even though the first judge had denied an earlier motion for summary judgment.

A.

Before turning to plaintiffs' specific arguments, we set forth some background regarding the federal regulations governing mobile homes.

In 1974, Congress adopted the Manufactured Housing Construction and Safety Standards Act, 42 U.S.C.A. §§ 5401-5426 (MHCSSA), to "protect the quality, durability, safety and affordability" of manufactured, sometimes called mobile, homes.

42 U.S.C.A. § 5401. To implement the MHCSSA, HUD adopted regulations codified at 24 C.F.R. §§ 3280, 3282 (2013). Among other things, the regulations set standards for acceptable levels of formaldehyde emissions in mobile homes. 24 C.F.R. § 3280.308(a).

The regulations require the following text be contained in the IHN:

> Some of the building materials used in this home emit formaldehyde. Eye, nose, and throat irritation, headache, nausea, and a variety of asthma-like symptoms, including shortness of breath, have been reported as a result of formaldehyde exposure. Elderly persons and young children, as well as anyone with a history of asthma, allergies, or lung problems, may be at greater risk. Research is continuing on the possible long-term effects of exposure to formaldehyde.
>
> Reduced ventilation resulting from energy efficiency standards may allow formaldehyde and other contaminants to accumulate in the indoor air. Additional ventilation to dilute the indoor air may be obtained from a passive or mechanical ventilation system offered by the manufacturer. Consult your dealer for information about the ventilation options offered with this home.
>
> High indoor temperatures and humidity raise formaldehyde levels. When a home is to be located in areas subject to extreme summer temperatures, an air-conditioning system can be used to control indoor temperature levels. Check the comfort cooling certificate to determine if this home has been equipped or designed for the installation of an air-conditioning system.

> If you have any questions regarding the health effects of formaldehyde, consult your doctor or local health department.
>
> [24 C.F.R. § 3280.309.]

The IHN may not be removed "until the entire sales transaction has been completed." 24 C.F.R. § 3280.309(c). A sales transaction is complete when all the goods and services that the dealer has agreed to provide by contract have been provided. 24 C.F.R. § 3282.252(b). In addition, the regulation provides:

> Completion of a retail sale will be at the time the dealer completes set-up of the manufactured home if the dealer has agreed to provide the set-up, or at the time the dealer delivers the home to a transporter, if the dealer has not agreed to transport or set up the manufactured home, or to the site if the dealer has not agreed to provide set-up.
>
> [Ibid.]

A copy of the IHN must also be included in the home manual. 24 C.F.R. § 3280.309(d).

HUD explained why the IHN must be displayed in every new mobile home:

> The product standards will limit, but not eliminate, formaldehyde from manufactured homes. The levels of formaldehyde which will be achieved by the product standards will not fully protect every manufactured home occupant. The health notice, therefore, will inform prospective purchasers that there are products in the home which emit formaldehyde and will

> describe the most common acute symptoms caused by formaldehyde exposure. The notice will be especially beneficial to those persons who are aware of their sensitivity to formaldehyde or who have histories of respiratory ailments. . . . The notice also indicates the benefits of added ventilation and refers to physicians and local health departments as sources for additional information. . . .
>
> This notice must be prominently displayed in the kitchen and be included in the consumer manual provided with each home.
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> [49 Fed. Reg. 31996 (1984).]

B.

Plaintiffs argue that the judge erred by denying their motion for partial summary judgment on their CFA claims and granting defendant summary judgment dismissing their complaint in its entirety. We first consider the contentions regarding the CFA claim and then seriatim consider the other causes of action pled in the complaint.

(i)

In a thoughtful written opinion, the motion judge reviewed the federal regulations. He noted that the sales of plaintiffs' homes were complete when the mobile homes were "set up," and at that point defendant's representatives were permitted to remove the IHN. There was no knowing concealment or affirmative misrepresentation, because defendant left the IHN in a kitchen drawer where plaintiffs eventually saw the notice. Also, the

judge determined there was no ascertainable loss because the formaldehyde emission levels in the homes complied with federal standards, and plaintiffs did not establish that the homes' actual values were less than the purchase prices.

Plaintiffs claim that defendant had a duty to disclose the IHN by at least leaving it in a prominent place until such time as they took possession of the homes. They argue that by removing the IHN and putting it in the drawer, defendant violated the CFA. They also contend that, at minimum, there was a genuine dispute of material fact as to whether removal of the IHN was an actionable omission under the CFA, and therefore, summary judgment in defendant's favor was inappropriate. We disagree.

The CFA provides a private right of action to any person who suffers an "ascertainable loss," N.J.S.A. 56:18-19, as a result of

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid . . . .
>
> [N.J.S.A. 56:8-2.]

"The CFA requires a plaintiff to prove three elements: 1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." D'Agostino v. Maldonado, 216 N.J. 168, 184 (2013) (citations omitted).

Claims brought by private plaintiffs under the CFA traditionally have been divided into three categories: "claims involving affirmative acts, claims asserting knowing omissions, and claims based on regulatory violations." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 556 (2009) (citation omitted). Intent is not an element of a claim based upon affirmative acts or regulatory violations. Ibid. However, "a plaintiff seeking to recover based on a defendant's omission[,] 'must show that the defendant acted with knowledge, and intent is an essential element of the fraud.'" Ibid. (emphasis removed) (quoting Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994)). "An ascertainable loss under the CFA is one that is 'quantifiable or measurable,' not 'hypothetical or illusory.'" D'Agostino, supra, 216 N.J. at 185 (quoting Thiedemann v. Mercedes-Benz USA, L.L.C., 183 N.J. 234, 248 (2005)).

In this case, defendant had no duty under the regulations to leave the IHN on the countertop until plaintiffs took

possession of the homes.[3] The regulations only require that the IHN be prominently displayed until the completion of the transaction, which is defined as such time as the mobile home is set up. 24 C.F.R. § 3280.309; 24 C.F.R. § 3282.

Plaintiffs argue that this interpretation essentially nullifies the seller's obligation to display the IHN. In other words, there is no point to requiring defendant to post the IHN in a prominent place if it can be removed when the mobile home has been set up but before purchasers are given the chance to see it. Plaintiffs contend that, despite the unambiguous language of 24 C.F.R. § 3282.252, a seller of a mobile home is obligated to conspicuously post the IHN for the benefit of the purchaser, presumably until the buyer takes possession.[4]

While we comprehend the argument, the federal regulations do not provide a specified period for which the notice must remain in place. 24 C.F.R. § 3280.309, which specifically requires that the IHN be prominently displayed, cross-references

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[3] In addressing this issue, we do not imply that a violation of federal regulations necessarily provides a basis for liability under the CFA, since such liability "is based on regulations enacted under N.J.S.A. 56:8-4." Cox, supra, 138 N.J. at 17.

[4] For support, plaintiffs cite to Liberty Homes, Inc. v. Department of Indus., Labor & Human Relations, 374 N.W.2d 142, 155 (Wis. Ct. App. 1985), aff'd, 401 N.W.2d 805 (Wis. 1987). There, the court held that the federal regulations that require the IHD pre-empted Wisconsin's formaldehyde warning requirement. The case does not support plaintiffs' argument in this regard.

24 C.F.R. § 3282 for the definition of when the sale is deemed completed. The sale is completed when the mobile home has been set up. Ibid. HUD could have easily required that the IHN not be removed until the buyer was in possession, but it did not enact such a regulation.

Plaintiffs failed to demonstrate any affirmative misrepresentation by defendant that supports a CFA claim. Therefore, the question devolves to whether defendant was entitled to summary judgment or whether, at the least, a genuine factual dispute existed as to an actionable "knowing omission" under the CFA. Plaintiffs contend defendant was required to advise of the potential danger of formaldehyde emissions when they signed their contracts. We disagree.

The regulatory scheme fairly may be characterized as providing information about how to ameliorate the levels of formaldehyde emissions. See, e.g., 24 C.F.R. § 3280.309 (advising purchasers that emission levels can be lowered by adding ventilation systems and air conditioning). The regulations do not, however, require that the seller of such homes provide notice at the time of the sale, which, in this case, was before the homes were even fabricated.

Plaintiffs' reliance on case law involving the duty to disclose adverse conditions of the property at the time of sale

is misplaced. For example, they rely on Weintraub v. Krobatsch, 64 N.J. 445, 454 (1974), where a realtor deliberately concealed from the purchaser that the property was infested with termites. Here, however, plaintiff's own expert's report indicated that the formaldehyde levels in the homes complied with federal safety standards. There was no proof of a defect that defendant knowingly concealed.

We also reject the argument that there was sufficient proof of a knowing omission because the IHN had been removed and placed in the drawer. The IHN was included in the owner's manual, which plaintiffs apparently received. Defendant did not discard the IHN; it placed it in the kitchen drawer in each home, and plaintiffs found it there several months after moving in. No reasonable juror could conclude that defendant acted with a knowing intent to conceal the information contained in the IHN from plaintiffs, an "essential element" of an actionable omission under the CFA. Bosland, supra, 197 N.J. at 556 (quotation omitted).

Summary judgment was properly granted on plaintiffs' CFA claim.

(ii)

The motion judge also concluded that plaintiffs failed to establish common law fraud or negligent misrepresentation as a

matter of law, because defendant made no material misrepresentation, and plaintiffs failed to prove any economic loss. Plaintiffs argue that both claims should have survived summary judgment because defendant committed a misrepresentation by removing the IHN, and their lack of knowledge of the dangers of formaldehyde emissions demonstrates their detrimental reliance.

"To establish common-law fraud, a plaintiff must prove: '(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172-73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). "'[N]egligent misrepresentation constitutes '[a]n incorrect statement, negligently made and justifiably relied on, [and] may be the basis for recovery of damages for economic loss . . . sustained as a consequence of that reliance.'" Singer v. Beach Trading Co., Inc. 379 N.J. Super. 63, 73-74 (App. Div. 2005) (alterations in original) (quoting McClellan v. Feit, 376 N.J. Super. 305, 317 (App. Div. 2005)). In order to prevail under either cause of action, a

plaintiff must establish that he suffered economic damages as a result. Kaufman v. i-Stat Corp., 165 N.J. 94, 109 (2000).

Here, the removal of the IHN was not a material misrepresentation of a fact, and plaintiffs do not assert that defendant made any other misrepresentation. Additionally, the motion judge correctly determined there was no proof that plaintiffs suffered economic losses. In short, we agree that plaintiffs' common law fraud and negligent misrepresentation claims were properly dismissed on summary judgment.

III.

Plaintiffs also argue that the judge erred by denying their motion to amend the complaint. In doing so, the judge acknowledged that pursuant to Rule 4:9-1, a motion to amend a pleading must be viewed with liberality. However, he noted that the litigation was more than four years old at that point, and discovery was complete. In addition, the judge reasoned that any negligence claim seeking non-economic damages must be predicated upon plaintiffs' homes being "defective[,]" and such a cause of action was subsumed by the PLA. The judge concluded plaintiffs had not alleged that the homes were defective, and therefore, there were "no facts before the [c]ourt that could support a claim under the PLA."

The "Court has construed Rule 4:9-1 to 'require[ ] that motions for leave to amend be granted liberally,' even if the ultimate merits of the amendment are uncertain." Prime Accounting Dept. v. Twp. of Carney's Point, 212 N.J. 493, 511 (2013) (alteration in original) (quoting Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456 (1998)). "One exception to that rule arises when the amendment would be 'futile,' because 'the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor.'" Ibid. (quoting Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006)). "'[C]ourts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. . . . [T]here is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted.'" Ibid. (alterations in original) (quoting Notte, supra, 185 N.J. at 501).

We need not decide whether plaintiffs' negligence claim is subsumed under the PLA. See, e.g., In re Lead Paint Litigation, 191 N.J. 405, 439 (2007) (discussing application of the PLA's toxic tort exception to various types of exposure claims). It suffices to say that, in seeking to amend, plaintiffs offered no excuse for the delay. More importantly, based on the motion record, we fail to see any viability whatsoever to a claim of

negligence since, in the end, plaintiffs would have needed to demonstrate that defendant had breached a duty. See e.g., Polzo v. Cnty. of Essex, 196 N.J. 569, 584 (2008) ("In order to sustain a common law cause of action in negligence, a plaintiff must prove four core elements: '(1) [a] duty of care, (2) [a] breach of [that] duty, (3) proximate cause, and (4) actual damages[.]'" (alterations in original) (quoting Weinberg v. Dinger, 106 N.J. 469, 484 (1987)). For the reasons already expressed, defendant had no duty to either leave the IHN on the countertop or cabinet, or otherwise advise plaintiffs of the dangers of formaldehyde emissions.

We affirm the denial of plaintiffs' motion to amend.

IV.

In light of our decision on the appeal, the issues raised by defendant in its cross-appeal are moot. An issue is "moot" if "the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corrs., 382 N.J. Super. 254, 258 (App. Div. 2006) (citation omitted).

Affirmed; the cross-appeal is dismissed as moot.