

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3475-11T4

MICHAEL LOGATTO and COREEN
LOGATTO,

Plaintiffs-Appellants,

v.

DAVID LIPSKY, D/B/A HIGH
RIDGE HOMES,

Defendant-Respondent.

Argued May 14, 2013 – Decided July 17, 2013

Before Judges Fisher and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Civil Part, Bergen County, Docket No. L-10007-09.

Michael R. Scully argued the cause for appellants (Michael R. Scully, L.L.C., attorneys; Mr. Scully and Maurice Napolitano, on the briefs).

William C. Bochet argued the cause for respondent (Muscarella, Bochet, Edwards & D'Alessandro, P.C., attorneys; Mr. Bochet, on the brief).

PER CURIAM

Plaintiffs Michael and Coreen LoGatto appeal the Law Division's orders dismissing their claims against defendant David Lipsky, who conducted his construction business under the

name High Ridge Homes, denying their post-judgment motions, and denying their motion for reconsideration. We affirm in part and reverse in part.

I.

We discern the following facts and procedural history from the record on appeal.

The LoGattos own a home on Pascack Road in Washington Township. In 2008, they sought proposals for a home-remodeling project that included a second-floor addition, including bedrooms and a bathroom, and renovation of the first floor. Lipsky, a home improvement contractor licensed pursuant to N.J.A.C. 13:45A-17.3, submitted a proposal sheet itemizing costs, including material, labor, and profit, totaling \$258,121.50. Some of the costs were labeled as being "estimated." After the LoGattos accepted Lipsky's proposal, he did not prepare a written contract as he was required to do by N.J.A.C. 13:45A-16.2(a)(12).

In March 2009, Lipsky notified the LoGattos that the expenses exceeded the proposed costs by approximately \$25,000. As of May, the LoGattos had paid Lipsky \$247,500. He informed them that he required an additional \$78,469.37 to complete the work. Because the parties were unable to reach agreement,

Lipsky left the job, which was approximately ten percent unfinished. The LoGattos arranged for its completion.

The LoGattos filed suit for the costs of completion in November. Lipsky filed a counterclaim seeking \$50,000 in unpaid costs. The parties subsequently amended their pleadings. In January 2011, the LoGattos moved for summary judgment. Lipsky filed a cross-motion seeking the same relief. Both motions were denied in March.

The case was tried before a jury in October and November 2011. After completion of the LoGattos' evidence, they moved for judgment in their favor on the issue of liability for violations under the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -195. Lipsky cross-moved for an involuntary dismissal of those claims. He also moved to withdraw his counterclaim.

The trial judge granted the LoGattos' motion, finding that there were technical violations of the CFA, such as Lipsky's failure to have a signed contract and change orders. He denied Lipsky's motion for involuntary dismissal, finding that there was a jury question as to whether the LoGattos sustained an "ascertainable loss." The judge allowed Lipsky to withdraw his counterclaim.

At the close of the evidence, the LoGattos moved for an order requiring Lipsky to refund all of the money he received from them pursuant to N.J.S.A. 56:8-2.11. The judge denied that motion. The jury returned a verdict in favor of Lipsky, finding that the LoGattos suffered no ascertainable loss.

In December, the LoGattos filed post-trial motions seeking counsel fees and costs under the CFA, reconsideration of the denial of their motion for a refund, and either a new damages trial or an award of damages notwithstanding the verdict. The judge denied the motions, entering a judgment in favor of Lipsky on January 25, 2012. The judge denied the LoGattos' motion for reconsideration on February 3. This appeal followed.

II.

On appeal, the LoGattos argue that the trial judge erred in denying their applications for counsel fees and for a refund. They also argue that the jury's no-cause finding was a miscarriage of justice.

The CFA was enacted to protect consumers against predatory merchants by imposing a broad array of prohibitions and requirements on sellers, advertisers, and contractors. According to the Supreme Court:

The Consumer Fraud Act has three main purposes: to compensate the victim for his or her actual loss; to punish the wrongdoer through the award of treble damages; and, by

way of the counsel fee provision, to attract competent counsel to counteract the community scourge of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual.

[Lettenmaier v. Lube Connection, Inc., 162 N.J. 134, 139 (1999) (citation omitted).]

Moreover, "[b]ecause [the CFA] is a remedial statute, its provisions are construed liberally in favor of the consumer to accomplish its deterrent and protective purposes." Ibid.; see also Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997) ("The history of the [Consumer Fraud] Act is one of constant expansion of consumer protection."); Cox v. Sears Roebuck & Co., 138 N.J. 2, 15-16 (1994).

While the CFA originally provided only for enforcement by the Attorney General, see L. 1960, c. 39, § 3, it now provides a private cause of action:

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under [the CFA] may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

[N.J.S.A. 56:8-19.]

Enacted in 2004, the Contractors' Registration Act (CRA), N.J.S.A. 56:8-136 to -152, supplements the CFA by imposing a number of disclosure obligations on contractors in order to guarantee that even the most inexperienced consumer is informed of his or her rights. Many of the CRA's provisions are enforced through administrative regulations applicable to home improvement practices, N.J.A.C. 13:45A-16.1 to -16.2, and home improvement contractor registration, N.J.A.C. 13:45A-17.1 to -17.14. Of particular importance to this case, failure to comply with the CRA's provisions and implementing regulations also constitutes a violation of the CFA. N.J.S.A. 56:8-146(a).

In order to demonstrate "ascertainable loss," a plaintiff must show "either out-of-pocket loss or . . . loss in value." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248 (2005). The Supreme Court has held that "[t]he limiting nature of the requirement allows a private cause of action only to those who can demonstrate a loss attributable to conduct made unlawful by the CFA." Id. at 246 (emphasis added) (citing Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 473 (1988)); see also N.J.S.A. 56:8-19 (stating that "ascertainable loss" must occur "as a result" of the claimed violation); Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 560 (2009) ("[A] plaintiff who cannot

prove the causal link between the asserted regulatory violation and his loss cannot find relief within the CFA."). An "ascertainable loss" is roughly "equivalent to any lost 'benefit of [the] bargain.'" Bosland, supra, 197 N.J. at 558 (alteration in original) (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 11-13 (2004)).

With respect to counsel fees, the case law is extremely straightforward. According to the Supreme Court, "a consumer-fraud plaintiff can recover reasonable attorneys' fees, filing fees, and costs if that plaintiff can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages." Cox, supra, 138 N.J. at 24 (citing Performance Leasing Corp. v. Irwin Lincoln-Mercury, 262 N.J. Super. 23, 31, 34 (App. Div.), certif. denied, 133 N.J. 443 (1993)). In Weinberg v. Sprint Corp., 173 N.J. 233, 253 (2002), however, the Supreme Court clarified Cox by holding that counsel fees are not available to a plaintiff whose claims for ascertainable loss are dismissed on summary judgment because ascertainable loss cannot be proven as a matter of law or the plaintiff has failed to present a prima facie case.

Nevertheless, under Weinberg, a plaintiff who loses on the issue of ascertainable loss before a finder of fact is entitled to counsel fees and costs.

Thus understood, the plaintiff with a bona fide claim of ascertainable loss that raises a genuine issue of fact requiring resolution by the factfinder would be entitled to seek also injunctive relief when appropriate, and to receive an award of attorneys' fees, even if the plaintiff ultimately loses on his damage claim but does prove an unlawful practice under the Act. The Act's remedial purposes are promoted thereby and the Legislature's requirement of ascertainable loss for a private cause of action is respected. Such actions by consumers affected by the unconscionable act of consumer fraud will lessen the burden on the Attorney General. The standard we articulate today furthers the legislative desire to recognize two classes of actions cognizable under the Act. To eliminate entirely the predicate of a bona fide claim of ascertainable loss would be violative of the legislative prerogative to give standing only to those private parties who present a legitimate claim of damages.

[Id. at 253-54.]

In this case, the trial judge denied the LoGattos' motion for counsel fees and costs because they failed to convince the jury that they had suffered an ascertainable loss. The judge's refusal was despite his own denial of Lipsky's motion for an involuntary dismissal based on his finding that the LoGattos had "made a prima facie showing from which could reasonably be

inferred that there was an ascertainable loss of some amount."¹ Because the judge's decision was inconsistent with the Supreme Court's contrary holding in Weinberg, we reverse and remand to the Law Division for disposition of the fee motion.

With respect to their claim for a refund, the LoGattos rely on N.J.S.A. 56:8-2.11, as well as Artistic Lawn & Landscape Co. v. Smith, 381 N.J. Super. 75 (Law Div. 2005). Their reliance on the statute is misplaced. It requires "a refund of all moneys acquired by means of any practice declared herein to be unlawful." N.J.S.A. 56:8-2.11 (emphasis added). That provision was enacted as section 3 of a standalone statute, L. 1979, c. 347, intended to supplement the CFA. Chapter 347 dealt with the unlawful practice of misrepresenting the identity of food at eating establishments. The term "herein" refers to the provisions governing food labeling in Chapter 347, not the provisions of the entire CFA. Artistic Lawn, which applies the refund remedy contained in N.J.S.A. 56:8-2.11 to the entire CFA, is a trial court opinion and not binding on us.

In any event, it is clear from the record that the LoGattos received at least the value of the work they paid for, so a

¹ We note that the motion judge had previously denied Lipsky's motion for summary judgment. Although plaintiffs have not supplied the transcript of the motion judge's reasons, the documents in the appendix suggest that the issue before the judge was whether there was proof of an ascertainable loss.

refund would be a windfall not warranted by notions of fairness, the CFA, or the jury's finding that they suffered no ascertainable loss. The judge correctly denied the application for a refund.

Finally, we reject the LoGattos' argument that the jury's verdict was against the weight of the evidence and a manifest injustice.² Rule 4:49-1(a) provides that a trial judge shall grant a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." A jury verdict should be set aside "only in cases of clear injustice." Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005) (citing Crego v. Carp, 295 N.J. Super. 565, 577 (App. Div. 1996), certif. denied, 149 N.J. 34 (1997)), certif. denied, 186 N.J. 242 (2006).

A judge may not vacate a jury verdict unless he or she determines "that the continued viability of the judgment would constitute a manifest denial of justice." Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977). Such a determination must be "carefully reasoned and factually supported (and

² We note that the LoGattos did not make a timely motion for a new trial. R. 4:49-1(b).

articulated)," and may be made only after the judge has "canvass[ed] the record and weigh[ed] the evidence." Ibid.

Both of the LoGattos testified that they paid more to the contractor who ultimately finished the job than the \$10,621.50 of the original proposal price remaining unpaid to Lipsky. Nevertheless, they offered absolutely no documentary evidence to support their testimony. Had the jury believed the testimony, they could have prevailed, which is why the trial judge correctly denied Lipsky's motion for an involuntary dismissal. However, the jury was not required to believe their testimony, and could well have disbelieved it due to the utter lack of documentation to support their assertions.

In addition, the arguments made by the LoGattos are premised on the notion that the total contained on Lipsky's proposal was a fixed price. The only writing initially submitted by Lipsky to the LoGattos, which projected total costs of \$258,121.50, clearly stated that some of the costs were estimates. It did not state that the costs were fixed. For that reason, the jury could also have concluded that plaintiffs did not suffer any ascertainable loss.

We see no basis in the record before us to conclude that "the continued viability of the judgment [in this case] would constitute a manifest denial of justice." See Baxter, supra, 74

N.J. at 597-98. Consequently, we affirm the denial of plaintiffs' motion for a new trial on damages.

Affirmed in part, reversed in part, and remanded.

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



CLERK OF THE APPELLATE DIVISION