SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0329-14T1

JOSEPH DIRENZO,

Plaintiff-Appellant,

v.

STEVEN KATCHEN and
RAYMOND BROOKS,

Defendants-Respondents,

and

ANTHONY GALATI, FIRST
INTERSTATE FINANCIAL CORPORATION,
AMERICA'S FIRST ABSTRACT,
INC., PREMIER MORTGAGE
SERVICES, L.L.C., and
CARDINAL FINANCIAL COMPANY,

Defendants.

Argued May 9, 2017 – Decided August 1, 2017

Before Judges Messano, Espinosa and Grall.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1990-10.

Patrice R. Ianetti argued the cause for appellant.

Brian J. Levine argued the cause for respondent Steven Katchen.

Brian Boyle argued the cause for respondent Raymond Brooks (Maria A. Arena, attorney; Ms. Arena and Mr. Boyle, on the brief).

PER CURIAM

In an effort to stave off the dire financial circumstances faced by his nephew, Antonio Galati, plaintiff Joseph DiRenzo agreed to purchase Galati's home (the property) with a mortgage arranged by defendant Steven Katchen, a licensed mortgage broker. Defendant Raymond Brooks attended the closing, ostensibly as a representative of the title insurance agency, America's First Abstract, Inc. (AFA). Galati was to receive $60,000 from the closing, make payments on the loan and retain beneficial use of the property until he could buy it back. Instead, Galati received far less money, the loan went into default and plaintiff paid carrying charges on the property until he eventually sold it at a loss.

Plaintiff filed suit against Katchen and Brooks, alleging legal and equitable fraud, violations of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -204 (the CFA), negligent misrepresentation, civil conspiracy, breach of fiduciary duty, and professional negligence against Brooks. In pre-trial motions, Katchen sought partial summary judgment dismissing the CFA claims against him;

Brooks sought an order striking plaintiff's expert report and granting summary judgment on the CFA claims against him.

After construing the CFA's provision prohibiting punitive damage and counsel fee awards against "a [licensed] real estate broker, broker-salesperson or salesperson," N.J.S.A. 56:8-19.1, and concluding Katchen was such a licensed professional, the motion judge quoted N.J.S.A. 56:8-19.1 in denying Katchen's motion without prejudice:

> [I]n order for the CFA to not apply to Katchen, Katchen has the burden of demonstrating that he . . . "[h]ad no actual knowledge of the false, misleading or deceptive character of the information; and . . . [m]ade a reasonable and diligent inquiry to ascertain whether the information is of a false, misleading or deceptive character."

The motion judge rejected Brooks' contention that title producers were "learned professionals" to whom the CFA did not apply. See, e.g., Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J. Super. 551, 561-63 (App. Div. 2006) (explaining this exception to the CFA). He wrote, "[T]itle producers are within the definition of real estate brokers and thus included in the exception to the learned professional rule set out in N.J.S.A. 56:8-19.1." The judge also rejected Brooks' argument that he served only as a notary public at the closing, stating, "Brooks signed as the settlement agent on a number of the closing documents

. . . . This . . . alone creates issues of material fact regarding Brooks' role in the sale of the subject property." The judge denied Brooks' motion without prejudice.

A bench trial ensued, spanning fourteen days over nine months before a different Law Division judge. At the conclusion of plaintiff's case, both defendants moved for involuntary dismissal. See R. 4:37-2(b). For reasons stated in his oral decision, the judge entered two orders dismissing plaintiff's complaint as to Katchen and Brooks.

Plaintiff appeals, asserting the trial judge applied the wrong standard in evaluating the sufficiency of the evidence as to each cause of action.[1] We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.

Before summarizing the evidence at trial, we explain the principles that inform the proper disposition of a motion for involuntary judgment and our review of that decision. Rule 4:37-2(b) provides:

> After having completed the presentation of the evidence on all matters other than the matter of damages (if that is an issue), the

[1] Plaintiff makes no argument regarding dismissal of his equitable fraud claim. An issue not briefed is deemed waived on appeal. N.J. Dept. of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 505-06 n.2 (App. Div.), certif. denied, 222 N.J. 17 (2015).

> plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action . . . on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

"If the court, '"accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom,"' finds that '"reasonable minds could differ,"' then '"the motion must be denied."'" ADS Assocs. Grp., Inc. v. Oritani Sav. Bank, 219 N.J. 496, 510-11 (2014) (quoting Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (quoting Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000))). "An appellate court applies the same standard when it reviews a trial court's grant or denial of a Rule 4:37-2(b) motion for involuntary dismissal." Id. at 511 (citing Fox v. Millman, 210 N.J. 401, 428 (2012)).

"[T]he judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Dolson

v. Anastasia, 55 N.J. 2, 5-6 (1969). The "criteria set forth in Dolson . . . are particularly applicable to complex transactions wherein fraud or other inequitable conduct is charged because in such instances the facts are peculiarly within the possession and knowledge of the parties charged with the improper conduct." Zucker v. Silverstein, 134 N.J. Super. 39, 50 (App. Div. 1975).

"Ordinarily, the dismissal motion should be denied if the plaintiff's case rests upon the credibility of a witness." Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 4:37-2 (2017) (citing Ferdinand v. Agric. Ins. Co. of Watertown, N.Y., 22 N.J. 482, 494 (1956)). However,

> when the trial court's dismissal is dependent upon its acceptance of the credibility of a key witness . . . , the dismissal is sustainable only where the witness's testimony "is clear and convincing, not incredible in the light of general knowledge and common experience, not extraordinary, not contradicted in any way by witnesses or circumstances, and so plain and complete that disbelief of the story could not reasonably arise in the rational process of an ordinarily intelligent mind . . . ."
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> [Cameco, Inc. v. Gedicke, 299 N.J. Super. 203, 213 (App. Div. 1997) (quoting Ferdinand, supra, 22 N.J. at 494), aff'd in part, mod. in part, 157 N.J. 504 (1999) (emphasis added).]

The trial judge relied in part upon a case that embodies this rare exception to Dolson's broad imperative, Caliguire v. City of

Union City, 104 N.J. Super. 210, 212 (App. Div. 1967), aff'd, 53 N.J. 182 (1969). In that case, a child died when he fell from a rope allegedly suspended from a tree on property owned by the city. A city police officer testified on the plaintiff's case that he regularly patrolled the area and had never seen a rope suspended from the tree, nor had anyone informed him of its existence. Id. at 214. The judge granted the defendant-city's motion for involuntary dismissal, and the plaintiff appealed. Ibid.

We concluded that the plaintiff failed to prove a necessary element of the case, i.e., the city had actual knowledge the rope was on its property. Id. at 216. We rejected plaintiff's contention that, although the officer's testimony was uncontroverted, it was not conclusive, because his credibility was an issue for the jury to decide. Id. at 217. Relying on Ferdinand, supra, 22 N.J. at 494, we said,

> [w]here, as here, the uncontradicted testimony of a witness is unaffected by any conflicting inferences to be drawn from it and is not improbable, extraordinary or surprising in its nature, and no other ground exists for hesitating to accept it as the truth, we cannot conclude that the trial judge erred in doing so. . . . While, as plaintiff argues, he was not conclusively bound by [the officer's] testimony we believe the trial judge could properly accept it as factually true -- not because [the officer] was called as a witness by the plaintiff, but because it

> was the only testimony offered on the subject of defendant's knowledge of the rope swing on its property.
>
> [Id. at 218-19.]

Lastly, "[i]f the plaintiff's case requires the support of expert testimony, the failure to adduce it will require dismissal." Pressler & Verniero, supra, comment 2.3 on R. 4:37-2; see also Smith v. Keller Ladder Co., 275 N.J. Super. 280, 284-86 (App. Div. 1994) (affirming dismissal when plaintiff's expert's opinion was sole proof of necessary element and was stricken as a net opinion).

With these principles in mind, we turn to the evidence at trial.[2]

II.

Galati purchased the property in 1999, and Katchen was the loan originator for the mortgage. Thereafter, Galati refinanced

[2] Plaintiff argues the trial judge erroneously dismissed his CFA claims and his professional negligence claim against Brooks by ignoring the motion judge's prior decisions, which he contends were law of the case. This specific argument lacks sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). "[A] denial of summary judgment is always interlocutory, and never precludes the entry of judgment for the moving party later in the case." Hart v. City of Jersey City, 308 N.J. Super. 487, 498 (App. Div. 1998) (citing Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988)); see also Gonzales v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 356 (App. Div. 2004) (holding that a denial of summary judgment "decides nothing and merely reserves issues for future disposition"), aff'd, 184 N.J. 415 (2005), cert. denied, 546 U.S. 1092, 126 S. Ct. 1942, 163 L. Ed. 2d 857 (2006).

the property three times, and on each occasion, Katchen arranged the mortgage loan. In March 2007, Galati experienced financial difficulties and sought Katchen's help again. However, Katchen told Galati his credit was too poor and suggested he find someone with better credit to help him. Galati called plaintiff, saying he needed someone to "sign" for him to secure funds from the equity in his home. Plaintiff agreed to meet Galati, and one hour later, Galati and Katchen arrived at plaintiff's home.

Katchen proposed that Galati transfer the house to plaintiff after plaintiff secured a $460,000 mortgage. Galati would receive $60,000 in cash from the arrangement, which he would use to pay the mortgage, taxes, and related expenses for the next year. At the end of one year, plaintiff would transfer the property back to Galati or to a corporation he controlled.

Galati testified that Katchen explained the entire plan to plaintiff. When plaintiff asked Katchen if he needed an attorney, Katchen told him no, because it was a "family matter," and Katchen would take care of it. Plaintiff did not sign a mortgage application or anything else at the meeting. There was no written agreement for sale or any written agreement detailing the terms of plaintiff's and Galati's agreement. After the meeting, plaintiff and Galati had no contact with Katchen until the closing.

On April 24, 2007, the mortgagee filed a foreclosure action against the property; the closing took place the next day at the property. Karinn Van Pelt, a real estate agent and title producer who owned AFA, testified AFA was the "settlement agent," whose job it was to ensure the title and closing documents were correct and to "sign off" when the closing was funded. According to Van Pelt, AFA only had one employee, who was not a title producer, so she hired independent contractors to attend real estate closings.

She explained that before a closing, the mortgage broker should explain the HUD-1 statement[3] to the borrower, review the "package" she prepared and answer any questions. For plaintiff's closing, Van Pelt got the "package" from the lender, First Interstate Financial, and gave it to Brooks on the day of the closing.

Van Pelt hired Brooks, a licensed title producer, and repeatedly testified he was simply a notary, whose job it was to witness the closing. However, she also acknowledged there were numerous places in the closing documents where Brooks signed as

[3] "The HUD-1 Settlement Statement is a document that lists all charges and credits to the buyer and to the seller in a real estate settlement, or all the charges in a mortgage refinance." https://www.consumerfinance.gov/ask-cfpb/what-is-a-hud-1-settlement-statement-en-178/ (last visited 7/14/17). According to Van Pelt, the purpose of the HUD-1 statement is "to know who's paying who."

"settlement agent." Van Pelt stated she used a notary who was also a licensed title producer because her insurance underwriter preferred that.

Plaintiff, Galati, Katchen and Brooks were the only people present at the closing. Galati recognized Brooks from a prior refinance closing. Brooks told plaintiff where to sign, but otherwise provided no explanation of the documents. Plaintiff admittedly asked no questions because he trusted Brooks and Katchen as "professional people."

Plaintiff signed a mortgage application at the closing that was dated March 27, 2007. Katchen signed the form, indicating he obtained plaintiff's application by "mail." The application contained several inaccuracies, including plaintiff's marital status and the extent of his education. The application listed the purchase price of the property as $455,000, the loan amount as $409,500, and cash from the borrower as $45,910.17. Plaintiff also signed a second loan application dated April 25, 2007, with the same information.

Plaintiff signed two different HUD-1 statements at the closing. Although both listed the sales price as $455,000, there were slight differences in the mortgage amount, the payoff amount for Galati's existing mortgage and the amount of cash due from borrower, i.e., plaintiff. According to plaintiff, no one told

him to bring any money to the closing, and he did not bring any. In one HUD-1 statement, the "cash to seller" was $70,972.60; in the other HUD-1, it was $58,716.31. AFA paid Premier Mortgage, Katchen's company, $11,252.

Galati did not receive any money at the closing, but about two weeks later, he received a check for $11,943.11 from AFA. Galati repeatedly called Katchen to ask where the rest of his money was, and Katchen told him he would look into the problem, but Galati never received any more money.

After the closing, Van Pelt repeatedly called Katchen to obtain proof of the check received from the borrower, because the loan could not be funded without the check. Katchen told her to "relax," and claimed he had the funds. Still, Van Pelt wanted proof and ultimately contacted Katchen's assistant, Damian Fumero, who, eventually faxed a copy of a bank check to her. Van Pelt produced a copy of a check for $40,000, payable to Galati and drawn on Wachovia Bank.

Fumero denied ever seeing the Wachovia check or that he had spoken to Van Pelt about it. An internal security officer for Wells Fargo, Wachovia's successor in interest, testified that Wachovia never issued the check, nor was it ever presented to the bank for payment. Van Pelt acknowledged the loan should not have

closed because of discrepancies on the HUD-1 and because plaintiff never tendered the necessary funds.

Plaintiff was initially unaware Galati did not receive $60,000, and found out one month later when Galati told him that he had not received the money. Plaintiff loaned Galati more money, but Galati soon defaulted on payments under the new mortgage and moved out of the property. Plaintiff started making the payments and eventually listed the house for sale with Katchen's wife, realtor Patricia Grish-Katchen. Plaintiff relisted the property several times thereafter with different agents until it finally sold in April 2013 for $325,000.

After an extensive N.J.R.E. 104 hearing, the judge qualified James Reilly as an expert in real estate transactions "through the lens of a settlement agent, a licensed title producer, or notary." Reilly explained that a buyer must bring the amount set forth on line 303 of the HUD-1 to the closing, and, failing to do so, the closing must be adjourned. He read from a HUD-1 in evidence, where Brooks signed under the following statement: "The HUD-1 settlement, which I have prepared, is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement." Both HUD-1 forms in evidence explained it was a "crime to knowingly make false statements . . . on this . . . form." Reilly acknowledged,

however, that the lender's instructions provided to Brooks did not require proof of funds. Reilly distinguished a notary's obligations from that of a settlement agent, and opined that, although Brooks was AFA's independent contractor, he was acting as settlement agent because a settlement agent is "any entity involved in the settlement process."

III.

Plaintiff contends the judge consistently misapplied the standards governing disposition of a Rule 4:37-2(b) motion by misconstruing our holding in Caliquire. We agree.

For example, in discussing the fraud claim, the judge cited inconsistencies in Galati's testimony, and between his and plaintiff's testimony, and said, "this testimony is as it was in Calaquire, contradictory, improbable, and surprising, such that the Court can draw a conflicting inference and has hesitation in accepting its truth on its face." Noting "multiple versions of the agreement" between plaintiff and his nephew, the judge concluded "much of [the testimony] falls within the category as defined by Caliquire as improbable and certainly surprising."

However, Caliquire permits a judge to accept "uncontradicted testimony" from a witness, which if not "improbable, extraordinary or surprising," may remove the issue of credibility from the jury and permits the judge to decide the issue based upon that

uncontradicted testimony alone. Caliquire, supra, 104 N.J. Super. at 218 (emphasis added). When that testimony is "the only testimony offered" by the plaintiff to prove an essential element of the case, id. at 219, dismissal is appropriate under Rule 4:37-2(b).

In Ferdinand, upon which we relied in Caliquire, the Court clearly stated that where people of "reason and fairness may entertain differing views as to the truth of the testimony," such testimony must go to the jury. Ferdinand, supra, 22 N.J. at 494. In short, the judge misapplied the holding in Caliquire, which had no relevance to the evaluation of conflicting testimony offered by plaintiff in this case.

We need not cite other instances where the judge made inappropriate credibility determinations because they are irrelevant to our consideration of this appeal. That is so because, as already noted, our standard of review requires us to examine the evidence ourselves and apply the extremely indulgent standard set forth in Rule 4:37-2(b). ADS Assocs., supra, 219 N.J. at 511. We do that now with respect to the various causes of action in plaintiff's complaint.

A.

To establish legal 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)). It was in considering the evidence regarding fraud that the judge's misunderstanding of Caliquire's holding caused the most mischief.

Applying the proper standard under Rule 4:37-2(b), the evidence demonstrated Katchen told plaintiff that Galati would receive $60,000, which would be sufficient to carry the costs of the loan on the property for one year. The judge believed these were only aspirational statements, not misrepresentations of presently existing facts, because no appraisal had been done on the property. However, Katchen had secured mortgages for the property many times in the past, most recently six months earlier, in October 2006, and presumably knew the balance of the existing mortgage on the property. Plaintiff was entitled to a reasonable inference that Katchen represented he could secure a loan for enough money to pay off the existing mortgage and net $60,000 to Galanti, all without plaintiff tendering any money at all.

Moreover, at closing, Katchen knew Galati would not receive $60,000. Yet, Katchen processed the loan and received his commission. His actions thereafter implicitly reflect knowledge

of the fraud. "The fact that no affirmative misrepresentation is made does not bar relief predicated on a claim of fraud. Silence in the face of an obligation to disclose may be fraud, since the suppression of truth when it should be disclosed is equivalent to an expression of a falsehood." Baldasarre v. Butler, 254 N.J. Super. 502, 521 (App. Div. 1992), aff'd in part, rev'd in part, 132 N.J. 278 (1993). Although plaintiff adduced no proof regarding the professional standards required of a mortgage broker, there was evidence that the loan closed only because of misrepresentations about the funds received from plaintiff. It is axiomatic that someone in Katchen's position had a duty to disclose the shortfall rather than process the closing and receive a fee.

We also reject the judge's conclusion that no reasonable person could find plaintiff's reliance upon Katchen's misrepresentation or silent affirmance was reasonable, because plaintiff, who had engaged in previous real estate transactions, signed documents that reflected the need to bring money to the closing. See Walid v. Yolanda for Irene Couture, Inc., 425 N.J. Super. 171, 181-82 (App. Div. 2012) (explaining reliance as prerequisite for fraud claim). However, where one party to an oral agreement trusts the other party to reduce it to writing, he may expect it will be drawn accurately in accordance with the oral

understanding between them. Peter W. Kero, Inc. v. Terminal Constr. Corp., 6 N.J. 361, 369 (1951); see also Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 611 (1989) (when terms of an oral agreement are not accurately reflected in writing, "it matters little that they [the plaintiffs] failed to read the agreement carefully before signing"). We reverse the dismissal of plaintiff's fraud claim against Katchen.

As to Brooks, there was no evidence of an affirmative misrepresentation regarding Galati's receipt of $60,000, or any evidence that Brooks was aware of the plan. However, plaintiff contends Brooks deliberately misrepresented the accuracy of the figures on the HUD-1 form, specifically, the lack of any funds from plaintiff. We agree.

Reilly testified that Brooks was the settlement agent and had a duty to make sure the HUD-1 form was accurate, including making sure that the amount of money on line 303 of the form, i.e., "cash from borrower," was correct. Plaintiff, however, did not rely upon this misrepresentation nor did he suffer any damages from Brooks' misrepresentation. After all, he knew he brought no money to the closing, and yet he received title to the property without paying for it. As a result, plaintiff adduced insufficient proof of fraud as to Brooks. We affirm the dismissal of the fraud claim against Brooks.

In arguing the judge wrongfully dismissed his CFA claims, plaintiff essentially relies on the rulings made by the motion judge, which, he argues, demonstrated he had established a prima facie case of statutory violations. As noted above, these arguments lack any merit.

However, much of what we have said about the evidence of common law fraud applies equally to plaintiff's CFA claims. In dismissing plaintiff's CFA claim against Katchen, the judge once again misconstrued Calaguire's holding and made numerous credibility findings based upon contradictory testimony. As to Brooks, he determined no reasonable person could conclude he acted as settlement agent, despite the fact that Brooks signed as such on numerous documents.

N.J.S.A. 56:8-19 provides a remedy to "[a]ny 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 . . . ." "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 U.S.A, L.L.C., 183 N.J. 234, 248 (2005)).

"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.'" Id. at 184 (quoting Bosland v. Warnick Dodge, Inc., 197 N.J. 543, 557 (2009)). "There is no precise formulation for an 'unconscionable' act that satisfies the statutory standard for an unlawful practice. The statute establishes a 'broad business ethic' applied 'to balance the interests of the consumer public and those of the sellers.'" Ibid. (quoting Kugler v. Romain, 58 N.J. 522, 543-44 (1971)).

A violation of the CFA can arise in three different settings, only two of which are important here. Gennari, supra, 148 N.J. at 605. 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)). An omission or failure to disclose a material fact, if accompanied by knowledge and intent, is also sufficient to violate the CFA. Ibid. (citing Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994)). Moreover, "causation under the CFA is not the equivalent of reliance. . . . To establish causation, a consumer merely needs to demonstrate that he or she suffered an ascertainable loss 'as a result of' the unlawful practice." Lee

v. Carter-Reed Co. L.L.C., 203 N.J. 496, 522 (2010) (citations omitted) (quoting N.J.S.A. 56:8-19).

Here, applying the indulgent standards under Rule 4:37-2(b), plaintiff proved Katchen made an affirmative misrepresentation before the closing and omitted material facts at the closing. The evidence demonstrated a causal connection between the unconscionable conduct of Katchen and plaintiff's ascertainable loss. We reverse dismissal of plaintiff's CFA claim against Katchen.

As to Brooks, following the completion of testimony, and apparently at the judge's direction, plaintiff's counsel emailed defense counsel setting forth the specific causes of action it had proven as to each defendant. As to Brooks, plaintiff limited his CFA claim to "knowing omissions." Several weeks later, the parties appeared before the judge to argue defendants' motions for involuntary dismissal.[4] It is unclear from the argument what plaintiff's specific CFA claim was against Brooks, however, in his oral decision, the judge only addressed and rejected plaintiff's claim that Brooks knowingly omitted telling plaintiff he had to bring $44,000 to the closing.

[4] The parties evidently provided briefs beforehand to the judge, but they are not part of the appellate record. R. 2:6-1(a)(2).

We fail to see any evidence of a "knowing omission" committed by Brooks. Reilly testified Brooks was not required to see proof of funds. Plaintiff makes no specific argument to support his CFA claim beyond conclusory statements without any supporting legal authority. Miller v. Reis, 189 N.J. Super. 437, 441 (App. Div. 1983). We affirm the dismissal of plaintiff's CFA claim against Brooks.

B.

Negligent misrepresentation is "[a]n incorrect statement, negligently made and justifiably relied upon," and may be the "basis for recovery of damages for economic loss or injury sustained as a consequence of that reliance." H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 334 (1983). "Negligent misrepresentation does not require scienter as an element," and therefore, "it is easier to prove than fraud." Kaufman v. i-Stat Corp., 165 N.J. 94, 110 (2000).

It was error to dismiss plaintiff's negligent misrepresentation claim against Katchen because there was evidence that Katchen misrepresented the consequences of the sale, and plaintiff relied upon those misrepresentations in agreeing to close. As to Brooks, plaintiff proved a misstatement on the HUD-1 form, but, as already noted, he failed to prove any reliance or

damages as a result. We affirm dismissal of the negligent misrepresentation claim against Brooks.

C.

Plaintiff contends the judge erred in dismissing his breach of fiduciary duty claim against each defendant. However, the record reflects that plaintiff's counsel advised the judge he was not pursuing such a claim against Katchen, and, indeed, the judge never addressed the issue in his decision. There is no indication that plaintiff ever sought reconsideration of the issue. We therefore refuse to consider it now for the first time on appeal. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973).

As to Brooks, the judge again focused on inconsistencies between Van Pelt's testimony, i.e., Brooks was only a notary, and Reilly's testimony about the role of a settlement agent at closing. He found plaintiff failed to establish a prima facie case that Brooks was a settlement agent.

However, plaintiff was entitled to all favorable testimony and evidence, as well as all favorable inferences drawn therefrom. Brooks signed the documents as settlement agent and stated under penalty that the amounts reflected on the HUD-1 statement were accurate. Reilly testified Brooks had an obligation not to consummate the closing if the numbers were not accurate, yet, the closing was consummated.

In F.G. v. MacDonell, 150 N.J. 550, 563-64 (1997), the Court explained:

> The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship.
>
> [(Citations omitted).]

Here, plaintiff admittedly never met Brooks before the closing and, while he trusted Brooks because he was a "professional," it is difficult to conclude they had a special fiduciary relationship, or that Brooks had a duty to act for plaintiff's benefit. Reilly never described the relationship in those terms. We affirm dismissal of plaintiff's claim that Brooks breached a fiduciary duty.

D.

We affirm dismissal of plaintiff's civil conspiracy claim. "[A] civil conspiracy is 'a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an

agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage.'" Banco Popular, supra, 184 N.J. at 177 (quoting Morgan v. Union Cty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994)). The judge concluded there was insufficient proof of a civil conspiracy, noting it was necessary to link Brooks to the alleged plan "hatched by Katchen" that Galati would realize $60,000 from the sale of the property and plaintiff would have no financial outlay. We agree.

E.

Lastly, plaintiff argues the judge should not have dismissed his professional negligence claim against Brooks. Initially, we reject Brooks' argument that plaintiff abandoned this claim via the above-referenced, post-testimonial email. Plaintiff's counsel clearly stated he was pursuing the "[n]egligence" claim against Brooks, and the judge considered the issue, ultimately concluding "Reilly's testimony failed to establish the standard of care of a closing agent." Plaintiff argues, among other things, that Brooks had a duty to "conduct the closing in a lawful manner in accordance with the duties of a [s]ettlement [a]gent." We agree.

The judge reached his conclusion because Reilly could not cite specific regulatory provisions regarding the HUD-1 statement and failed to provide "his industry's definition of a settlement

agent." Clearly, opinions that are nothing more than the expert's personal views are inadmissible net opinions. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011). However, Reilly's testimony was not a net opinion.

He clearly set forth the duties of a settlement agent. He did so based upon his training, experience and education as a licensed title producer who had served as a settlement agent at countless closings. See, e.g., Rosenberg v. Tavorath, 352 N.J. Super. 385, 399-400 (App. Div. 2002) (reversing order of involuntary dismissal and concluding the plaintiff's expert was qualified to render opinions based upon his education, occupational experience and knowledge acquired over years). Moreover, Reilly cited an obligation imposed on the settlement agent by the HUD-1 form itself, i.e., that it was "a true and accurate account of th[e] transaction," and the settlement agent had "caused or w[ould] cause the funds to be disbursed in accordance with this statement." Under the indulgent standard applicable to a Rule 4:37-2(b) motion, plaintiff demonstrated Brooks was a "settlement agent" who breached this duty by executing a false HUD-1 form. Clearly, Brooks' actions were necessary to consummate the closing, the proximate result of which was plaintiff's ownership of the property without the expected concomitant disbursement of $60,000 to Galati. Under the

circumstances, it was error to dismiss plaintiff's negligence claim against Brooks.

IV.

In sum, as to Katchen, we affirm the order dismissing plaintiff's claims for equitable fraud, breach of fiduciary duty and conspiracy, all of which were properly dismissed, and reverse the dismissal of plaintiff's claims for legal fraud, violation of the CFA and negligent misrepresentation.

As to Brooks, we affirm the order dismissing all plaintiff's claims, except for negligence. We reverse the order in that respect.

We remand the matter to the Law Division for further proceedings consistent with this opinion. We do not retain jurisdiction.