NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3466-13T2

MEDHAT ABBAS,

Plaintiff-Appellant,

v.

PENNYMAC CORP.,

Defendant-Respondent.

Argued January 7, 2015 – Decided July 16, 2015

Before Judges Fuentes and Ashrafi.

On appeal from Superior Court of New Jersey, Hudson County, Law Division, Docket No. L-2297-13.

Nicholas A. Stratton argued the cause for appellant (Denbeaux & Denbeaux, attorneys; Joshua W. Denbeaux and Mr. Stratton, on the brief).

Kevin C. Rakowski argued the cause for respondent (Blank Rome L.L.P., attorneys; Mr. Rakowski and Louis A. Greenfield, of counsel and on the brief).

PER CURIAM

On October 29, 2012, plaintiff Medhat Abbas's home in the Township of North Bergen was damaged by the powerful "Superstorm" Sandy. Plaintiff's homeowner's insurance carrier, GEICO, together with and/or doing business as Homesite Insurance

Company, assessed the damage to the house and issued a check in the amount $12,277.43 to defendant PennyMac Corporation (PennyMac),[1] the owner of the promissory note and mortgage originally executed by plaintiff to secure the loan he used to purchase his home in May 2006.

On May 10, 2013, plaintiff filed a complaint against PennyMac in the Superior Court Law Division alleging common law fraud and a violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. Plaintiff alleged PennyMac ignored his repeated demands for the release of the funds his homeowner's insurance carrier had paid to PennyMac, forcing him to use $9000 of his own funds to pay contractors to repair the storm damage to his home. Plaintiff alleged that despite his compliance with all of PennyMac's requests for documentation, defendant continued to wrongfully withhold the funds paid by the insurance carrier in connection with this loss.

On May 20, 2013 (ten days after plaintiff filed his complaint), defendant issued a check to plaintiff in the amount of $12,277.43, representing the proceeds paid by plaintiff's homeowner's insurance company in connection with the storm damage claim. The check was dated May 14, 2013, and plaintiff

[1] Although PennyMac Corporation was not the original lender, it became and remains the owner of the promissory note and mortgage for purposes of this cause of action.

received the check sometime before May 24, 2013. Defendant alleges the decision to release the funds was totally unrelated to plaintiff's complaint. The affidavit executed by the process server indicates PennyMac was served with plaintiff's summons and complaint at its business address in Moorpark, California, at 4:43 p.m. on June 4, 2013.[2]

On June 13, 2013, plaintiff's counsel sent defendant a letter, returning the check as a rejected settlement offer and stating, "[Plaintiff] is unwilling to discuss or accept any offer of settlement at this time." On July 24, 2013, defendant filed its answer to plaintiff's complaint. On January 2, 2014, defendant filed a motion to dismiss plaintiff's complaint on summary judgment.

After considering the arguments of counsel, the motion judge granted defendant's motion and dismissed plaintiff's complaint with prejudice. The judge held plaintiff was unable to show he suffered an ascertainable loss as required by the CFA under N.J.S.A. 56:8-19 because defendant had released to him the $12,277.43, which was the underlying basis of his complaint.

Plaintiff now appeals arguing the motion judge erred in viewing defendant's "tardy attempt to mitigate the damages

[2] We note, however, that the affiant's signature was notarized by a notary public on May 5, 2013. We have no explanation for this discrepancy and presume it was merely a clerical error.

caused by [its] unconscionable business practices [as a means of] absolv[ing] [it] of liability under the Consumer Fraud Act." Defendant argues the trial judge correctly dismissed plaintiff's cause of action because plaintiff could not prove an ascertainable loss after having received and rejected the $12,277.43 from defendant, an amount thirty-three percent greater than the amount of money plaintiff was suing to recover.

Because the trial court's decision was based purely on a question of law, our review is de novo. Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). Because the court dismissed the case by granting defendant's motion for summary judgment, we view the evidence in the light most favorable to plaintiff. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

After considering the record before us and mindful of prevailing legal standards, we reverse and remand for further proceedings.

Our Supreme Court recently reaffirmed the three basic elements a plaintiff must establish to present a prima facie case under the CFA: "To prevail on a CFA claim, a plaintiff must establish 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." Zaman v. Felton, 219 N.J. 199, 222 (2014) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009)). Here, the question before us is limited to determining whether plaintiff suffered an "ascertainable loss." N.J.S.A. 56:8-19 provides:

> Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. 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.

"An ascertainable loss under the CFA is one that is 'quantifiable or measurable,' not 'hypothetical or illusory.'" D'Agostino v. Maldonado, 216 N.J. 168, 185 (2013) (quoting Thiedemann v. Mercedes-Benz USA, L.L.C., 183 N.J. 234, 248 (2005)). Applying these standards here, plaintiff suffered a clearly quantifiable or measurable loss when defendant failed to release the $12,277.43 in insurance proceeds in a timely fashion. Justice Patterson emphasized in D'Agostino that in

adjudicating CFA claims, a trial court must conduct "a case-specific analysis of a defendant's conduct and the harm alleged to have resulted from that conduct." Id. at 186. The evidence shows defendant failed to forward the insurance proceeds to plaintiff in a timely fashion, without having a good-faith basis for such a prolonged delay. Defendant's decision to send the proceeds at a time of its choosing does not eliminate liability under the CFA because the $12,277.43 in insurance proceeds became the ascertainable loss the moment the funds were wrongly withheld.

Under the circumstances presented here, defendant cannot escape liability by releasing the insurance proceeds at a time when plaintiff had already assumed the burden of financing the cost of rebuilding his home. This approach leaves the door ajar for unscrupulous operators to use unconscionable commercial practices, as long as it can close the door before the victimized consumer initiates legal action to enforce the remedial measures conferred by the Legislature in the CFA. Here, defendant was not entitled to summary judgment because plaintiff's evidence showed an ascertainable loss at the time he filed his complaint.

Reversed and remanded.