SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4174-13T4
A-4351-13T4

KERYN BROWN,

Plaintiff-Respondent,

v.

JORGE LOPEZ,

Defendant-Appellant.

and

STANLEY M. VARON, WILLIAM LINDSLEY,
WEST HOBOKEN REALTY, LLC,
STEVEN CARRACIO and LUIS VELASCO,

Defendants.

KERYN BROWN,

Plaintiff-Appellant,

v.

JORGE LOPEZ, STANLEY M. VARON and
WILLIAM LINDSLEY, and WEST HOBOKEN
REALTY, LLC,

Defendants,

and

STEVEN CARRACIO and LUIS VELASCO,

Defendants-Respondents.

Argued September 27, 2016 – Decided April 11, 2017

Before Judges Yannotti, Fasciale and Kennedy.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2425-09.

Thomas J. Wall argued the cause for appellant Jorge Lopez in A-4174-13 and respondent Luis Velasco in A-4351-13.

Frank J. Nostrame argued the cause for respondent Keryn Brown in A-4174-13 and appellant in A-4351-13.

S. Gregory Moscaritolo argued the cause for respondent Steven Carracio in A-4351-13.

PER CURIAM

In A-4174-13, defendant Jorge Lopez appeals from the amended judgment entered by the Law Division on April 11, 2014, which found that he violated New Jersey's Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -204, and awarded plaintiff Keryn Brown damages and attorney's fees. In A-4351-13, Brown appeals from the provision of the amended judgment, which dismissed her claims against defendants Steven Carracio and Luis Velasco. We address both appeals in this opinion, and for the reasons set forth herein, we affirm.

I.

We briefly summarize the relevant facts and procedural history. In April 2009, Lopez filed a landlord-tenant action against Brown in the Special Civil Part, seeking a judgment of possession of certain leased premises on the basis of non-payment of rent. In May 2009, Brown filed a complaint in the Law Division against Lopez and other defendants, asserting among other claims, that Lopez violated the CFA. Thereafter, the court transferred the landlord-tenant action to the Law Division, and the cases were consolidated.

Brown later amended her complaint to add defendants Stanley M. Varon, Brown's lawyer; William R. Lindsley, Lopez's lawyer; West Hoboken Realty, L.L.C. (West Hoboken), a company in which Lopez operated and had an ownership interest; Carracio; and Velasco. In January 2011, the trial court granted summary judgment in favor of Lindsley. In October 2011, the court granted summary judgment in favor of Varon, and in December 2011, the court dismissed Brown's claims against Carracio and Velasco. In February 2012, the court dismissed Brown's claims against Lopez, and entered a judgment for Lopez in the amount of $32,300. The court also awarded possession of the leased premises to Lopez.

Brown appealed the trial court's orders. In an unpublished opinion, we affirmed the grant of summary judgment to Lindsley, but reversed the orders granting summary judgment to Lopez,

Carracio, Velasco, and Varon. Brown v. Lopez, No. A-3172-11 (App. Div. Aug. 2, 2013). We held that there were genuine issues of material fact as to whether Lopez, Carracio and Velasco engaged in acts or practices declared unlawful under the CFA. Id. at 14-15. We also concluded that summary judgment should not have been granted to Varon. Id. at 17-19. We remanded the matter to the trial court for further proceedings. Id. at 19. Thereafter, Brown's claims against Varon were resolved.

In February 2014, the court conducted a five-day bench trial on the remaining claims. At the trial, the following evidence was presented. On November 6, 2001, Brown borrowed $117,000 from Countrywide Mortgage Company (Countrywide), and the loan was secured by a mortgage on Brown's property. Brown fell behind on her mortgage payments, and in November 2005, Countrywide obtained a final judgment of foreclosure against Brown's property.

Thereafter, Joahan Pineda, a salesperson for West Hoboken Realty, read a public notice indicating that Brown's property was to be sold at a sheriff's sale. Lopez and Pineda were interested in investing in the property. Lopez was a licensed real estate broker and sales agent.

In early January 2006, Lopez visited Brown at her home several times. She rejected his offer to buy the property. Brown testified that Lopez pressed her to do business with him, emphasizing the

risk that she would lose the home to foreclosure if she did not take action. According to Brown, Lopez suggested that they own the property as partners. Lopez told Brown he wanted to help her save her home.

Lopez thereafter prepared contracts, which reflected various proposals. In the first contract, dated January 20, 2006, Lopez and Pineda each acquired a fifty-percent ownership interest in the property, in exchange for payment of $270,000. Lopez also prepared a handwritten addendum, which stated that Lopez and Pineda would acquire title to the property, and immediately give Brown a fifty-percent interest in the property. Brown did not sign the contract.

Lopez explained to Brown that the home needed repairs. He said he would first have the repairs done to the attic and second floor, and Brown would move to the first floor apartment to accommodate the repair work. Lopez also promised to teach Brown the real estate business. Brown moved to the first floor of the home. Brown testified that she trusted and believed Lopez would help her save her home and teach her the real estate business.

On February 15, 2006, Lopez prepared a second contract, which stated that Brown would sell the property to Lopez and Pineda for $225,000. The contract did not, however, state that Brown would share ownership of the property with Lopez and Pineda. Brown, Lopez, and Pineda executed this contract.

Around this time, Brown realized she needed an attorney and she met with Varon at his office. Lopez learned that Brown had met with Varon, and he subsequently suggested they all meet. Lopez drove Brown to Varon's office. He also paid Varon's retainer. Varon prepared an addendum to the second contract, which was intended to clarify the parties' understandings.

The addendum superseded any contrary terms in the February 15, 2006 agreement, and stated that Lopez, Pineda, and Brown's daughter were the purchasers of the property. The addendum provided that Lopez and Pineda would possess a fifty-percent ownership interest in the property, and Brown's daughter would possess the remaining fifty percent.

The addendum also stated that upon execution of the addendum, Lopez, Pineda, and Brown's daughter would make a secondary mortgage loan to Brown in the amount of $74,000, which was necessary to reinstate the first mortgage and make repairs to the property. In addition, the addendum stated that Lopez and Pineda would loan Brown's daughter $10,000.

The addendum further provided that Brown could remain as a tenant of the first floor of the property for one year, at a specified monthly rent, which would be deducted at closing. In addition, beginning in April 2006, Lopez, Pineda, and Brown's daughter would lease the second and third floors of the house, and

they would have the right to rent those units to others and collect rent. The parties executed the February 15, 2006 contract and the addendum.

Thereafter, Lopez contacted Carracio and Velasco, two of his long-time acquaintances and business associates. He wanted to resolve the foreclosure action, pay Countrywide the amount owed, and commence repairs and renovations on the house. Lopez testified that the property required extensive repairs and Brown lacked the funds required to pay Countrywide and to pay for the repairs.

Although they had no experience in construction, Lopez and Pineda took charge of the repairs. Lopez did not tell Brown he lacked experience in contracting, and he did not inform her that he did not obtain estimates from qualified individuals for the construction. Lopez acknowledged that he never obtained the permits required to convert the two-family home into a four-family home.

On February 27, 2006, Carracio wired $42,467.81 to Varon, who transferred the money to Countrywide, to pay Brown's outstanding mortgage payments. On February 28, 2006, Brown executed a note and mortgage in favor of Carracio for $74,000. The balance of the funds, $31,532.19, was used for repairs to the property.

At trial, Lopez could not account for all of the money allegedly spent on the improvements. He could not provide

contracts, canceled checks, or estimates from contractors, or locate any records pertaining to the construction. Lopez testified that he used the monies obtained from Carracio and Velasco to reinstate the mortgage and make extensive repairs. However, Lopez only produced ledger sheets as evidence of these expenditures.

In 2006, Lopez began to collect rents for all four apartments. He rented the attic apartment to Brown's daughter for $900. He also collected $600 per month from Brown, and rent from tenants in the basement and second-floor apartments. In addition, Lopez took Brown to a bank to open a joint checking account.

According to Lopez, rent from the four apartments would be deposited in the account, and the monies on deposit would be used to pay bills. On cross-examination, Lopez was shown the bank statements. He conceded that he never deposited the rents he received into the account, and he did not use the monies in the account to pay bills.

Carracio testified that at Lopez's direction, he disbursed $77,500 to Lopez and Pineda. Velasco testified that he provided Lopez $102,104.22. He stated that, at Lopez's direction, he disbursed $78,642 to various payees. The difference, approximately $23,000, were cash payments to certain parties, which Velasco could not recall or document.

On July 28, 2006, Brown entered into a third contract with Lopez. This contract stated that Lopez would purchase the property for $430,000. Although the contract contains Brown and Lopez's signatures, Brown could not identify her signature on the contract. The July 28, 2006 contract did not state that Brown or her daughter would retain a fifty-percent ownership interest in the property.

Brown testified, however, that she still believed she would be a partner with Lopez in owning the property and that he would teach her the real estate business. Brown further testified that through the closing, which occurred on February 2, 2007, Lopez never said anything to lead her to believe otherwise.

At the closing, Brown and Lopez signed the Real Estate Settlement Procedures Act (RESPA) form, which stated that various debts and obligations totaling $459,811.65 would be deducted from the contract price of $430,000. These debts and obligations included the Countrywide mortgage, federal tax liens, real estate commissions, and attorney's fees. Brown disputed the amounts that were to be paid to Carracio and Velasco, which required her to pay $29,811.65. Velasco agreed to accept a $29,811.65 reduction in the amounts due on his mortgages.

Brown signed a "use and occupancy" agreement, which allowed her to remain in the house through September 30, 2007, at a rent of $600 per month. The agreement also gave Brown the option to

purchase the property from Lopez for $497,000 at any time prior to September 30, 2015. At the closing, Lopez received title to Brown's property.

On March 10, 2014, the trial judge issued a written opinion finding that Lopez committed unlawful practices in violation of the CFA and that, as a result, Brown suffered an ascertainable loss of $51,915.38, which the court trebled to $155,746.14, pursuant to N.J.S.A. 56:8-19. The judge dismissed the claims against Velasco and Carracio. Lopez then filed a motion for reconsideration, and Brown filed an application for attorney's fees and costs.

On April 11, 2014, the judge heard oral argument on the motions. The judge granted Brown's application for attorney's fees and costs, in the amount of $22,080; reduced the award of damages of $155,746.14 against Lopez, to $123,446.14, to reflect a credit for the previous judgment entered against Brown for $32,300; upheld the dismissal of Brown's claims against Velasco and Carracio; and denied all other relief sought by Lopez in his motion for reconsideration. These appeals followed.

II.

We first address Lopez's appeal. Lopez argues that the trial judge erred by finding that he committed unlawful acts in violation

of the CFA. He also contends that the judge erred by finding that Brown suffered an ascertainable loss as a result of his alleged unlawful acts.

We note initially that an appellate court will not disturb the findings of a trial judge, sitting without a jury, when the judge's findings are supported by adequate, substantial, and credible evidence. Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 483-84 (1974). Deference to the judge's factual findings is appropriate because the judge who saw and heard the witnesses testify "has a better perspective than a reviewing court in evaluating the veracity of witnesses." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)).

Nevertheless, we review the trial court's legal findings and conclusions de novo, since "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The CFA was enacted "to curtail the 'sharp practices and dealings in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kind of selling or advertising practices.'" DepoLink Court Reporting & Litig. Support

Servs. v. Rochman, 430 N.J. Super. 325, 338 (App. Div. 2013) (quoting Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 271 (1978)).

To succeed on a CFA claim, "a plaintiff [must] 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) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009)).

Conduct that rises to the level of an unlawful practice under the CFA includes:

> [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, 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 CFA protects consumers from three types of unlawful practices: 1) affirmative acts, 2) knowing omissions, and 3) violations of regulations promulgated pursuant to the CFA. Allen v. V & A Bros., Inc., 208 N.J. 114, 131 (2011). "Proof of any one

of those acts or omissions . . . will be sufficient to establish unlawful conduct under the Act." Cox v. Sears Roebuck & Co., 138 N.J. 2, 19 (1994).

There is, however, no precise definition of an unconscionable commercial practice. D'Agostino, supra, 216 N.J. at 184. "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)).

Here, the trial judge found that, in his dealings with Brown, Lopez committed unlawful practices in violation of the CFA. In support of that conclusion, the judge found that Brown's testimony was credible. The judge pointed out that during the relevant period, Brown was in financial distress. She possessed limited education and understanding of real estate transactions, which made her vulnerable to deception. On the other hand, Lopez had extensive experience in real estate transactions as an agent and broker.

The judge found that from the beginning of their relationship, Lopez misrepresented to Brown that they would own her home as partners. Lopez also told Brown he would arrange financing to renovate the property and pay off Brown's outstanding debts and obligations. Lopez told Brown that, thereafter, they would be co-equal owners of the property. The judge noted that this shared-

ownership concept was reflected in the contracts that Lopez prepared in January and February 2006.

The judge determined that, although the July 2006 contract did not specifically include this shared-ownership, Lopez unlawfully represented to Brown that they were still partners and her ownership interest in the property would be protected. The judge found that Lopez never disavowed this understanding.

Furthermore, Brown's attorney was not aware that Brown had entered into the July 2006 contract until he appeared at the closing for the sale of the property. The judge pointed out that Lopez had been communicating with Brown for over a year, even though he knew she had an attorney. At the closing, Lopez acquired full ownership of the property and Brown assumed responsibility for the monies provided by Carracio and Velasco.

The judge also found that Lopez never told Brown that he did not have any experience in general contracting. Lopez never told Brown that he had decided not to obtain the services of a general contractor, or that he had failed to obtain estimates from qualified contractors for the repairs and renovations.

The judge determined that Lopez intended that Brown would enter into various contracts, without knowing of these facts. Lopez also failed to estimate properly the costs for the repairs and renovations. This led to Brown signing the July 2006 contract, in

which she no longer had an interest in the property yet assumed the cost for the repairs and renovations.

The judge found that ultimately, Lopez's lack of experience in construction matters led to the issuance of building code violations, which resulted from his failure to obtain necessary permits and approvals before construction began. The judge determined that Lopez's misrepresentations regarding the shared-ownership concept with respect to the property violated the CFA.

In addition, the judge found that during 2006, Lopez collected rent on all of the apartments in the house, under the guise that he and Brown were partners. He also took Brown to a bank to open an account in which the rent proceeds were to be deposited to pay bills. Lopez conceded, however, that he never deposited the rent he collected from the tenants in the account, and he did not use the account to pay bills.

Lopez also made numerous misrepresentations to Brown in the contracts he had prepared. The misrepresentations included Lopez's statement that he had the funds required to complete the sale. The judge noted that Lopez had conceded that these representations were false. Lopez did not have those funds. The judge pointed out that the RESPA form indicated that at closing, Lopez was to pay $9,721.30. However, at the closing, Lopez paid nothing.

On appeal, Lopez argues that the trial judge erroneously ignored the third contract, which superseded the earlier agreements, and purportedly negated any assumption that Brown would have a fifty-percent ownership interest in the property. He contends that he and Brown did not have a partnership agreement. He argues that there was no evidence that he intended to deceive Brown.

Lopez also argues that Brown benefitted substantially under the agreements. He asserts that in his decision, the trial judge erroneously substituted Brown's daughter for Brown when they were two distinct individuals. He contends that there was no testimony that Brown's daughter was acting as Brown's alter ego in the transactions.

We are convinced that Lopez's arguments are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). We are convinced that there is sufficient credible evidence in the record to support the trial judge's findings of fact, and the conclusion that Lopez engaged in unlawful acts or practices in violation of the CFA.

Lopez further argues that the judge erred by awarding Brown damages. In a CFA action, a plaintiff must present sufficient "evidence from which a factfinder could find or infer that the plaintiff suffered from an actual loss." Thiedemann v. Mercedes-

Benz USA, L.L.C., 183 N.J. 234, 248 (2005). In cases in which the unlawful act is based on a misrepresentation, a plaintiff can show either an out-of-pocket loss or demonstrate a loss in value. Id. at 248-49.

On appeal, Lopez argues that Brown was not harmed by the increase in the purchase price for the property because the increase permitted her to pay off all of her outstanding debts and obligations. He contends the judge erroneously emphasized that Brown had been required to pay all of the construction costs, but failed to consider the fact that the construction was necessary so that the monies needed to pay off Brown's debts could be obtained.

Lopez's arguments are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). However, we add the following comments.

In his decision, the judge noted that Brown claimed her damages consisted of the total amount of the Carracio and Velasco loans. She alleged that there was no evidence that any repair or renovation work had ever been done, and no proof as to the cost of any such work.

The judge did not accept Brown's claim in its entirety. The judge found that repairs and renovations had been performed, and they enhanced the value of the home. The record also showed that at closing, Brown's outstanding mortgage had been paid off, as

well as her other debts and obligations. The judge noted that Brown had not received a fifty-percent interest in her home, but found that she suffered a loss because at the closing she assumed one hundred percent of the debt incurred to finance the repairs and renovations.

The judge determined that the evidence supported a remedy, which consisted of reducing the debt allocated to Brown by fifty percent. The judge awarded Brown one-half of the $31,532.19 of the monies provided by Carracio. The judge also awarded Brown with one-half of $72,298.57, the amount that was outstanding on the Velasco loan. The total was $51,915.38. The court trebled these damages pursuant to N.J.S.A. 56:8-19.

We are convinced that there is sufficient credible evidence in the record to support the judge's finding that Brown suffered an ascertainable loss. The record also supports the award of damages to Brown in the amount of $155,746.14. The judge calculated Brown's damages "within a reasonable degree of certainty." Thiedemann, supra, 183 N.J. at 249 (quoting Cox, supra, 138 N.J. at 22).

Lopez also argues that the judge erred by awarding Brown attorney's fees and costs. He contends that, since he did not violate the CFA, the award of counsel fees and costs was not warranted. However, since the judge found that Lopez violated the

CFA, the award of attorney's fees and costs was permitted by N.J.S.A. 56:8-19.

Accordingly, we affirm the judgment finding that Lopez violated the CFA, the award of damages, and the award of attorney's fees and costs to Brown.

III.

We next consider Brown's appeal. She argues that the trial judge erred by finding that Carracio and Velasco did not violate the CFA. Brown contends that she presented sufficient evidence to support her claims against Carracio and Velasco.

In dismissing Brown's claims against these defendants, the judge found that, based on the evidence presented at trial, neither defendant had any responsibility to Brown under the CFA. The judge stated that:

> [t]here was no credible evidence or testimony from plaintiff or her witnesses that Carracio or Velasco intended to defraud nor were they in any position to defraud someone they never met nor contacted. Furthermore, neither Carracio or Velasco was a participant in any of the dealings and/or conversations between [] Lopez and [plaintiff]. Clearly, defendant Lopez dealt directly with both of them to loan him money to finance the repairs for plaintiff's property. They were not part of Lopez's scheme.

On appeal, Brown argues that the judge failed to consider evidence which allegedly showed that Carracio and Velasco were involved with Lopez in his alleged unlawful conduct. She contends

Carracio and Velasco's participation in Lopez's "scheme" provided a sufficient nexus to her losses to support liability on the part of these defendants under the CFA. She further argues that Carracio made affirmative misrepresentations and knowingly omitted material facts in his dealings with her, thereby causing her to sustain an ascertainable loss.

We find no merit in these arguments. We are convinced that there is sufficient credible evidence in the record to support the court's finding that Carracio and Velasco had no responsibility to Brown under the CFA.

Here, the judge found that Brown failed to show that either Carracio or Velasco made a false promise or misrepresentation to her, or that they acted to deceive her in any manner. The judge found that there was insufficient evidence to show that either Carracio or Velasco knowingly concealed, suppressed, or omitted any material facts to Brown.

At trial, Brown presented evidence that Carracio and Velasco had previous relationships with Lopez, and that they loaned monies to Lopez, which were used to repair and renovate Brown's property. The evidence showed that Carracio and Velasco wrote checks, provided cash payments, and/or wired funds to Lopez. The judge determined, however, that Brown failed to provide sufficient evidence to show that Carracio or Velasco were complicit in Lopez's

scheme to deceive her. There is sufficient credible evidence in the record to support that finding.

Brown argues, however, that the judge's decision is inconsistent with Blatterfein v. Larken Assocs., 323 N.J. Super. 167 (App. Div. 1999). In Blatterfein, we concluded that summary judgment should not have been granted to the defendant architect because there was evidence that he operated not only as an architect, but also as a seller of real estate, who marketed and made misrepresentations about the building materials that induced the plaintiffs to purchase homes. Id. at 183.

We stated that although there was no direct contractual relationship between the architect and the plaintiffs, the architect had been associated with the other defendant-realtors for years and had reinforced contractual expectations by reviewing the designs of the homes with the plaintiffs. Id. at 180-81. We observed that the architect had "involved himself . . . in a real estate marketing venture wherein he [permitted] his services to be held out as part of what [was] being sold, or provided by way of influencing purchasers[.]" Id. at 183.

Brown's reliance upon Blatterfein is misplaced. Here, the record supports the court's finding that neither Carracio nor Velasco had any direct communications with Brown. Carracio and Velasco merely loaned Lopez money. Neither defendant was involved

in Lopez's unlawful actions. Furthermore, there also was no evidence that Brown was induced to sign the contracts of sale or the mortgages because of Carracio or Velasco's involvement as lenders.

We conclude that the trial judge did not err by finding that Brown had not submitted sufficient evidence to support her claims against Carracio and Velasco under the CFA.

Affirmed in A-4174-13 and in A-4351-13.