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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0249-14T4

COURT PLAZA ASSOCIATES,

Plaintiff-Appellant,

v.

WAUSAU TILE, INC.,

Defendant-Respondent.

Telephonically Argued November 4, 2015 – Decided December 4, 2015

Before Judges Messano and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2858-12.

Leonard E. Seaman argued the cause for appellant (Vincent P. Trovini, P.C., attorneys; Mr. Trovini, of counsel and on the briefs; Richard Malagiere, of counsel; Mr. Seaman, on the briefs).

Robert W. Bannon, II argued the cause for respondent (Welby, Brady & Greenblatt, LLP, attorneys; Mr. Bannon, on the brief).

PER CURIAM

Plaintiff Court Plaza Associates appeals from the July 29, 2014 Law Division order, which granted summary judgment to defendant Wausau Tile, Inc. on all claims asserted in the second

amended complaint. We affirm, but for reasons other than those expressed by the trial court. Aquilio v. Cont'l Ins. Co. of N.J., 310 N.J. Super. 558, 561 (App. Div. 1998).

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in the light most favorable to plaintiff. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

Plaintiff owned a building in Hackensack and sought to replace the exterior steps. On September 26, 2006, plaintiff issued a purchase order to defendant, which contained defendant's name and address, a specific description of the reinforced concrete steps to be supplied by defendant (the steps), and the price. The purchase order also specified that defendant must manufacture the steps in accordance with certain plans and specifications (the plans). The plans required that the steps conform to the New Jersey Uniform Construction Code, the New Jersey Building Code, and the standards of the American Concrete Institute (ACI).

October 9, 2006, plaintiff sent the plans to defendant. On November 14, 2006, defendant mixed the concrete that it used to manufacture the steps. Thereafter, on November 20, 2006,

defendant signed and returned the purchase order to plaintiff. Sometime in December 2006, defendant delivered the steps, and on December 29, 2006, issued an invoice to plaintiff for payment. On April 18, 2007, defendant issued a one-year limited warranty for defects caused by "poor workmanship in manufacturing."

Plaintiff claimed that in the spring of 2010, it discovered defects in the steps. In a second amended complaint, plaintiff alleged that the steps did not conform to ACI standards and defendant manufactured the steps before signing and returning the purchase order. We presume from plaintiff's allegations that plaintiff deemed November 20, 2006, the date defendant returned the signed contract, as the contract date. Plaintiff alleged that defendant violated the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -197, by: (1) knowingly concealing that the steps were non-conforming; and (2) affirmatively misrepresenting on the contract date that the steps were conforming.[1]

Defendant filed a motion for summary judgment, arguing that the steps conformed to ACI standards. Alternatively, defendant

[1] Plaintiff also asserted breach of warranty claims and a claim that defendant violated the CFA by misrepresenting on its website that it manufactured precast reinforced concrete stairs that conformed to ACI standards. The July 29, 2014 order also granted summary judgment on these claims. Because plaintiff did not address these issues in its merits brief, they are deemed waived. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); Pressler & Verniero, Current N.J. Court Rules, comment 4 on R. 2:6-2 (2016).

argued the CFA claims must be dismissed for lack of evidence that it either knew the steps were non-conforming or affirmatively misrepresented the steps were conforming, and for lack of evidence of substantial aggravating factors.

In opposition, plaintiff maintained the steps were non-conforming. Plaintiff admitted that defendant did not knowingly conceal the non-conformance, but argued that the CFA does not require knowledge to sustain a claim for misrepresentation. Plaintiff reiterated that defendant manufactured the non-conforming steps before the contract date, and thus violated the CFA by affirmatively misrepresenting that the steps were conforming.

In a July 29, 2014 order and written opinion, the trial judge granted summary judgment on all claims. The judge found there was no evidence of an unconscionable commercial practice or of a knowing concealment. The judge also found that plaintiff's breach of warranty claim was untimely, this was a breach of contract that did not rise to the level of a CFA violation, and breach of warranty or breach of contract alone that did not violate the CFA. This appeal followed.

On appeal, plaintiff concedes there was no evidence that defendant knew the steps were non-conforming, and plaintiff does not challenge the dismissal of its knowing concealment claim.

Rather, plaintiff focuses on its misrepresentation claim, arguing there was a genuine issue of material fact as to whether the steps were non-conforming and whether, at the time of the contract, defendant misrepresented that the steps were conforming.

We review a ruling on a motion for summary judgment de novo, applying the same standard governing the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014) (citations omitted). Thus, we consider, as the motion judge did, "'whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Id. at 406 (citation omitted). If there is no genuine issue of material fact, we must then "'decide whether the trial court correctly interpreted the law.'" DepoLink Court Reporting & Litig. Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). Applying these standards, we conclude that defendant was entitled to summary judgment, but for reasons other than those expressed by the trial judge.

The CFA "provides a remedy for any consumer who has suffered an ascertainable loss of moneys or property as a result of an unlawful commercial practice and allows him or her to recover treble damages, costs, and attorneys fees." Heyert v. Taddese, 431 N.J. Super. 388, 411 (App. Div. 2013) (citations omitted). To establish a cause of action under the CFA, the 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.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 121 (2014) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009)). Additionally, the plaintiff must demonstrate that the nature of the transaction was consumer-oriented, involved the sale of merchandise, and that the alleged violator was acting in a professional, commercial capacity. D'Agostino v. Maldanado, 216 N.J. 168, 187-88 (2013) (citations omitted).

Unlawful commercial practices fall into three categories:

> The 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.
>
> [O'Neill, supra, 217 N.J. at 122 (emphasis added) (quoting N.J.S.A. 56:8-2).]

"[T]o establish a violation of the [CFA], a plaintiff need not prove an unconscionable commercial practice." Belmont Condo. Ass'n, Inc., supra, 432 N.J. Super. at 81 (citing Cox v. Sears Roebuck & Co., 138 N.J. 2, 19 (1994)). Proof of a misrepresentation will suffice. N.J.S.A. 56:8-2.

A misrepresentation does not require the defendant's knowledge of the falsity of the misrepresentation or an intent to deceive. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 605 (1997). In addition, a plaintiff need not show reliance on the misrepresentation as long as an ascertainable loss resulting from the defendant's conduct is demonstrated. Leon v. Rite Aid Corp., 340 N.J. Super. 462, 468 (App. Div. 2001). However, a misrepresentation prohibited by the CFA must be one that "is material to the transaction and which is a statement of fact, found to be false, and made to induce the buyer to make the purchase." Gennari, supra, 148 N.J. at 607 (citation omitted). To constitute a CFA violation, the misrepresentation must be made at the time of or prior to formation of the contract to induce the creation of the contract. Cole v. Laughrey Funeral

Home, 376 N.J. Super. 135, 144 (App. Div. 2005). The question here, therefore, is whether the contract was formed at the time of or prior to defendant's alleged misrepresentation.

The contract was governed by the New Jersey Uniform Commercial Code (UCC), N.J.S.A. 12A:1-101 to -308. As to the formal elements of memorialization, N.J.S.A. 12A:2-201(1) requires that to be enforceable, "a contract involving the sale of goods for the price of $500 or more" must have "some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." However, when the transaction is between merchants, such as here, there are exceptions to this general rule. An unsigned writing will satisfy N.J.S.A. 12A:2-201(1)

> if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents . . . unless written notice of objection to its contents is given within ten days after it is received.
>
> [N.J.S.A. 12A:2-201(2).]

N.J.S.A. 12A:2-201(1) will also be satisfied

> if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which

> reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement[.]
>
> [N.J.S.A. 12A:2-201(3)(a) (emphasis added).]

Further, a contract for sale of goods under the UCC "may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." N.J.S.A. 12A:2-204(1).

Here, on September 26, 2006, plaintiff sent defendant the purchase order, which specified the terms of the contract between the parties. In connection with the contract, on October 9, 2006, plaintiff sent the plans to defendant. Neither party objected to the purchase order or plans. Thus, the contract was formed on either September 26, 2006 or October 9, 2006. N.J.S.A. 12A:2-201(2) and -204(1). Alternatively, the contract was formed on November 14, 2006, when defendant manufactured the steps pursuant to the purchase order. N.J.S.A. 12A:2-201(3)(a). Defendant made the alleged misrepresentation on November 20, 2006, after formation of the contract. Thus, the alleged misrepresentation did not constitute a violation under the CFA. Cole, supra, 376 N.J. Super. at 144.

Defendant's alleged failure to manufacture the steps in accordance with the purchase order and plans merely constituted a breach of contract or breach of warranty. Such claims, alone,

are not cognizable under the CFA. Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 533 (App. Div. 1996), aff'd, 148 N.J. 582 (1997); D'Ercole Sales v. Fruehauf Corp., 206 N.J. Super. 11, 31 (App. Div. 1985); see also DiNicola v. Watchung Furniture Country Manner, 232 N.J. Super. 69, 72-73 (App. Div.), (holding that "a breach of warranty in a sales transaction not involving an unconscionable commercial practice is not a violation of the [CFA]"), certif. denied, 177 N.J. 126 (1989).

Although poor workmanship and aggravating factors, such a substitution of substandard materials, in addition to breach of contract may constitute an unconscionable practice in violation of the CFA, see New Mea Construction Corporation v. Harper, 203 N.J. Super. 486, 501-02 (App. Div. 1985), there was no competent evidence of aggravating factors in this case. The evidence confirmed that, at worst, defendant improperly manufactured the steps. This does not equate to a CFA violation. See Cox, supra, 138 N.J. at 19 (holding that poor workmanship, by itself, does not constitute a CFA violation); DiNicola, supra, 232 N.J. Super. at 73 (holding that the mere delivery of a defective product without more does not "equate with any unconscionable commercial practice absent other aggravating factors").

Affirmed.