NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4164-12T2

MALL CHEVROLET, INC.,

Plaintiff-Respondent,

v.

ROBERT COLLIER,

Defendant-Appellant.

Argued telephonically January 30, 2014 -
Decided June 17, 2014

Before Judges Hayden and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Special Civil Part, Burlington County, Docket No. DC-8811-12.

Predrag Filipovic argued the cause for appellant.

Laura D. Ruccolo argued the cause for respondent (Capehart & Scatchard, attorneys; Ms. Ruccolo, on the brief).

PER CURIAM

Defendant Robert Collier appeals from the Law Division's March 7, 2013 judgment awarding plaintiff, Mall Chevrolet, $15,000 in damages based on the court's finding that he breached his contract with plaintiff to purchase a 2012 Chevrolet

Avalanche LTZ (2012 Avalanche), and trade-in his 2010 Chevrolet Avalanche LTZ (2010 Avalanche). Defendant ultimately failed to deliver clear title to the 2010 Avalanche, which he jointly owned with his then-wife, while the two were in the midst of a contested divorce. When he could not deliver title to his vehicle, defendant and plaintiff entered into a vehicle exchange agreement, whereby defendant was to return the 2012 Avalanche, receive back the 2010 Avalanche, and have his original car loan reinstated. The agreement also reserved plaintiff's right to sue defendant for any damages.

In its complaint, plaintiff alleged that defendant breached the contract of sale by falsely representing that he was the sole owner of the 2010 Avalanche. Defendant denied the allegation, contending that plaintiff had interfered with his ability to perform the contract by preventing him from contacting his wife to effectuate transfer of title. He also challenged the validity of the vehicle exchange agreement.

After a two day bench trial, the court found in favor of plaintiff and awarded damages for the vehicle's depreciation, reconditioning expenses for the resale of the 2010 Avalanche, payments made on defendant's loan, and registration fees. In a later order, the court awarded plaintiff $11,614.90 in counsel fees.

On appeal, defendant argues:

POINT I

THE LOWER COURT ERRED FINDING THAT THE AMOUNT OF MILES THE 2010 LTZ WAS DRIVEN WHILE IN MALL CHEVROLET'S POSSESSION, AND IN FINDING THAT MALL CHEVROLET HAD NO CONSTRUCTIVE OR ACTUAL KNOWLEDGE OF THE DUAL OWNERSHIP OF THE 2010 LTZ.

A. The Lower Court Erred to Find that Mall Chevrolet Utilized Collier's 2010 LTZ While in their Exclusive Possession for Only 8 Miles, when they had Admittedly Used it for 1,098 Miles.

B. The Lower Court Erred in Finding that Mall Chevrolet had no Constructive or Actual Knowledge of Dual Ownership of Collier's 2010 LTZ Trade-In.

POINT II

THE LOWER COURT ERRED IN FAILING TO MAKE A LEGAL CONCLUSION BASED ON THE FACTS PRESENTED THAT MALL CHEVROLET WRONGFULLY INTERFERED WITH COLLIER'S PERFORMANCE OF THE CONTRACT.

POINT III

THE LOWER COURT ERRED IN FAILING TO APPLY THE UNIFORM COMMERCIAL CODE LAW IN ITS LEGAL ANALYSIS OF MALL CHEVROLET'S BREACH OF CONTRACT CLAIM, SPECIFICALLY IN ITS MEASURE OF DAMAGES ANALYSIS.

POINT IV

THE LOWER COURT ERRED IN A LEGAL CONCLUSION THAT THE VEHICLE EXCHANGE AGREEMENT CONSTITUTED A VALID AND ENFORCEABLE CONTRACT

AND THAT NO VIOLATION OF THE NEW JERSEY CONSUMER FRAUD ACT OCCURRED.

A. The Lower Court Erred in Legal Conclusion that the Vehicle Exchange Agreement Constituted a Valid and Enforceable Contract.

B. The Lower Court Erred in Dismissing Collier's Counterclaim under New Jersey "Consumer Fraud Act."

POINT V

MALL CHEVROLET VIOLATED THE NEW JERSEY CONSUMER FRAUD ACT.

POINT VI

MALL CHEVROLET COMMITTED VIOLATIONS OF "TCCWNA" UNDER CFA.

POINT VII

THE COURT ERRED IN CONCLUDING THAT COLLIER VIOLATED COVENANT OF GOOD FAITH AND FAIR DEALING IN THE TRANSACTIONS WITH MALL CHEVROLET.

POINT VIII

THE LOWER COURT'S POST TRIAL ORDER AWARDING ATTORNEY'S FEES OF $11,320 GRANTED WITHOUT PROVIDING DEFENDANT FULL 10 OR 13 DAYS TO RESPOND IS A VIOLATION OF NEW JERSEY RULES AND SHOULD BE OVERTURNED.

We have considered all of these arguments in light of the record and applicable law. We affirm.

I.

We have adduced the following facts based on the record developed at trial. On or about March 10, 2012, defendant visited plaintiff Mall Chevrolet to purchase a vehicle. He was assisted by salesman Peter Colletti, and the two began negotiating a trade-in deal, whereby defendant would receive a 2012 Avalanche in exchange for his 2010 Avalanche and payment of an additional sum. The model that he wanted was not in stock on that day, and so defendant corresponded with Colletti by email over the next two weeks about his specifications, until plaintiff located the correct model.

The trade-in occurred on March 31, 2012. Defendant completed the transaction with a different salesperson, as Colletti was not present at the time. According to defendant, he provided his registration and insurance to one of plaintiff's employees. He also signed a purchase agreement, providing that,

> Customer warrants any trade-in vehicle to be his property free and clear of all liens and encumbrances except as otherwise noted on this order. Customer further warrants that he will deliver to dealer an original legally valid and binding title to any trade-in vehicle and that said title does not contain any title brand.
>
> . . . [C]ustomer agrees to indemnify and hold dealer harmless should any of the above statements be false including but not limited to attorneys fees the dealer may incur defendant an actions [sic] with third

> parties concerning the prior history of the vehicle.
>
> . . . .
>
> . . . . Customer agrees to deliver to dealer satisfactory evidence of title to any trade-in vehicle used as a part of the consideration for the motor vehicle ordered at the time of delivery of such . . . used motor vehicle to dealer. Customer warrants any trade-in vehicle to be his property free and clear of all liens and encumbrances except as otherwise noted on this order and also warrants that the trade-in title does not contain title brand.

At the time, defendant owed $40,395.63 on the 2010 Avalanche to Ally Bank, and its trade-in value was $38,000. The 2012 Avalanche was priced at $53,419, and defendant paid $50,740 after all rebates were applied. After taking possession of the 2010 Avalanche, plaintiff reconditioned and detailed the vehicle, and filled it with gas, at a cost of $1147.15. It also paid the outstanding balance defendant owed to Ally Bank, as well as registration and title fees to transfer title of the 2010 Avalanche.

Plaintiff was later contacted by the Division of Motor Vehicles in South Carolina, where the 2010 Avalanche was registered. At this time, it learned that the vehicle was in fact jointly owned by defendant and his then-wife Shaunda Stewart, whom he was in the process of divorcing, and whose signature was required to effect the title's transfer.

Immediately thereafter, plaintiff "pulled" the 2010 Avalanche off its lot. Colletti called defendant, informing him that plaintiff could not acquire proper title to the 2010 Avalanche without Stewart's signature. According to defendant, he then asked plaintiff for the title so that he could ask Stewart to sign it. Colletti refused, stating that it was against their policy and that they were required to send the paperwork to Stewart directly in order to avoid forgery. However, plaintiff never told defendant not to speak with Stewart about signing the title.

Plaintiff spoke with Stewart over the phone and informed her that they would be sending the title transfer paperwork to her overnight. It then sent the paperwork, but received no direct response from her. Rather, on May 31, 2012, Stewart's divorce attorney sent plaintiff a letter stating that Stewart had no knowledge of the trade-in, and that she did not consent to it. The letter alleged that defendant was trying to exchange a jointly-owned car for a solely-owned car, in an attempt to interfere with Stewart's marital property rights. As a result, plaintiff required defendant to return the new vehicle and pick up his trade-in vehicle. The parties then entered into the vehicle exchange agreement.

Based on these events, plaintiff alleged breach of contract, failure to show good faith and fair dealing, and unjust enrichment. In support, it relied on the purchase agreement provision that required defendant to deliver "legally valid and binding title to any trade-in vehicle." However, defendant charged plaintiff with actual or constructive knowledge of the 2010 Avalanche's dual ownership. Moreover, he said he was excused from the obligation to provide clear title because plaintiff breached the contract. He argued that plaintiff wrongfully interfered with his performance by refusing to give him the title documents, and failing to cooperate with defendant in obtaining Stewart's signature. The trial court disagreed with defendant and entered its judgment in favor of plaintiff. The trial court concluded that defendant failed to perform his agreement by not delivering title to his vehicle.

II.

A.

Our scope of review after a bench trial is limited: we must defer to the trial judge's fact-findings and credibility determinations, in light of its "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Locurto, 157 N.J. 463, 471 (1999) (quoting State v. Johnson, 42 N.J. 463, 471 (1999)) (internal

quotation marks omitted). "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974) (citing N.J. Tpk. Auth. v. Sisselman, 106 N.J. Super. 358 (App. Div.), certif. denied, 54 N.J. 565 (1969)). Thus, we 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[.]" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Trust Created by Agreement Dated December 20, 1961, 194 N.J. 276, 284 (2008)).

However, we owe no deference to trial court's "interpretation of the law and the legal consequences that flow from established facts," Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), and we review such decisions de novo, 30 River Court E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 476 (App. Div. 2006) (citing Rova Farms, supra, 65 N.J. at 483-84).

The trial court concluded that defendant failed to perform his agreement by not delivering title to his vehicle. Delivery of clear title was a condition precedent to the performance of

the contract — meaning "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." Restatement (Second) of Contracts § 224 (1981). A condition serves to "limit[] or qualif[y] a transfer of property." Ibid. "[T]he failure to comply with a condition . . . works a forfeiture." Liberty Mut. Ins. Co. v. President Container, Inc., 297 N.J. Super. 24, 34 (App. Div.) (quoting Castle v. Cohen, 840 F.2d 173, 177 (3d Cir. 1988)) (internal quotation marks omitted), certif. denied, 149 N.J. 406 (1997). If a party was under a duty to bring about the condition, its non-occurrence is a breach. Restatement (Second) of Contracts § 225(3) (1981). However, "[a] party to a contract may not avail itself of a condition precedent where by its own conduct it has rendered compliance therewith impossible." Ward v. Merrimack Mut. Fire Ins. Co., 332 N.J. Super. 515, 522 (App. Div. 2000) (citing Creek Ranch, Inc. v. N.J. Turnpike Auth., 75 N.J. 421, 432 (1978)).

The purchase agreement did not indicate that the 2010 Avalanche was jointly owned by defendant and Stewart. Defendant claims he told Colletti he owned the vehicle jointly with his wife, but Colletti denied this and further said he did not know the vehicle was jointly owned until after the trade-in. Also, in defendant's emails with Colletti before the trade-in,

defendant never mentioned Stewart or her name being on the title, and he continuously referred to the vehicle as "my" car.

Both defendant and Stewart were listed in the registration allegedly provided by defendant. However, both Colletti and Charles Falkenstein, plaintiff's vice president and general manager, claimed they never saw the registration for defendant's 2010 Avalanche. They said they would not have needed to see the registration, as plaintiff was not transferring license plates. Also, there was no registration card in the "deal jacket," where plaintiff's employees keep every document supplied to them.

Defendant contends that "usage of trade and common knowledge" support a finding "that [a] registration card is a necessary document even upon state inspection and emission of a vehicle, let alone in a far more consequential transaction as the one at hand." However, he did not explain how the instant circumstance is analogous to an inspection, nor assert that a registration is actually required for a trade-in.

The trial judge found Colletti more credible than defendant on this issue, and further noted that Stewart was neither referenced in the agreement nor defendant's emails. The judge also found that plaintiff did not need the registration, because no license plate transfer had occurred. Accordingly, the trial judge determined that plaintiff did not have actual or

constructive knowledge that the 2010 Avalanche was jointly owned.

The judge also rejected defendant's argument that plaintiff wrongfully prevented him from obtaining clear title. The judge concluded that plaintiff's employees did not prevent defendant from speaking with his wife regarding her signing over the title to the 2010 Avalanche. In addition, the judge determined that plaintiff's policy was not meant to interfere with defendant's ability to meet the clear title requirement; rather, plaintiff's policy was meant to prevent forgery.

The judge's conclusions were amply supported by credible evidence in the record. It is clear that plaintiff did not prevent defendant from delivering clear title. On the contrary, plaintiff attempted to aid defendant in the completion of this contractual requirement by contacting Stewart and sending her the requisite paperwork.

The contract provision requiring defendant to provide clear title was not excused. It is equally clear that plaintiff could not perform the condition as evidenced by Stewart's letter via her attorney that she was unaware of the trade-in and would not sign the title. Therefore, we are satisfied there was substantial credible evidence to support the court's conclusion

that it was defendant — and not plaintiff — who breached the contract.

C.

Defendant also challenges the trial judge's finding he did not show good faith and fair dealing in entering the purchase agreement with plaintiff. The judge found that defendant failed to inform plaintiff that he and his wife jointly owned the 2010 Avalanche. Defendant contends he "did everything [plaintiff] asked him to do throughout the course of the transactions." He specifically notes that when he "learned" that his wife's signature was needed for title transfer, he offered to personally obtain her signature. When plaintiff refused to give him the title papers, he provided her contact information. He also notes that he entered the vehicle exchange agreement.

Article 2 of the Uniform Commercial Code (UCC) governs contracts for the sale of goods. N.J.S.A. 12A:2-102; Ford Motor Credit Co. v. Arce, 348 N.J. Super. 198, 200 (App. Div. 2002). "Every contract or duty within the [UCC] imposes an obligation of good faith in its performance and enforcement." N.J.S.A. 12A:1-304. The UCC defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." N.J.S.A. 12A:2-103(1)(b). Moreover,

every contract carries an implied covenant of good faith and fair dealing, that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract[.]" Wood v. N.J. Mfrs. Ins. Co., 206 N.J. 562, 577 (2011) (quoting Kalogeras v. 239 Broad Ave., L.L.C., 202 N.J. 349, 366 (2010)). To sustain a claim for breach of the covenant, a party must provide "proof of 'bad motive or intention.'" Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 225 (2005) (quoting Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001)).

In this case, defendant's "bad motive" was evidenced by his attempt to procure the 2012 Avalanche solely in his name to avoid distribution of the 2010 Avalanche as marital property in his divorce. To this end, he concealed the fact that the 2010 Avalanche was jointly-owned, and falsely represented to plaintiff that he could provide clear title. He therefore deprived plaintiff of the "fruits of the contract." Wood, supra, 206 N.J. at 577. Again, we are satisfied that the record supported the judge's finding that defendant breached the covenant of good faith.

III.

A.

Defendant also alleged several violations of the Consumer Fraud Act by plaintiff, based on the events surrounding the vehicle exchange agreement. On June 1, 2012, Colletti called defendant, asking him to return the 2012 Avalanche to the dealership. Defendant also spoke with Falkenstein over the phone, who was angry and accused defendant of stealing the vehicle. Defendant agreed to bring the vehicle back, despite believing he did not have to, and that he had done nothing wrong.

On June 8, 2012, defendant returned to plaintiff's showroom with the 2012 Avalanche. Once there, according to defendant, Falkenstein began "going off" and "hollering" at him, and again accused him of stealing. He said Falkenstein also "snatched" the keys from him, and was "adamant" that he sign the vehicle exchange agreement. According to Falkenstein, defendant came in "with an attitude," knowing his estranged wife would not sign off on the trade-in. Both Colletti and Falkenstein denied ever threatening or yelling at defendant, and Falkenstein denied taking his keys.

According to defendant, he could not leave with his vehicle, as a maintenance employee had removed the computer

chips from both cars. According to defendant, the employee said he was instructed to do so by Falkenstein, to prevent defendant from stealing the vehicle. He also tried to call a friend, who turned out to be unavailable. Defendant was therefore "stranded," and signed the agreement so that he could get his car back. He did so, rather than call the police, because he is an Army intelligence officer, was in uniform that day, and wanted to avoid any possible repercussions from the Army.

Under the terms of the vehicle exchange agreement, defendant was to return the 2012 Avalanche and take back the 2010 Avalanche. Plaintiff was to have defendant's car loan reinstated. The agreement further provided that, "[Plaintiff] reserves all its legal rights to take the appropriate action against [defendant] for damages resulting from the transactions with [defendant]." Defendant says that before he signed the agreement, he asked about that provision, and Falkenstein told him that it only pertained to mechanical issues or damages to the 2012 Avalanche. Defendant says that based on that provision, at his request, plaintiff and defendant inspected both vehicles on that day. Colletti then signed and marked the vehicle exchange agreement "6/8/12 INSPECTED" next to the subject provision. Falkenstein denied telling defendant this,

and also denied that he promised not to sue defendant for damages.

After taking back the 2010 Avalanche, defendant claims the odometer indicated 1098 more miles than when he had traded it in, leading to a diminution in value. In support, he relies on a March 31, 2012 trade-in odometer statement indicating a mileage of 19,671, and a June 9 statement indicating a mileage of 20,769. Neither of these statements were signed by an employee of plaintiff, and Falkenstein had no personal knowledge of them. However, plaintiff produced a motor vehicle retail order form, with a March 31 trade-in date and mileage of 19,671. Then, while the 2010 Avalanche was still in plaintiff's possession, odometer statements indicate that on April 3, the car had 20,393 miles before being serviced; and on April 14, the car had 20,401 miles after being serviced.

Falkenstein testified consistent with the April 3 and April 14 statements, that the dealership had only put seven to eight miles on the 2010 Avalanche as a result of reconditioning. When questioned on defendant's odometer statements, Falkenstein said he did not know who put the miles on the 2010 Avalanche, but said that plaintiff had custody and control of the vehicle at that time. No one testified about how the mileage increased by 722 miles from March 31 to April 3, as stated in the retail

order form. There was also no testimony or explanation regarding the 368 mile increase after reconditioning, as stated in defendant's odometer statements. Falkenstein testified that the 2010 Avalanche was immediately removed from the lot when the title issues were discovered.

B.

Defendant argues that the court erred by finding that plaintiff's conduct, with respect to the vehicle exchange agreement, did not violate the Consumer Fraud Act (Act), N.J.S.A. 56:8-1 to -20. We disagree.

The Act permits a private cause of action where a party has suffered an "ascertainable loss of moneys or property" as a result of prohibited conduct." N.J.S.A. 56:8-19; Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 555-56 (2009). That conduct includes "the use of unconscionable commercial practices, deception, fraud, and misrepresentations 'in connection with the sale or advertisement of any merchandise.'" DepoLink Court Reporting & Litigation Support Servs. v. Rochman, 430 N.J. Super. 325, 338 (App. Div. 2013) (quoting N.J.S.A. 56:8-2). "[T]he misrepresentation has to be one which is material to the transaction . . . made to induce the buyer to make the purchase." Ibid. (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607 (1997)) (internal quotation marks omitted). The

Act also defines "sale" as including "any sale, rental or distribution, offer for sale, rental or distribution or attempt directly or indirectly to sell, rent or distribute." N.J.S.A. 56:8-1(e).

The Act's purpose is "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, supra, 430 N.J. Super. at 338 (quoting Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 271 (1978)). To this end, the Act is directed at "those who sell consumer goods and services to the public[.]" Marascio v. Campanella, 298 N.J. Super. 491, 501 (App. Div. 1997).

We construe the Act broadly, in light of its remedial purpose to protect the consumer. Bosland, supra, 197 N.J. at 555. However, even the most generous reading of the Act does not permit us to apply it to this case. The vehicle exchange was not a "sale" transaction within the meaning of the Act. Moreover, the vehicle exchange served to benefit defendant by limiting plaintiff's loss to only the diminution of the 2012 Avalanche's value, rather than the original purchase price.

Even if the transaction was subject to the Act, defendant failed to demonstrate any resulting "ascertainable loss." N.J.S.A. 56:8-19. He had to produce "evidence of loss that [was] not hypothetical or illusory[, but] capable of calculation." Thiedemann v. Mercedes-Benz U.S., LLC, 183 N.J. 234, 248 (2005). "In cases involving breach of contract or misrepresentation, either out-of-pocket loss or a demonstration of loss in value will suffice to meet the ascertainable loss hurdle and will set the stage for establishing the measure of damages." Ibid. A claimant may present an expert "to speak to a loss in value of real or personal property due to market conditions, with sufficient precision[.]" Id. at 249.

Therefore, had defendant proven that plaintiff misrepresented the mileage, his claim would have been cognizable under the Act. See, e.g., Romano v. Galaxy Toyota, 399 N.J. Super. 470, 480-82 (App. Div. 2008); Sema v. Automall, 384 N.J. Super. 145, 152 (App. Div. 2006). However, he has still failed to prove his out-of-pocket loss or any loss in his vehicle's value. Thiedemann, supra, 182 N.J. at 248; Romano, supra, 399 N.J. Super. at 483-84. The trial judge's determination will not be overturned.

C.

Defendant also contends that plaintiff violated the Truth-in-Consumer Contract, Warranty, and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18, by inducing him to enter the vehicle exchange agreement "under dire circumstances." The TCCWNA prohibits a seller from entering into a contract "which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller." He says that the parties had previously entered an agreement on the day of the trade-in, under which each had "an absolute right to have any dispute between them arbitrated." Therefore, according to defendant, the vehicle exchange agreement violated his right to arbitration, as it provided an alternative resolution to their dispute. He also argues, without support, that Colletti's mark-up of the vehicle exchange agreement was also a violation of TCCWNA because it was illegible.

These arguments were not raised in the original complaint or counterclaim, but during cross-examination. They were not properly before the trial court, and are therefore not properly before us. State v. Robinson, 200 N.J. 1, 20 (2009). We decline to address them.

IV.

A.

Falkenstein, who has forty years' experience in the auto industry, valued the now-used 2012 Avalanche at $40,700 — that is, $12,719 less than when it was new. He derived this number from the National Auto Dealers Association used car value book. The 2012 Avalanche was also added to plaintiff's inventory as a used vehicle, though Falkenstein did not know for how much it was resold. In addition, to reinstate the Ally Bank loan, plaintiff paid $2361.54 to bring the loan up to date.

The trial judge determined plaintiff's damages amounted to $16,365.69 — including $12,719 for the diminished value of the 2012 Avalanche, $2361.54 for the payments to Ally Bank, $138 for the transfer registration in South Carolina, and $1147.15 for the pre-owned inspection of the 2010 Avalanche. The judge also found that plaintiff mitigated its damages by accepting return of the 2012 Avalanche, which it was not under any obligation to do. Accordingly, the judge awarded plaintiff damages up to the jurisdictional limit of $15,000.

B.

Defendant argues that the trial court erred in not offsetting plaintiff's damages by the 2012 Avalanche's resale

value, as required under the UCC.[1] He says plaintiff withheld the 2012 Avalanche's resale price, and that the judge erroneously allowed plaintiff to claim the 2012 Avalanche had diminished in value, based on an internet-based resource. He contends that the proper measure of damages would have been the contract price, minus the resale price plus incidental damages. He says plaintiff would not be entitled to alternative damage calculations, because there was no finding that plaintiff was a "lost volume seller," or that the goods were specialty goods with no market for resale. N.J.S.A. 12A:2-708(2).

We are bound to uphold damages awarded in non-jury cases if supported by adequate, substantial and credible evidence. Curtis v. Finneran, 83 N.J. 563, 565 (1980); Rova Farms, supra, 65 N.J. at 483-84. We discern from our review of the record that the court's award was adequately supported.

As previously stated, when a buyer breaches a contract, a "seller may resell the goods concerned or the undelivered balance thereof." N.J.S.A. 12A:2-106(1). "Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages . . .

[1] Defendant also claimed at trial that the UCC governed this case and that plaintiff had failed to prove damages because it did not establish the resale price.

but less expenses saved in consequence of the buyer's breach." Ibid.

However, such damages would prove inadequate for a "lost-volume seller," as "a dealer-seller of standardized goods in unlimited supply[] would have made two sales instead of one if the breaching buyer had performed." P.F.I., Inc. v. Kulis, 363 N.J. Super. 292, 298 (App. Div. 2003), certif. denied, 178 N.J. 453 (2004). In other words, where a seller can satisfy the demand of both the customer who broke his agreement and another customer, the proceeds of the second sale cannot be used as a credit against the seller. Van Ness Motors v. Vikram, 221 N.J. Super. 543, 545 (App. Div. 1987); see N.J.S.A. 12A:2-708(2).

The seller has the burden of proving that it is a lost-volume seller, P.F.I., supra, 383 N.J. Super. at 298, by demonstrating that it could have supplied both the breaching purchaser and the resale purchaser." Van Ness Motors, supra, 221 N.J. Super. at 546. The plaintiff must also prove "the amount of damages with a reasonable degree of certainty, that the wrongful acts of the defendant caused the loss of profit, and that the profits were reasonably within the contemplation of the parties at the time the contract was entered into." Sons of Thunder v. Borden, Inc., 148 N.J. 396, 427 (1997) (internal quotation marks and citation omitted).

In this case, plaintiff was entitled to the full price of the 2012 Avalanche as a lost-volume seller, as it could have supplied both defendant and the resale purchaser with vehicles to their specifications. See Van Ness Motors, supra, 221 N.J. Super. at 546. However, plaintiff only requested damages in the form of the one vehicle's depreciated value, rather than the profit it could have realized from the sale of the vehicle and the re-sale of defendant's trade-in. The award that was supported by the evidence in the record, and we find no reason to disturb it.

C.

Defendant also challenges the damages award based on the trial judge's finding there was no evidence to support the claim that plaintiff placed hundreds of miles on the 2010 Avalanche while it was in their possession. He argues that the judge should have awarded defendant damages or offset plaintiff's award based on the 2010 Avalanche's use; and should not have awarded defendant damages for reconditioning, as the reconditioning was the result of plaintiff's usage. He further asserts that plaintiff attempted to conceal its usage of defendant's 2010 Avalanche, thereby unjustly profiting by providing no offset to defendant.

We are satisfied from our review of the record that the court's factual findings were supported by and consistent with the competent, relevant and credible evidence presented at trial, Seidman, supra, 205 N.J. at 169, and are entitled to the deference based on the trial judge's credibility findings, N.J. Division of Youth & Family Services v. M.M., supra, 189 N.J. 261, 279 (2007).

Significantly, defendant's counterclaim did not seek damages for plaintiff's alleged use of his vehicle, as he only relied on that claim in support of his Consumer Fraud Act claim. He never argued an entitlement to request any offset, and, even if we agreed with defendant, he ultimately offered no evidence as to the value of his alleged loss. Without proving any amount, the court could not award him damages or an offset. Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 411-412 (2009).

V.

On April 26, 2013, plaintiff was awarded $11,614.90 in attorneys' fees and costs. Defendant challenged that order only in his appellate brief. However, the order is not mentioned in his notice of appeal or accompanying case information statement. We decline to review an issue that has not been properly appealed. See R. 2:5-1(f)(3)(A); Pressler & Verniero, Current

N.J. Court Rules, comment 6.1 on R. 2:5-1 (2013) ("[I]t is clear that it is only the judgments or orders or parts thereof designated in the notice of appeal which are subject to the appeal process and review."). We reject defendant's argument on that basis. see, e.g., Campagna ex rel. Greco v. Am. Cyanamid Co., 337 N.J. Super. 530, 550 (App. Div.) (refusing to consider order not listed in notice of appeal), certif. denied, 168 N.J. 294 (2001); Sikes v. Twp. of Rockaway, 269 N.J. Super. 463, 465-66 (App. Div.) (issue raised in brief but not designated in notice of appeal not properly before court), aff'd o.b., 138 N.J. 41 (1994).

Affirmed.