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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5135-13T3

RAJIV HAZARAY, VENKATESWARA
PULLETI and VENKATARAJU KALIDINDI,

Plaintiffs-Respondents,

v.

THE ESTATES AT BORDENS CROSSING, LLC,
HARRY KANTOR, PATRICIA SCHLAEFER,
and ANDREW BRAVERMAN,

Defendants-Appellants,

and

PAUL CIESMELEWSKI,

Defendant.

Argued September 22, 2015 – Decided February 4, 2016

Before Judges Reisner, Leone and Whipple.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-2549-11.

Sam Maybruch argued the cause for appellants (Arbus, Maybruch & Goode, LLC, attorneys; Mr. Maybruch and Matthew R. Goode, on the brief).

W. Barry Rank argued the cause for respondents (Pellettieri, Rabstein and Altman, attorneys; Mr. Rank, on the brief).

PER CURIAM

Plaintiffs Rajiv Hazaray, Venkateswara Pulleti, and Venkataraju Kalidindi purchased model homes to be built with a two-car garage. The garage bay on the left side was not useable for its intended purpose of housing a car, because a platform and stairs made it too short. After a bench trial, Judge Marc M. Baldwin awarded damages, which were trebled pursuant to the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. The court also awarded costs and counsel fees. We affirm.

I.

We highlight the relevant facts established at the bench trial. Defendant The Estates at Bordens Crossing, L.L.C. (EBC) is a residential developer that constructed homes in a residential development located in Bordentown. Defendant Harry Kantor is the sole member of EBC. Defendant Patricia Schlaefer was employed by EBC in marketing and sales capacities, working directly for Kantor. Defendant Andrew Braverman oversaw the construction of the homes and service and warranty department of EBC. Braverman is also Kantor's son-in-law. We refer to these defendants collectively as "defendants."[1]

[1] Defendant Paul Ciesmelewski was the chief operating officer and the chief financial officer of EBC. All claims against Ciesmelewski were dismissed with prejudice after trial.

Plaintiffs are three homebuyers who each purchased a "Princeton" model of home that EBC was building in its Bordentown development. Most of the "Princeton" model homes in the development had a side-facing garage, but to reduce the price by $5000 and to increase sales, defendants decided to build about five of the "Princeton" model homes with front-facing garages.

Each of the Princeton model homes purchased by plaintiffs had front-facing two-car garages. The two bays of each garage were approximately twenty feet deep. However, the left bay of each garage had a platform and stairs, providing an additional entryway into the home. The platform and stairs shortened the available parking in each left bay by approximately three-and-a-half feet.

The primary question at trial was whether defendants were aware of this issue and failed to disclose it to plaintiffs. The trial court found defendants were on notice of the issue prior to each plaintiff's closing. In October 2009, a building inspector, Peter Carbone, expressed concern to Braverman that the left bays of the Princeton model homes' front-facing garages were too short to properly accommodate parking, due to the stairs and platforms.

On October 26, 2009, Michelle Belluscio, the first purchaser of a Princeton model home with a front-facing garage, who was a witness but not a party here, complained to Braverman during a walkthrough of her garage that she was concerned her vehicles would not fit in the left bay. She expressed the same concern in an email to Schlaefer on November 21, 2010. On January 21, 2010, Belluscio sent an email to EBC and Braverman, which read in relevant part:

> [A]fter we closed we tried to pull my husband's truck (Chevy Equinox) into the left garage door. It doesn't fit. He would have to pull up so he's touching the steps and then walk outside the garage to get into the house. A Chevy Equinox is an average sized vehicle. I would recommend you re-think the garage size for front entry garages on your future Princeton model homes because it's quite frustrating to think your [sic] getting a two car garage and only one car fits.
>
> [Da48-49 (emphasis added)].

All of the plaintiffs received a brochure and signed a contract stating that their Princeton model home when built would have a "two car garage." Despite the complaints above, defendants never told plaintiffs that there would be a problem in parking a normal-sized vehicle in the left garage bay, even though defendants received these complaints prior to key dates in plaintiffs' purchasing timelines.

Plaintiff Kalidindi executed a purchase contract with EBC

on September 20, 2009. On November 10, 2009, about two weeks after Belluscio's first complaint about the garage, a building permit was issued for Kalidindi's home. Closing was held on May 5, 2010. On June 7, 2010, Kalidindi emailed EBC and Braverman that his four-door Honda Accord sedan "barely fits in the garage on the staircase [left] side."

Plaintiff Hazaray executed a purchase contract with EBC on October 11, 2009. The building permit was issued on February 2, 2010. Closing was held on July 23, 2010. On that day, Hazaray told Schlaefer that his Mitsubishi Galant did not fit in the left side of his garage. The following day, Hazaray emailed Braverman, complaining that his car did not fit in the left garage bay.

On November 21, 2009, plaintiff Pulleti executed a purchase contract with EBC. The building permit was issued on March 30, 2010. On July 26, 2010, Pulleti emailed Braverman that "it looks like it will be very hard to park a full size car near the[] stairs" in the garage. On September 24, 2010, Pulleti's attorney sent a letter to EBC and Braverman noting that "a significant error in the interior dimensions of the garage . . . renders the garage useless for its intended purpose as to my client['s] vehicle."

In a September 29, 2010 conference call with Pulleti and

his attorney, Kantor said both garage bays were functional, and Braverman "denied having any prior knowledge of similar issue[s] on other Princeton model houses which ha[d] been closed earlier." On the scheduled closing date, because there was a "defect in the garage," Pulleti said "I cannot close with this defect still in place." In further negotiations, Pulleti indicated he was considering closing under protest "and pursu[ing] my legal course of action to get the garage fixed after closing." Kantor wrote: "[t]hat is your right," and agreed: "If in fact you are so sure you are correct, then why don't you close, and then pursue any remedies you may have in court." Unable to reach a resolution on the issue of the garage, Pulleti completed closing on October 15, 2010, attaching a letter indicating that he did so "under protest," because of his "dissatisfaction with the size of the front-entry garage."

Plaintiffs filed suit on August 4, 2011, alleging EBC breached its contracts with plaintiffs and that all defendants committed common law fraud and violated the CFA.

During trial, Judge Baldwin personally inspected plaintiffs' garages. He emphasized that Kalidindi's four-door Honda Accord did not fit in the left bay unless it was pulled closer than two inches away from the steps. The judge observed that Hazaray's Mercedes-Benz C280 could fit in the left bay but

that the trunk could not open fully without hitting the garage door. The judge found that the metal handle used to manually close the garage door hit the back of Hazaray's Mitsubishi Galant, a four-door sedan, and prevented the door from closing.

Judge Baldwin saw that Pulleti's Nissan Maxima, another four-door sedan, had nicked the stairway in attempting to pull in enough to close the garage door. The judge determined that even parked just an inch from the stairway, Pulleti's Maxima prevented the garage door from closing due to the door's electronic sensor. Additionally, the judge found that no one could walk behind the car or open the trunk when the door was closed. Judge Baldwin also noted that Pulleti's four-door Honda CR-V could not have its hatchback opened with the garage door closed. For these reasons, Judge Baldwin found the left garage bays of these Princeton model homes were not functional for their intended purpose.

At trial, plaintiffs, defendants, Carbone, Belluscio, a construction expert for plaintiff, and defendants' architect all testified. Judge Baldwin found Braverman's testimony was not credible. In particular, the judge did not believe Braverman's testimony that he did not recall discussing the garage bays with Carbone. He emphasized that Braverman's testimony that plaintiffs signed every page of the construction plans was "not

true because we have the plans" and they were "not signed on every page."

Judge Baldwin further found that the inability of the left garage bays to serve their intended purpose was a material fact. He emphasized that Schlaefer and Braverman had direct knowledge of the complaints regarding the garages, and inferred that Kantor learned of the complaints from Braverman, given their close working and familial relationships. Thus, he found defendants knew about the problem but knowingly omitted this material fact during their disclosures to plaintiffs.

Judge Baldwin rejected defendants' argument that compliance with the construction plans exempted them from liability, because while plaintiffs are intelligent and sophisticated people, they are not architects. He also rejected the argument that Pulleti knowingly waived his rights to sue by proceeding to close on the property despite being aware of the issue with the left bay, emphasizing that Kantor explicitly advised Pulleti he could still sue.

Judge Baldwin did not find plaintiffs' common law fraud claim by clear and convincing evidence, but found by a preponderance that EBC breached its contracts with plaintiffs, and that EBC, Kantor, Schlaefer, and Braverman violated the CFA. On the basis of expert testimony regarding the cost to make the

left garage bays functional, the trial court determined that damages were $9,200 for each of the three, "trebled pursuant to the [CFA] for each plaintiff," to $27,600. The court also awarded $101,967.70 in counsel fees pursuant to the CFA. The court issued a final judgment on May 28, 2014, and an amended final judgment on June 10, 2014.[2] Defendants appeal.

II.

We must hew to our "deferential standard" of review. D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013). "'Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review.'" Ibid. (citation omitted). "'[F]indings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility.'" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (citation omitted). "To the extent that the trial court's decision constitutes a legal determination, we review it de novo." D'Agostino, supra, 216 N.J. at 182. However, "'we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced

[2] The amended judgment corrected the initial final judgment's omission of the entry of the treble damages award against EBC in relation to Pulleti's CFA claim.

that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Ibid. (citation omitted); accord Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974).

Based on our standard of review, we affirm substantially for the reasons set forth in Judge Baldwin's thoughtful and well-reasoned December 20, 2013 oral verdict and opinion. We add the following.

III.

The trial court did not err in finding that defendants violated the CFA. "The CFA was intended 'to greatly expand protections for New Jersey consumers.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 120-21 (2014) (citation omitted). The CFA provides a private cause of action to consumers who fall victim to "unlawful practice[s]." D'Agostino, supra, 216 N.J. at 184. The CFA requires proof of (1) unlawful conduct; (2) an ascertainable loss; and (3) a causal relationship between the two. Ibid.

The CFA provides, in relevant part, that

> [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 . . . real estate, . . . 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 (emphasis added).]

Thus, a knowing omission of a material fact constitutes unlawful conduct under the CFA.

Defendants argue that the inability to park a car in a garage bay is not a material fact. A fact is material if "'a reasonable person would attach importance to its existence in determining a choice of action[,]'" or if one knows that another "'regards or is likely to regard the matter as important in determining [a] choice of action, although a reasonable [person] would not so regard it.'" Ji v. Palmer, 333 N.J. Super. 451, 462 (App. Div. 2000) (citation omitted). Here, the trial court could find a reasonable person would attach importance in purchasing a house to whether its garage bay could practically fit a normal-sized sedan. As Pulleti reasonably stated prior to closing: "I PAID for [a] 2 car garage home. I should get 2 garages which can accommodate 2 standard size cars. I only got 1 [Garage] and some storage space."

Defendants point out that the applicable building codes do not set forth a required length for a garage bay. However, the

CFA does not require the violation of a building code before the omission of material information constitutes consumer fraud.

Defendants complain the trial court erred in determining Carbone and Belluscio expressed concerns regarding the left garage bays in October 2009, and in finding that Kantor had knowledge of these complaints due to his familial and working relationships with Braverman. Defendants also argue that by the time they knew about the issue, it was too late for them to act.

However, there is "adequate, substantial, credible evidence in the record supporting the trial court's findings." Seidman, supra, 205 N.J. at 169. The court found the testimony of Belluscio and Carbone "very persuasive," and discredited Braverman's contrary testimony. "'Appellate courts should defer to trial courts' credibility findings that are influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record.'" State v. Kuropchak, 221 N.J. 368, 382 (2015) (citation omitted). Furthermore, Kantor testified that Braverman and Schlaefer told him of the problem raised in Belluscio's email, and the trial court could draw the reasonable inference that they also promptly conveyed to him the earlier concerns voiced by Carbone and Belluscio. Even if some or all of the plaintiffs were already under contract when defendants

were told the left garage bay was too short, construction of the homes and closing of the home purchase had not yet been completed, giving defendants time to correct the length of the left bay, or at least to disclose the situation to plaintiffs and offer them an appropriate remedy.

Defendants argue that plaintiffs knew the left garage bays were inadequate because they reviewed the architectural plans, and walked through the houses during construction. However, the architectural sketches contained in the appendix provide dimensions for the entire garage without subtracting for the stairs and platform. Moreover, "[t]he average buyer lacks the skill and expertise necessary to make an adequate inspection." McDonald v. Mianecki, 79 N.J. 275, 288, 299 (1979) (abolishing caveat emptor in home purchases); see also Strawn v. Canuso, 140 N.J. 43, 66 (1995) ("Professional builders and their brokers have a level of sophistication that most home buyers lack."). The trial court could find that plaintiffs were genuinely surprised when they discovered their normal-sized sedans would not fit in the left garage bay.

We also reject defendants' argument that the trial court erred when it found that Pulleti had not waived his claim by closing after noting issues with the left bay. Waiver "involves the intentional relinquishment of a known right, and thus it

must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them." Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 291 (1988). "Such a waiver must be done 'clearly, unequivocally, and decisively.'" Cole v. Jersey City Med. Ctr., 215 N.J. 265, 277 (2013) (quoting Knorr v. Smeal, 178 N.J. 169, 177 (2003)).

Here, defendants failed to show that Pulleti waived his right. Kantor explicitly told Pulleti he could still sue. Because of Kantor's assurance, Pulleti preserved his rights by signing under protest. Thus, Pulleti "merely accepted the said premises and did not release the defendants from liability for the breach of the contract." Weinberg v. Wilensky, 26 N.J. Super. 301, 305-06 (App. Div. 1953) (contrasting the situation "if no protest or complaint of the quality of the work is promptly made").

IV.

We also reject defendants' argument that the trial court erred in finding that EBC breached its contracts with plaintiffs. As the Supreme Court has stated: "When, as in this case, there is no express contractual provision concerning workmanship, the law implies a covenant that the contract will be performed in a reasonably good and workmanlike manner." Aronsohn v. Mandara, 98 N.J. 92, 98 (1984). "An implicit

understanding of the parties to a construction contract is that the agreed price is tendered as consideration for a home that is reasonably fit for the purpose for which it was built — i.e., habitation." McDonald, supra, 79 N.J. at 293. That same implicit understanding of reasonable fitness for intended purpose applies to an associated structure such as a garage. Aronsohn, supra, 98 N.J. at 98 (patio) (quoting Minemount Realty Co. v. Ballentine, 111 N.J. Eq. 398, 399 (E. & A. 1932) (garage)). Moreover, EBC breached the implied covenant of good faith and fair dealing when it failed to disclose the issue with the left garage bays, after its principal became aware of the defect. "A covenant of good faith and fair dealing is implied in every contract in New Jersey." Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001). This covenant requires "'consistency with the justified expectations of the other party[.]'" Id. at 245 (citation omitted).

V.

Defendants argue that Judge Baldwin erred when he permitted plaintiffs' counsel to question Kantor on the garage extension plan and a series of emails between Kantor and Pulleti, because those documents were not produced during discovery. Defendants similarly protest that Belluscio was recalled to discuss the November 21, 2010 email, which was also not produced.

Appellate courts apply "'an abuse of discretion standard to decisions made by [the] trial courts relating to matters of discovery,'" and "'"generally defer[s] to a trial court's disposition of discovery matters[.]"'" C.A. ex rel. Applegrad v. Bentolila, 219 N.J. 449, 459 (2014) (citations omitted). Similarly, "the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion," Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010), and "a reviewing court grants substantial deference to the evidentiary rulings of a trial judge," Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 319 (2006). "An appellate court applying this standard 'should not substitute its own judgment for that of the trial court, unless "the trial court's ruling is so wide of the mark that a manifest denial of justice resulted."'" State v. J.A.C., 210 N.J. 281, 295 (2012) (citations omitted). We find no abuse of discretion here.

VI.

Finally, we turn to defendants' argument that the trial court erred in finding defendants jointly and severally liable for plaintiffs' counsel fees.[3] "At the outset, we note that 'fee determinations by trial courts will be disturbed only on the

[3] There is no dispute with regard to the stipulated amount of fees awarded.

rarest of occasions, and then only because of a clear abuse of discretion.' That deferential standard of review guides our analysis." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)).

On February 14, April 11, and May 15, 2014, the court heard oral argument about the allocation of damages and counsel fees. Defendants argued that liability for both must be apportioned amongst defendants. Judge Baldwin accepted defendants' argument with regard to damages, finding Kantor, Schlaefer, and Braverman each one-third responsible for each plaintiff's $27,600 damages, and EBC fully responsible for each plaintiff's $27,600 damages under a theory of respondeat superior. See Gennari v. Weichert Co. Realtors, 148 N.J. 582, 609 (1997) (holding that "'parties causing an injury should be liable in proportion to their relative fault'" for damages and treble damages under the CFA and Comparative Negligence Act (citation omitted)).

Judge Baldwin determined that counsel fees were not to be apportioned, and held defendants jointly and severally liable. The trial court relied on Cogar v. Monmouth Toyota, 331 N.J. Super. 197 (App. Div. 2000), where we distinguished Gennari and held that counsel "fees should not be apportioned according to percentage of liability" because "the provision for attorneys'

fees under the CFA is mandatory as a result of the legislation's intent to encourage attorneys to take small claims in order to serve the important public policy behind the statute." Id. at 210-11. Our ruling in Cogar was not undermined by Allen v. V & A Bros., Inc., 208 N.J. 114 (2011), which did not address counsel fees. Thus, the trial court did not err in holding defendants jointly and severally liable for plaintiffs' counsel fees.

Defendants' remaining arguments are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION