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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4888-14T1

EMIGRANT MORTGAGE COMPANY,
INC.,

Plaintiff-Respondent,

v.

KAREN COSTA,

Defendant-Appellant.

Telephonically argued May 24, 2017 – Decided September 18, 2017

Before Judges Nugent, Currier, and Geiger.

On appeal from Superior Court of New Jersey,
Chancery Division, Burlington County, Docket
No. F-043930-08.

Roosevelt N. Nesmith argued the cause for
appellant.

Carol Ann Slocum argued the cause for
respondent (Klehr Harrison Harvey Branzburg,
LLP and Hartlaub, Dotten & Mezzacca, PC,
attorneys; Ms. Slocum, Michael D. Mezzacca and
Robert P. Johns, III, on the brief).

PER CURIAM

The New Jersey Home Ownership Security Act of 2002, N.J.S.A.
46:10B-22 to -35 (HOSA), authorizes a homeowner who has borrowed

money for home improvements to assert against the loan creditor all affirmative claims and defenses the borrower may have against the home improvement contractor if the contractor arranged the loan. In the case now before us, a home improvement contractor, with the knowing or unknowing assistance of a mortgage broker and title company, swindled defendant Karen Costa out of money she borrowed from plaintiff Emigrant Mortgage Company, Inc., to pay for home improvements.¹ Emigrant then filed an action to foreclose on Costa's home.² Costa asserted affirmative defenses and counterclaims against Emigrant.

On cross-motions for summary judgment, the trial court dismissed the consumer fraud claim Costa had purportedly asserted against Emigrant under HOSA for the consumer fraud committed by the home improvement contractor, the mortgage broker, and the title company. The court determined Costa had not pleaded or otherwise raised HOSA and further determined her HOSA claim was barred by the applicable statute of limitations. The court also dismissed several of Costa's affirmative defenses and three other counts of Costa's counterclaim. Following the close of plaintiff's

¹ Costa has since changed her name.

² Emigrant actually assigned the note and mortgage to an affiliate, Emigrant Residential, LLC. The assignment is not at issue on this appeal.

proofs at trial, the court dismissed Costa's remaining affirmative defenses and claims against Emigrant.

We conclude Costa pleaded in her complaint the elements of a consumer fraud claim authorized by HOSA, even though she did not cite the statute. Under those circumstances, and considering our Legislature's strong pronouncement of HOSA's policy underpinnings, N.J.S.A. 46:10B-23, the trial court should not have dismissed her claim on summary judgment. We further conclude the trial court erred by dismissing all Costa's remaining claims at the close of her proofs at trial. For these reasons, we reverse those parts of the court's orders barring Costa from asserting claims through HOSA, vacate the foreclosure judgment, and remand for further proceedings.

This action's procedural history began when Emigrant filed a foreclosure action against Costa on November 5, 2008. Defendant did not plead or otherwise respond to the complaint, so a default was entered against her. Thereafter, plaintiff obtained final judgment and a writ of execution. Following numerous stays or postponements of sheriff's sales, mediation, Costa's filing of Chapter 13 bankruptcy petitions, and a sale of Costa's home, the trial court set aside the sheriff's sale and vacated the final default judgment.

Costa filed an answer, twelve affirmative defenses, a counterclaim, and a third-party complaint against the home improvement contractor, Full Spectrum Remodeling; Professional Abstract and Assurance Title Company, Inc.; and Merit Finance, a mortgage broker. In her counterclaim's seven counts, Costa pleaded causes of action for consumer fraud, common law fraud, negligence, breach of contract, predatory lending, violation of the Truth in Lending Act, and violation of the Truth in Consumer Contract Warranty and Notice Act.

Following discovery, Emigrant filed a motion for summary judgment. Costa filed opposition and a cross-motion for summary judgment. On May 30, 2014, the court entered an order and memorandum of decision granting Emigrant's motion in part. The court found that Emigrant had established the elements of a prima facie case for foreclosure, dismissed six of Costa's affirmative defenses, and dismissed her counterclaim counts alleging predatory lending, violation of the Truth in Lending Act, and violation of the Truth in Consumer Contract Warranty and Notice Act. The court denied Emigrant's motion as to the remaining counts after determining genuinely disputed facts existed as to whether an agency relationship existed between Emigrant and either Merit Finance or Professional Abstract. The court denied Costa's cross-motion for summary judgment.

Emigrant filed a motion to reconsider, or, alternatively, clarify that the court's May 30, 2014 order precluded defendant from asserting a consumer fraud claim against it as permitted by HOSA. On October 24, 2014, the trial court issued an order and memorandum of decision barring Costa from asserting a consumer fraud claim against Emigrant based on the provisions of HOSA.

The case proceeded to trial on the remaining counts. At the close of Costa's case, Emigrant moved for judgment. The court granted the motion. The court entered default judgments against the third-party defendants. This appeal followed.

Construed in the light most favorable to Costa, the party opposing Emigrant's summary judgment motion, Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014), the motion record establishes the following facts. On September 6, 2007, after responding to a newspaper advertisement for home improvement work and a loan for repair and remodeling, Costa entered into a home improvement installment contract with Full Spectrum. Full Spectrum's representative, Bill Markum ("Markum"), promised to arrange financing for the home improvements. The contract price for the work was \$83,649.

The next day, Costa received an unsolicited telephone call from Merit Finance, a company she had never heard of. Merit Finance was already aware of her meeting with Full Spectrum and

asked her questions for a mortgage loan application. Several days later, Merit Finance submitted to Emigrant a loan application package that included documents purportedly signed by Costa on September 7, 2007 — the day she spoke to a person from Merit Finance on the telephone. According to Emigrant, it had entered into a "Broker Direct Agreement" with Merit two years earlier, but Merit had produced only a handful of applications.

In any event, after receiving an appraisal of Costa's home as well as a closing service letter and title insurance commitment from Professional Abstract and Assurance Title Co., ("Professional Abstract"), Emigrant approved the loan. Emigrant sent Merit documents, which Merit returned after Costa purportedly signed them. Thereafter, on October 26, 2007, Emigrant extended a mortgage loan to Costa in the principal amount of \$115,000. Costa executed a note and a mortgage, which was duly recorded.

Meanwhile, becoming increasingly concerned about the amount of the home improvement contract, Costa had her husband call Full Spectrum and ask for a detailed breakdown of the work. On September 21, 2007, Full Spectrum's Vice President, Josh Schneider, wrote to Costa and said, among many other things, Full Spectrum did not charge Costa for "my personal efforts to obtain the mortgage loan." A few weeks later, a Full Spectrum representative notified Costa the loan had been approved and Full

Spectrum would start the work the next day, October 19, 2007. Full Spectrum began the work as promised, but never took out a permit.

The following week, a woman from Professional Abstract telephoned Costa, said the loan had been approved, and asked to come to Costa's home the next day for a closing. The next day, Debra Davis from Professional Abstract appeared at Costa's home, where Costa signed numerous closing documents. Davis instructed Costa to come to Professional Abstract's Pennsylvania office five days later to get the loan check. On the scheduled day, Costa received a check for \$23,056.87 rather than the full loan balance. She learned the remaining money had been disbursed to Full Spectrum.

A day or two later, someone from Full Spectrum appeared at her house and demanded she endorse three checks or he would immediately pull his men off the job. She complied. Full Spectrum cashed the checks but did not finish the work. Their workers left the site on March 24, 2008, and never returned.

Costa defaulted on the loan and Emigrant commenced the foreclosure action in November 2008. After Costa filed a complaint with the New Jersey Department of Banking and Insurance, she learned most of the documents generated during the mortgage application process had been forged. The forged documents included

a Refinance Certification that represented that no part of the loan would be used to finance a home improvement.

In the first sixty-three paragraphs of her counterclaim and third-party complaint, Costa set forth the factual allegations on which she based her counterclaim and third-party complaint. She alleged Emigrant and "its agents," Full Spectrum, Merit Finance, and Professional Abstract, "acting in concert, employed unfair trade practices to deceive [Costa] into engaging in a sham home improvement financing transaction." She further alleged "Full Spectrum represented that they would arrange financing for the home improvements" and Full Spectrum arranged for Merit Finance to process her loan application. Lastly, she summarized the facts she later developed on the summary judgment record as set forth above.

In her counterclaim against Emigrant, Costa alleged in the first count the conduct of Emigrant, Full Spectrum, Merit Finance, and Professional Abstract constituted multiple violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. Costa also alleged that "as a direct result of the conduct of Emigrant, [she] suffered an ascertainable loss."

In the counterclaim's third count, Costa alleged, among other things, Emigrant breached its duty of good faith and fair dealing "by failing to employ appropriate managerial control over the loan

closing process." In the sixth and seventh counts, Costa specifically identified and alleged violations of the Truth in Consumer Contract Warranty and Notice Act and violations of the Truth in Lending Act.

In the same pleading, Costa asserted a third-party complaint against Full Spectrum, Merit Finance, and Professional Abstract. She repeated by reference her factual allegations and then pleaded five causes of action against each third-party defendant: violations of the CFA, common law fraud, breach of contract, predatory lending, and violation of the Consumer Contract Warranty and Notice Act.

Costa argued in opposition to Emigrant's summary judgment motion, and in support of her own, that, among other reasons for denying Emigrant's motion, Emigrant was liable for the acts and omissions of the third-party defendants under HOSA and under principles of agency. Emigrant responded that Costa had not raised HOSA in her counterclaim and third-party complaint. Emigrant argued there was no evidence to support Costa's agency theories of liability, Costa did not address her affirmative defenses in her motion pleadings, and Costa produced insufficient proofs to support any of her counterclaims against Emigrant.

The court granted Emigrant's motion in part. The court found Costa had established no genuine issues of material fact to

support six of her affirmative defenses or her counterclaims alleging predatory lending and violation of the Truth in Lending and violations of the Truth in Consumer Contract Warranty and Notice Acts. The court also rejected Costa's HOSA arguments, stating

to the extent [Costa] tries to raise issues under [HOSA, she] does not contend that this is a high cost loan and in any event based upon the [p]laintiff's arguments, it was not. A violation of HOSA was not even raised in these pleadings. Finally, the statute of limitations with respect to New Jersey HOSA has run.

The court denied Emigrant summary judgment on Costa's remaining affirmative defenses and counterclaim counts, finding that the disposition of those claims depended on whether Emigrant had an agency relationship with the third-party defendants, an issue which depended upon resolution of genuinely disputed material facts.

Emigrant moved for clarification of the court's decision. Costa opposed the motion. The court reiterated its previous ruling and therefore clarified "that the [HOSA] claim cannot be raised under the CFA. Any CFA claim based on [HOSA] violations is precluded from trial."

The case proceeded to trial on Costa's agency theory of liability against Emigrant and on the remaining counts of the

third-party complaint against the third-party defendants. Costa adduced essentially the same proofs she had established on the summary judgment motion record. The court dismissed defendant's remaining claims at the close of Costa's case pursuant to Rule 4:37-2(b).³

The court analogized the facts regarding Professional Abstract to a condominium complex hiring an independent snow removal company, telling the snow removal company where to clean and what to salt. Notwithstanding such directives, the snow removal company remains an independent contractor. The court noted, "here Emigrant doesn't select Professional [Abstract], and the question is . . . the control that Emigrant has over Professional [Abstract], is that analogous to what a condominium association has over snow removal people or is it something more." The court could not "find a way . . . to distinguish that interaction with the Emigrant - Professional Abstract interaction."

The court concluded, "I don't think that the evidence and all the legitimate inferences therefrom could sustain a judgment that Professional [Abstract] is an agent for Emigrant, and absent that . . . there's no inculcation of Emigrant for Professional

³ The judge who decided the cross-motions for summary judgment was not the trial judge.

Abstract's negligence. So I find that under [Rule] 4:37-2(b), and that's the standard I'm using, that there's nothing in the case to show any independent fraud or negligence of Emigrant."

The court also dismissed Costa's claims against Emigrant based on her theory that Merit Finance was Emigrant's agent. The court found the language in the Emigrant – Merit Finance contract to be dispositive. The court explained that "Merit can place a loan with a lot of different banks, Merit is similar to the insurance broker that I've talked about, so I don't think there's any agency between Emigrant and Merit."

Following the trial, Emigrant received the court's authorization to proceed with the foreclosure action as a non-contested case, and obtained a final foreclosure judgement.

On appeal, Costa first argues the trial court erred in denying her summary judgment motion based on the CFA and common law fraud claims she asserted, through HOSA, against Emigrant. She asserts the trial court grossly misconstrued HOSA, failed to recognize the statute's plain meaning, and interpreted the statute in a manner inconsistent with both its corresponding regulations and legislative intent. In a lengthy dissertation on HOSA, interspersed with misinterpretations of the trial court's opinion, Costa disregards the twin underpinnings of the court's decision:

she never raised HOSA, and HOSA claims were barred by the applicable statute of limitations.

Emigrant argues that by the time it moved for summary judgment, Costa knew she couldn't prove any wrongdoing by Emigrant, so she changed course and asserted Emigrant was liable for Full Spectrum's consumer fraud by virtue of HOSA. Emigrant asserts "[t]he trial court rejected [Costa's] backdoor effort to assert a new claim against Emigrant based on strict liability." It notes the court held that Costa's assertion of a CFA claim based on a violation of HOSA "was barred because [Costa] did not allege that [Emigrant] violated [HOSA]." Lastly, Emigrant cites the trial court's ruling "that any claim against [Emigrant] based on [HOSA] was time barred."

Although Costa's counterclaim and third-party complaint did not specifically allege Emigrant was subject to liability for fraud or consumer fraud committed by others under N.J.S.A. 46:10B-27(a), it stated facts that established the elements of such a cause of action. The statute provides:

Notwithstanding any other law to the contrary, if a home loan was made, arranged, or assigned by a person selling either a manufactured home, or home improvements to the dwelling of a borrower, or was made by or through a creditor to whom the borrower was referred by such seller, the borrower may assert all affirmative claims and any defenses that the borrower may have against the seller or home-

improvement contractor limited to amounts required to reduce or extinguish the borrower's liability under the home loan, plus the total amount paid by the borrower in connection with the transaction, plus amounts required to recover costs, including reasonable attorney's fees against the creditor, any assignee or holder, in any capacity. (Emphasis added).

Costa's counterclaim and third-party complaint contained facts which, if proved, would establish that Full Spectrum, Merit Finance, and Professional Abstract had committed fraud and consumer fraud. Costa's pleading also alleged quite clearly that Full Spectrum, the home improvement contractor, had arranged the loan to Costa. Lastly, the pleading alleged Emigrant was the creditor. These facts were clearly sufficient to trigger N.J.S.A. 46:10B-27(a).

To be sure, Costa's attorney should have specifically identified HOSA, as was done with the Truth in Lending and Truth in Consumer Contract Warranty and Notice Acts. A prudent attorney would have done so. Nonetheless, it is evident from the forged Refinance Certification, printed on a document bearing Emigrant's name and logo, that Emigrant was aware of HOSA. The Refinance Certification provided were pre-printed statements for a mortgage applicant to choose and certify. One choice contained a statement that "no part of these additional funds will be used to finance a

home improvement to my (our) primary residence or other home owned by me (us)." Another choice contained this language:

No person or entity who is the seller or contractor for the home improvement or who is otherwise connected with the home improvement in any way . . . arranged for the loan applied for with Emigrant or referred me (us) to Emigrant in connection with this loan application, nor did any such Contractor inform me (us) of or suggest to me (us) the availability of financing with Emigrant. To the best of my (our) knowledge, neither Emigrant nor any broker involved in connection with this loan application is in any way involved in the home improvement or connected with any Contractor for the home improvement.

Considering these circumstances, the strong legislative policy declaration in N.J.S.A. 46:10B-23, and Emigrant's intent to take Costa's home notwithstanding the provisions of HOSA, we conclude Costa's pleadings provided notice to Emigrant that the facts underlying Costa's claims triggered HOSA, such that the claims should not have been dismissed.

Nor can we conclude from the record the basis on which the trial court determined HOSA's statute of limitations barred Costa's claims against Emigrant. In view of our disposition of the issue concerning the application of N.J.S.A. 46:10B-27(a), the record on that issue requires further development.

On the other hand, we reject Costa's argument that the judge erred in denying her cross-motion for summary judgment. Given the

manner in which Costa apparently first elaborated on her HOSA claim during motion practice, Emigrant may have had inadequate time to develop the record on the issue. Not only that, but Costa's reliance on N.J.S.A. 46:10B-27(a) without establishing a substantive violation of HOSA, particularly under the circumstances of this case, raises a host of potential legal and factual issues that the trial court did not address. One such argument is that which Emigrant raises as to whether HOSA applies to Emigrant under the facts of this case, given that Full Spectrum did not directly refer Emigrant to Costa. We leave these issues to the trial court to resolve in the first instance on a record developed accordingly.

Turning to the dismissal of Costa's claims at trial, we reverse as to Costa's theory that Professional Abstract was Emigrant's agent. Professional Abstract and Emigrant had a written contract specifically authorizing Professional Abstract to act as Emigrant's agent. Emigrant explicitly instructed Professional Abstract how to conduct the loan closing. Additionally, Emigrant required that Professional Abstract use a closing services letter in order to act as its settlement agent.

The written contract between Professional Abstract and Emigrant states in part: "ANY DEVIATION FROM THE INSTRUCTIONS OR ALTERATIONS TO THE CLOSING DOCUMENTS MUST BE APPROVED IN WRITING

BY EMIGRANT MORTGAGE COMPANY'S CLOSING DEPARTMENT PRIOR TO DISBURSEMENT." It further provides: "You are required to establish the identity of all parties executing closing documents. Photo identification such as a driver's license, passport, or employer identification is required."

The trial court did not analyze any of these facts before granting Emigrant's motion for judgment at trial. Considered in the light most favorable to Costa, these facts, "together with the legitimate inferences therefrom, could sustain a judgment in [Costa's] favor." R. 4:37-2(b). A jury could conclude from these facts that Emigrant "consent[ed] to have [Professional Abstract] act on its behalf, with [Emigrant,] the principal[,] controlling and directing the acts of [Professional Abstract,] the agent." Sears Mortg. Corp. v. Rose, 134 N.J. 326, 337 (1993).

We have considered the parties' remaining arguments and found them to be without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).


For the foregoing reasons, we reverse the trial court's order barring Costa from asserting CFA and other claims through HOSA against Emigrant. We also reverse that part of the order dismissing at the close of Costa's trial proofs Costa's claims against Emigrant based on an alleged agency relationship with Professional Abstract. We affirm the denial of Costa's cross-

motion for summary judgment. Lastly, based on our decision concerning Costa's claims through HOSA against Emigrant, we vacate the judgment of foreclosure.

We remand this matter to the trial court for further proceedings consistent with this opinion. The trial court should schedule a case management conference within forty-five days to determine whether additional discovery is necessary in light of our decision, and to schedule motion practice to dispose of all legal issues concerning HOSA and any other legal issues not previously addressed by the trial court; including any statute of limitations argument with respect to the HOSA claims. The parties should not construe this opinion as expressing any comment on how Costa's claims should ultimately be resolved or decided.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION