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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3063-13T1

HUDSON HARBOUR CONDOMINIUM
ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

OVAL TENNIS, INC.,

Defendant-Respondent.

Submitted March 24, 2015 – Decided July 29, 2015

Before Judges Fisher and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-9264-11.

Cutolo Mandel, LLC, attorneys for appellant (Jeffrey S. Mandel, of counsel; Mr. Mandel and Andrew Stein, on the brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff, Hudson Harbour Condominium Association, Inc. (Hudson), appeals from a dismissal of a count in the complaint seeking damages against Oval Tennis, Inc. (Oval), pursuant to the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. As we conclude that Hudson made out a prima facie case under the CFA, we reverse and remand.

In January 2008, the Falcon Group, acting on behalf of Hudson, provided Oval with a Request for Proposal (RFP) for the installation of an outdoor tennis court. The RFP placed bidders on notice that the court would be installed "onto an existing (uncoated) concrete slab" and that the work "shall consist of the preparation of the existing surface" and installation of a Premier Court® "resilient surface (or equal)."

The RFP's "Conditions" section stated that this particular court would be installed "on the rooftop of a parking garage" and "[t]he preparation of the existing concrete slab is considered to be the most important step of the PREIER [sic] COURT installation process." Prior to submitting its proposal, Oval was aware the tennis court would be installed over concrete.

Hudson and Oval entered into a contract on May 9, 2008 for the installation of a Premier Court® tennis court. The contract was prepared by Oval and provided for the installation of an "open-celled" Premier Court®. This "open-celled" court would be installed by Oval's "trained technicians according to the company specifications."

Hudson paid the $32,500 contract price. Installation was completed by Oval on July 29, 2008. Within a very short timeframe after installation, Hudson communicated to Oval that

there were problems with the court. On October 10, 2009, Oval's owner, Thomas Benz, returned to inspect the court and observed "small blisters near the net." Benz returned "several times" and noticed that the bubbling "got worse."

The contract required the installation be in accordance with "any and all manufacturer's specifications and installation guidelines." Prior to entering into the contract, Benz represented to Hudson that he was "familiar with the requirements of the scope of work," he possessed "sufficient experience to properly perform [the] work," and he employed "trained technicians" to install the court. Benz represented that he was a "certified" installer of Premier Court®.[1] Despite the contractual requirement that Oval would install an open-cell court, Oval installed a closed-cell, non-breathable court.

During his testimony, William Payne, Hudson's structural engineer, explained why the court's non-breathable surface caused the problem with the tennis court. After expounding upon where and how the court was constructed, i.e., over a parking deck with the "rubber" court installed on top of the concrete, Payne noted:

[1] Notwithstanding this representation, during the trial, Benz, called as a witness on Hudson's case, testified there is no certification and nothing by which someone can actually be "certified."

> Not all rubber is the same. There's some rubber that is not breathable. In other words, the structure of the rubber is tight and connected all the way through if you look at it at a molecular level. And there's other rubbers that have what they would call an open-cell structure that allows vapor to go right through it. And you can measure it. It's measured in something called perns. And there are rubber tennis court surfaces that are breathable. And there are rubber tennis court surfaces that are not breathable. Just like there are paints that are breathable and there are paints that are not breathable. There's paints for the inside, paint for the outside, paint for concrete, paint for wood. There are tennis courts in the same fashion. There are tennis courts that are breathable, which would allow this vapor to go through it. And there are tennis courts that are not breathable.

Upon reviewing the material used by Oval, Payne opined the court would have failed "within a very short period of time after install" and certainly in less than one year from being installed. Payne further testified that upon inspection he observed "classic signs" that the court exhibited "failure." According to Payne, "the tennis court surface was delaminated or no longer fastened or bonded or adhered to the concrete," and the court had "a lot of holes and ripples, and bubbles that made it so you couldn't play on the surface angle."

Payne additionally opined that the court's condition was due to the failure of Oval to install the court with material that would allow vapor to "push through." Instead, Oval

installed a non-breathable court rather than the required open-cell surface. Despite Benz' representation that he was trained, certified and experienced, he conceded at trial that he did not know the difference between an open-cell and closed-cell surface.

Notwithstanding that the contract provided for a two-year warranty "against defective materials or workmanship," Oval sought payment to perform repair work to the court. Despite the court's condition and the warranty, Oval did not make any repairs.

Hudson filed a complaint seeking damages against Oval for, among other things, violations of the CFA, breach of warranty, and breach of contract arising out of the installation of the court.

The trial took place before a jury. At the conclusion of Hudson's proofs, Oval moved for dismissal of the CFA count. The court granted the motion. The jury returned a verdict finding Oval liable for breach of contract and breach of warranty and awarded damages of $32,500. The court entered a Final Order of Judgment, which memorialized the dismissal of the Consumer Fraud Act count and the jury's verdict. Thereafter, Hudson filed a timely notice of appeal.

When reviewing a ruling by a trial judge on a motion for involuntary dismissal at the close of plaintiff's proofs pursuant to Rule 4:37-2(b), an appellate court must "accept[] as true all the evidence which supports the position of the party defending against the motion" and must accord him or her "the benefit of all inferences which can reasonably and legitimately be deduced therefrom," in determining whether a cause of action has been made out. Dolson v. Anastasia, 55 N.J. 2, 5 (1969). Like the trial court, we are not concerned with the weight, worth, nature or extent of the evidence. Id. at 5-6.

Under the CFA:

> The 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, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]
>
> [N.J.S.A. 56:8-2.]

"The consumer fraud statute is aimed at promoting truth and fair dealing in the market place." Feinberg v. Red Bank Volvo, Inc., 331 N.J. Super. 506, 512 (App. Div. 2000). It is intended to "promote the disclosure of relevant information to enable the consumer to make intelligent decisions in the selection of

products and services." Div. of Consumer Affairs v. G.E., 244 N.J. Super. 349, 353 (App. Div. 1990). CFA is a remedial statute and as such, its provision must be liberally construed in favor of the consumer in order to accomplish its deterrent and protective purposes. Lettenmaier v. Lube Connection, Inc., 162 N.J. 134, 139 (1999).

To make out a prima facie case under the CFA, a plaintiff must present evidence of: "(1) unlawful conduct by defendant; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009). Consumer fraud violations can be divided into three categories: (1) affirmative acts; (2) knowing omissions; and (3) regulatory violations. Feinberg, supra, 331 N.J. Super. at 510. A misrepresentation is actionable under the CFA only if it is material to the transaction, false in fact and induces the buyer to purchase. Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 535 (App. Div. 1996), aff'd as modified, 148 N.J. 582 (1997). Oral misrepresentations are covered by the CFA to the same extent as written misrepresentations. Gupta v. Asha Enters., L.L.C., 422 N.J. Super. 136, 147 (App. Div. 2011).

If a plaintiff establishes that a defendant committed a consumer fraud by making an affirmative misrepresentation,

"intent is not an essential element." Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994). If, however, the alleged consumer fraud is the result of a defendant's omission, a "plaintiff must show that the defendant acted with knowledge, and intent is an essential element of the fraud." Id. at 18. A practice can be unlawful even if no person was, in fact, misled or deceived thereby. Id. at 17. It is the mere "capacity to mislead" that is the "prime ingredient of all types of consumer fraud." Ibid. Finally, any claimed loss must be established with reasonable certainty. Feinberg, supra, 331 N.J. Super. at 511.

From our review of the trial record, we conclude there was sufficient, credible evidence to support a prima facie case that Oval engaged in "unlawful conduct" pursuant to the CFA. Oval knowingly represented to Hudson that it was qualified by experience and practice to install an open-cell court. Oval's owner, Benz, admitted at trial he was not "certified" as an installer of the court as he represented. Significantly, Benz also admitted he did not know the difference between an open-cell and closed-cell tennis court. We hold this evidence, when taken together with the legitimate inferences therefrom, provided a rational basis for the jury's determination whether Oval engaged in deceptive conduct actionable under the CFA.

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