SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1442-21

YOGESH SHAH,

Plaintiff-Respondent,

v.

AMAZON HOME WARRANTY SERVICE,

Defendant-Appellant.

Submitted November 29, 2022 – Decided January 13, 2023

Before Judges Messano and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. SC-000807-21.

JDE Law Firm, PLLC, attorneys for appellant (Jesse David Eisenberg, on the briefs).

Yogesh Shah, respondent pro se.

PER CURIAM

Defendant appeals from the December 9, 2021 judgment following a

two-day bench trial, wherein the judge determined that defendant: (1) waived any right to mediation or arbitration; (2) violated the New Jersey Consumer Fraud Act (CFA) (N.J.S.A. 56:8-1 to -20); and (3) was liable to plaintiff in the amount of $3,042.[1] We affirm.

The parties each presented one trial witness. Plaintiff called Dipika Shah and defendant summoned Denny Mendoza, Director of Consumer Relations. The judge determined that Dipika was a credible witness.

Plaintiff purchased warranty coverage for various appliances and systems from defendant. The total cost for three years of coverage was $1,350. On June 28, 2021, plaintiff filed a claim for the repair of a covered appliance. Plaintiff made service appointments with defendant's contractor on July 1, 2, and 3. Defendant's contractor failed to appear. Defendant failed to answer plaintiff's phone calls and texts. Defendant advised plaintiff that she had to make an appointment for July 7. Plaintiff scheduled the appointment for between 2:00 p.m. and 3:00 p.m. and took off from work to attend the appointment. Defendant texted plaintiff at 2:00 p.m. and advised that it had to cancel the appointment. Defendant rescheduled the appointment for July 12, but then

[1] The $42 represents plaintiff's filing fees and is an excepted cost under Rule 6:1-2(a)(2).

cancelled and rescheduled for July 22. Finding the situation "ridiculous," plaintiff arranged to have the repair completed by a contractor of her choice, and defendant agreed to provide reimbursement. Defendant was to be contacted before any work began. On July 13, plaintiff and her contractor called defendant and the contractor provided the make of the appliance, the part number, and the total cost. Defendant requested the contractor refrain from repairing the appliance until it supplied an approval number. After waiting ninety minutes, the call was disconnected. Plaintiff called defendant again and, after waiting another thirty-five to forty minutes, the call was disconnected.

Ultimately, plaintiff proceeded with the repair and emailed defendant the reimbursement form. Not hearing from defendant, plaintiff followed up with a telephone call. Defendant emailed plaintiff and advised that it never received the reimbursement form. Plaintiff called defendant again and, within a few minutes, received an email that defendant received the form. Defendant advised that the matter was under review. Defendant then contacted plaintiff to confirm the correct mailing address for the check. Plaintiff did not receive the check. Plaintiff emailed defendant and was advised to wait thirty days. After not receiving the check in thirty days, plaintiff emailed defendant again. Defendant claimed there was a problem with the mailing address.

Ultimately, plaintiff filed this complaint in the Small Claims Division of the Special Civil Part. On the second day of trial, plaintiff received two checks in the mail totaling $518.

I.

Defendant argues that the judge erred in determining that it waived any right to mediation or arbitration. The parties' agreement provides that "[i]n the event of a dispute over claims or coverage You agree to file a written informal claim with Us and allow us twenty (20) calendar days to respond to the claim. You and We, agree to mediate in good faith and before resorting to mandatory arbitration."

Defendant summoned Mendoza, after plaintiff rested their case. He testified that plaintiff failed to follow the requirements of the mediation paragraph. In its closing, defendant again raised the issue of the mediation paragraph and noted that plaintiff "should have initiated a mediation and/or arbitration under Section X of the contract." The judge concluded that "both parties have waived any mandatory mediation or arbitration by appearing . . . in court."

"[P]arties may waive their right to arbitrate in certain circumstances." Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013). Although "[w]aiver is

never presumed." Ibid. "An agreement to arbitrate a dispute 'can only be overcome by clear and convincing evidence that the party asserting [arbitration] chose to [litigate] in a different forum.'" Ibid. (quoting Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008)). "The clear and convincing standard 'should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'" Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169-70 (2004) (quoting In re Purrazzella, 134 N.J. 228, 240 (1993)).

In Cole, our Court explained:

> Any assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances. That assessment is, by necessity, a fact-sensitive analysis. In deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute. Among other factors, courts should evaluate: (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of the discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any.

[Cole, 215 N.J. at 280-81.]

In assessing defendant's "litigation conduct" each Cole factor weighs in favor of finding defendant waived their right. Ibid. First, defendant failed to raise the issue until after plaintiff rested at trial, implicating "delay," "notice," and "litigation strategy." Ibid. Second, defendant's failure to raise the issue in advance of the first day of trial implicates the "proximity factor" and weighs in favor of waiver. Ibid. Finally, defendant raised the issue during trial, and after plaintiff rested, thereby "prejudice[ing]" plaintiff. Ibid. Plaintiff has established by clear and convincing evidence that defendant waived its right.

II.

The CFA is construed "in light of its objective to greatly expand protections for New Jersey consumers." D'Agostino v. Maldonado, 216 N.J. 168, 183 (2013) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 555 (2009)). "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, 197 N.J. at 557 (2009)). "Each of these elements is rooted in the statutory text." Ibid.

Plaintiff's burden of persuasion is the preponderance of the evidence standard. Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 541 (App. Div. 1996), aff'd on other grounds, 148 N.J. 582 (1997). "Under the preponderance standard, 'a litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met.'" Land, 186 N.J. at 169 (quoting Biunno, Current N.J. Rules of Evidence, cmt. 5(a) on N.J.R.E. 101(b)(1) (2005)).

"We review the judge's determinations, premised on the testimony of witnesses and written evidence at a bench trial, in accordance with a deferential standard." D'Agostino, 216 N.J. at 182. "[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant, and reasonably credible evidence as to offend the interests of justice." Ibid. (second alteration in original) (quoting Seidman v. Clifton Sav. Bank, SLA., 205 N.J. 150, 169 (2011)). "To the extent that the trial court's decision constitutes a legal determination, we review it de novo." Ibid. (citing Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

N.J.S.A. 56:8-2 describes the conduct that gives rise to an unlawful practice under the CFA:

> The act, use or employment by any person of any commercial practice that is unconscionable or abusive, 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 . . . .

"Guided by the language of N.J.S.A. 56:8-2, a trial court adjudicating a CFA claim conducts a case-specific analysis of a defendant's conduct and the harm alleged to have resulted from that conduct." D'Agostino, 216 N.J. at 186.

The judge determined that defendant was guilty of an "unconscionable commercial practice." "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.'" Id. at 184 (quoting Kugler v. Romain, 58 N.J. 522, 543-44 (1971)). "An unconscionable practice under the CFA 'necessarily entails a lack of good faith, fair dealing, and honesty.'" Id. at 189 (quoting Van Holt v. Liberty Mut. Fire Ins. Co., 163 F.3d 161, 168 (3d Cir. 1998)). The judge determined that defendant did not act with "good faith" or "fair dealing."

"[A] breach of warranty, or any breach of contract, is not per se unfair or unconscionable . . . and a breach of warranty alone does not violate a consumer protection statute." Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994) (quoting D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 25 (App. Div. 1985)). "This is not to say, however, that a breach of warranty under a sales agreement may not, under given circumstances, also violate the [CFA]." D'Ercole Sales, 206 N.J. Super. at 31. Since "any breach of warranty or contract is unfair to the non-breaching party . . . the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach." Cox, 138 N.J. at 18 (citing DiNicola v. Watchung Furniture's County Manor, 232 N.J. Super. 69, 72 (App. Div. 1989)).

"[A]n unconscionable commercial practice or conduct under the [CFA] is not limited to the initial transaction but extends to 'the subsequent performance of such person [involved in the transaction].'" D'Ercole Sales, 206 N.J. Super. at 25 (quoting N.J.S.A. 56:8-2). "Unfairness (unconscionability) is measured by analyzing the potential effect the conduct will have upon the consumer or marketplace." Ibid.

Therefore, in searching this record for substantial aggravating factors, the prospective considerations, addressed in D'Ercole, are not present. Id. at 29–30.

Here, the judge determined that during the performance of the agreement, defendant's conduct was not in "good faith" or in "fair dealing." This determination was made, not merely because of the breach of the agreement, but because the judge specifically found substantial aggravating factors beyond mere breach and refusal to perform.

Defendant argues that its "actions do not rise to substantial aggravating circumstances in addition to any breach of the [c]ontract." However, the judge's findings are "adequately supported by competent, relevant and reasonably credible evidence." D'Agostino, 216 N.J. at 190.

III.

"The treble damages remedy 'is mandatory under N.J.S.A. 56:8-19 if a consumer-fraud plaintiff proves both an unlawful practice under the [CFA] and an ascertainable loss.'" Id. at 185 (quoting Cox, 138 N.J. at 24).

The judge applied the mandatory treble damages to plaintiff's ascertainable loss ($1,350) and determined a gross award of $4,050. However, the judge recognized two considerations that would reduce the gross amount. First, the judge reduced the gross amount by $518. This was the amount plaintiff received from defendant the second day of trial. Therefore, the gross amount was reduced to $3,532. Second, the judge further reduced this amount to the

Special Civil Part — Small Claims' monetary jurisdiction of $3,000. R. 6:1-2(a)(2).

Defendant argues that the judge should have first reduced the award amount from $4,050 to $3,000, and then apply its payment credit of $518, rendering an award of $2,482. However, defendant provides no legal foundation to support the reduction of the award to the monetary limit before applying the credit, rather than applying the credit to the overall award and then reducing the award to the monetary limit. Treble damages are intended to punish the wrongdoer, D'Agostino, 216 N.J. at 183, and defendant received the benefit of the waiver of any award amount in excess $3,000. R. 6:1-2(c).

Affirmed.