NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4825-15T2

ALL THE WAY TOWING, LLC, and
CHAYIM GOODMAN,

Plaintiffs-Appellants,

v.

BUCKS COUNTY INTERNATIONAL, INC.,
and DYNAMIC TOWING EQUIPMENT
AND MANUFACTURING, INC.,

Defendants-Respondents.

APPROVED FOR PUBLICATION

January 9, 2018

APPELLATE DIVISION

Argued November 14, 2017 – Decided January 9, 2018

Before Judges Fisher, Fasciale and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1865-12.

Jay J. Rice argued the cause for appellants (Nagel Rice, LLP and Levin Cyphers, attorneys; Jay J. Rice, of counsel and on the brief; Harry J. Levin, of counsel; Randee M. Matloff, on the brief).

Thomas E. Kopil argued the cause for respondent Bucks County International, Inc. (Marte and Toadvine, attorneys; Thomas E. Kopil, on the brief).

Daniel J. Kluska argued the cause for respondent Dynamic Towing Equipment and Manufacturing, Inc. (Wilentz, Goldman & Spitzer, PA, attorneys; Daniel J. Kluska, of counsel and on the brief).

The opinion of the court was delivered by

FISHER, P.J.A.D.

Plaintiffs All The Way Towing, LLC, and Chayim Goodman, appeal the dismissal of their complaint, which contained, among others, a claim that defendant Bucks County International, Inc., breached a contract to manufacture and sell to plaintiffs a custom-built tow truck, and a Consumer Fraud Act (CFA)[1] claim against both Bucks and defendant Dynamic Towing Equipment and Manufacturing, Inc. After discovery was completed, defendants successfully moved for summary judgment on all counts. Because the judge applied incorrect legal principles to these claims and failed to view the evidence in the light most favorable to plaintiffs, we reverse.

In examining the summary judgment under review, we apply the same Brill standard[2] that bound the trial judge. Townsend v. Pierre, 221 N.J. 36, 59 (2015); W.J.A. v. D.A., 210 N.J. 229, 237 (2012). This standard requires that we examine the record in the light most favorable to plaintiffs, the opponents of the successful summary judgment motion. Brill, 142 N.J. at 540. Following a brief discussion of the operative facts in Section I, we separately discuss in Sections II and III the dismissal of the breach of

[1] N.J.S.A. 56:8-1 to -20.

[2] Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

contract and CFA claims, respectively, and, in Section IV, we summarize our disposition of this appeal.

I

We start by recognizing that, after extensive discussions, Bucks entered into a contract on February 3, 2011, that called for its manufacture and sale of a tow truck, with particular specifications, deliverable to plaintiff by April 15, 2011. It is undisputed the vehicle was not delivered by that date.[3]

In fact, the first attempt at delivery occurred months later, sometime in October 2011.[4] At that time, the tow truck's forks did not move correctly; other significant problems were identified as well. Two more attempts at delivery later occurred; on those occasions, the towing function was not operational and the truck spewed hydraulic fluid. The fourth attempt at delivery appears to have occurred in November 2011. At that time, metal fell out from beneath the truck, and the wheel lift failed to close properly.

[3] Bucks asserts that this date was simply an estimate. That may be so, but that contention is disputed and, in considering whether Bucks was entitled to summary judgment, we must assume the parties were bound by plaintiffs' version that the date stipulated in their contract governed the time for delivery.

[4] The record on appeal does not provide any greater clarity as to when this and the three other delivery attempts occurred, but there appears to be no dispute that the first took place in October 2011 and the last in November 2011.

Plaintiffs found the situation "hopeless" and believed Bucks would never be able to deliver a properly functioning tow truck. Plaintiffs rejected delivery and demanded return of their $10,000 deposit. The deposit was not returned, and this suit was later commenced.

Following discovery, the trial judge granted defendants' summary judgment motion in all respects. Plaintiffs appeal, arguing the judge erred in granting summary judgment, in applying Article Two of the Uniform Commercial Code (UCC), N.J.S.A. 12A:2-101 to -725, to their breach of contract claim, and in concluding the CFA did not apply to this transaction. We agree.

II

The judge dismissed plaintiffs' breach of contract claim because, in his view, Bucks produced and tendered a tow truck. In support of this conclusion, the judge cited in his written opinion only N.J.S.A. 12A:2-106(2), which, in defining terms relevant to sales contracts, declares that "[g]oods" are "'conforming' or conform to the contract when they are in accordance with the obligations under the contract." In other words, as the judge explained, the contract called for the delivery of "an International 7300 4X4 with a Dynamic 801 tow body mounted" and that's what was tendered; the judge did not consider plaintiffs'

allegations that the tow truck failed to function properly and, for that reason alone, we must reverse.

Had he viewed the evidence in the light most favorable to plaintiffs, the judge would have been required to assume that Bucks attempted delivery on four occasions — all well beyond the stipulated delivery date — and on each occasion failed to deliver a truck that adequately performed its essential functions. If plaintiffs' allegations regarding the tow truck's apparent problems, which were identified at each of four attempted deliveries, are ultimately proven, plaintiffs would have demonstrated the tow truck was nonconforming, N.J.S.A. 12A:2-106(2), its failure to conform authorized plaintiffs' rejection of delivery, N.J.S.A. 12A:2-601; Ramirez v. Autosport, 88 N.J. 277, 289 (1982), and a proper rejection opened an avenue toward plaintiffs pursuit of the remedies permitted by the UCC, see, e.g., N.J.S.A. 12A:2-711 to -724. In short, the record reveals a central factual dispute as to whether the tow truck conformed to the contract and that dispute alone precludes summary judgment.

Bucks alternatively argues dismissal of the breach of contract claim may be sustained because plaintiffs failed to show damage. We reject this as well. Even if the judge had dismissed on this discrete basis — he did not — the retention of plaintiffs' deposit alone constitutes an element of damages. Because that fund

alone represents a valid claim for damages, we need not now consider whether other damages[5] may also prove available if plaintiffs succeed at trial.

III

We also find merit in plaintiffs' argument that the judge erred in dismissing the CFA claims against Bucks and Dynamic. The judge's decision was based solely on his conclusion that the CFA did not apply to this transaction; citing and relying only on Finderne Mgmt. Co. v. Barrett, 402 N.J. Super. 546 (App. Div. 2008) and Princeton Healthcare Sys. v. Netsmart N.Y., Inc., 422 N.J. Super. 467 (App. Div. 2011), the judge held that the transaction was not a "sale of merchandise," N.J.S.A. 56:8-2, because the tow truck was not something available "to the public for sale," N.J.S.A. 56:8-1(c). The judge buttressed this conclusion by referring only to the fact that nine of the contract's ten pages contained "vehicle specifications, and the tow truck/chassis was tailored specifically to meet [plaintiffs'] needs." The application of the CFA in this instance, however, does not turn on whether the item to be sold was tailored to the buyer's

[5] Defendants have argued that if we reverse in any respect we should preclude any further discovery and bar plaintiffs' use of an expert report on damages. We decline that invitation and leave those matters to the trial judge in the first instance.

needs. As we observed in Finderne, a loan or an insurance policy — items indisputably designed specifically for a particular consumer — may constitute a transaction falling within the CFA's ambit. 402 N.J. Super. at 571. We, thus, reject the sole express basis upon which the judge entered summary judgment on this claim.

Arguably, by citing Princeton Healthcare and Finderne, the judge may have also found the goods sold in those cases to be similar to the custom-built tow truck here and, thus, warranted the same result. If that is what the judge intended, we reject that conclusion as well.

Princeton Healthcare and Finderne appear to have adopted an exemption from what constitutes a "sale of merchandise" based upon the fact that the goods and services sold there were "complex." For instance, in Princeton Healthcare, 422 N.J. Super. at 473, the purchaser was sold a medical billing system. The panel found the transaction was not a "sale of merchandise" because it was comprised of the "installation and implementation of a complex computer system," ibid. (emphasis added), and "not . . . simply the installation of a standardized computer software program," id. at 474, which presumably would have constituted a "sale of merchandise" as we have previously held, see Hundred East Credit Corp. v. Eric Schuster Corp., 212 N.J. Super. 350, 353-57 (App. Div. 1986). In Finderne, the panel determined the sale of a

"multiple employer welfare benefit plan and trust," 402 N.J. Super. at 553, was exempt because it was "very complex," id. at 571 (emphasis added).

Even if we were to agree that sales of "complex" computer programs or tax shelters do not constitute "sale[s] of merchandise" — a question we need not reach — we fail to see how such a theory has application here. While it may be true that defendants engaged in considerable efforts to create the tow truck in question, it hasn't been shown there was anything more "complex" about this tow truck than any other.

Rather than be distracted by the unique circumstances in Princeton Healthcare and Finderne, we instead lastly focus on defendants' argument that the sale was not a "sale of merchandise" because the item sold was custom built and, therefore, not, as we expressed in Neveroski v. Blair, 141 N.J. Super. 365, 378 (App. Div. 1976), offered to "consumers in the popular sense." We reject this interpretation of the CFA. It has been firmly established that a sale of a custom-built item may constitute a "sale of merchandise." Perth Amboy Iron Works v. Am. Home Assurance Co., 226 N.J. Super. 200, 209 (App. Div. 1988) (sale of a yacht), aff'd o.b., 118 N.J. 249 (1990); New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 501-03 (App. Div. 1985) (sale of a custom-built home); see also Marascio v. Campanella, 298 N.J. Super. 491, 497-

98 (App. Div. 1997) (applying the CFA to a contract for electrical work and services specific to the premises in question). Consequently, we conclude that the CFA encompasses the sale here of a custom-built tow truck. Cf., D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 21-24 (App. Div. 1985) (where we discussed but ultimately did not decide whether the sale of a custom-built tow truck falls within the CFA).

For these reasons only,[6] we reverse the summary dismissal of the CFA claims asserted against defendants.

IV

Except for the dismissal of the breach of a warranty claim, which, as plaintiffs conceded at oral argument in the trial court, has no application because plaintiffs never accepted delivery of the tow truck, we reverse in its entirety the order granting summary judgment. We would note, however, that some of the other common-law claims may be subsumed in those claims upon which we have focused. We leave further consideration and narrowing of the

[6] Defendants also argue there was no evidence of an unconscionable sales practice and seek our affirmance of summary judgment on that basis. True, we may at times affirm for reasons other than those adopted in the trial court. See Isko v. Planning Bd. of Livingston Twp., 51 N.J. 162, 175 (1968). But here the trial judge provided no analysis of this contention. Consequently, the better course is to leave this subject for further development in the trial court.

issues for the trial court proceedings that will follow today's decision.

Reversed and remanded for further proceedings. 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