New Jersey Law Journal

VOL. 200 NO. 10 JUNE 7, 2010 ESTABLISHED 1878

Real Estate Title Insurance & Construction Law

JUNE 7, 2010 An ALM Publication

How To Navigate Through the Murky Waters of Home Improvement

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Attorneys who represent home improvement contractors need to tiptoe through a minefield of statutes, regulations and often conflicting case law in order to avoid the long reach of the Consumer Fraud Act. Home improvement contracts have become the legal testing ground for consumer fraud issues. Hopes of collecting attorneys' fees, treble damages, and refund of payments have emboldened homeowners, enticing them to pursue claims against home improvement contractors, a result that was actually envisioned by the statute.

Every attorney who counsels home improvement contractors should be familiar with several statutes and codes, including the Consumer Fraud Act, the Home Improvement Practice Regulations and the Contractor Registration Act. These statutes and codes provide the framework for the conduct and contractual prerequisites, to which home improvement contracts must adhere.

It is possible that violations of these regulatory requirements exist in more contracts than they do not. However, awareness of these statutes and codes begins the attorneys' analysis rather than bringing it to a close. Once conversant with the legislation affecting consumer fraud for contractors, attorneys can begin their education through the litany of cases addressing these statutes, which include seminal cases from the Supreme Court and Appellate Division and a plethora of seemingly contradictory unpublished opinions.

A violation of the CFA can arise in three different settings. *Gennari v. Weichart Co. Realtors*, 148 N.J. 582 (1997). An affirmative misrepresentation, even if unaccompanied by knowledge of its falsity or an intention to deceive, is sufficient. An omission or failure to disclose a material fact, if accompanied by knowledge and intent, is sufficient to violate the CFA. Lastly, the third category of unlawful acts consists of violations of specific regulations promulgated under the CFA. In those instances, intent is not an element of the unlawful practice and the regulations impose strict liability for such violations.

A starting point for the analysis is to separate those cases in which CFA claims are brought as a homeowner's affirmative claim and those in which the CFA is used as a defense to contractor claims. Where CFA claims are used as a defense, an argument exists that the homeowner should not be required to pay the contractor and should be entitled to its attorneys fees where there has been a violation of the CFA.

In *Blake Construction v. Pavlick*, 236 N.J. Super. 73, 80 (Law Div. 1989), the contractor committed a technical violation of the CFA by performing home improvement work without a written contract. Judge Harris acknowledged that the parties were friends, that there was no intent to deceive by the contractor, that the contractor performed its work in good faith, and that the work was authorized orally. Nonetheless, the law, together with its strong public policy, was enforced and Blake was not entitled to payment and was required to refund money to the homeowner. Judge Harris opined that:

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> What this teaches is that every home improvement contract, including the addendum and an authorization for extras, must be in writing and signed by the parties. If this means that the contractors must keep a pad of pre-printed forms on the job to be initialed to authorize field changes, that is but a small price to pay for enhancing the understanding between the contractor and its customers. If that were done, there would have been no misunderstanding.

Courts have held that the CFA makes no distinction between "technical" violations and more substantive ones. *BMJ Insulation and Construction, Inc. v. Evans*, 278 N.J. Super. 513, 518 (App. Div. 1996). Toward that end, the Appellate Division has held that attorneys' fees are appropriate even where a technical violation of the CFA results in no harm to the consumer. In *Branigan v. Level on the Level, Inc.*, 326 N.J. Super. 24, 30-31 (App. Div. 1999), the Appellate Division noted:

> The Supreme Court has made it clear that the statute mandates an award of counsel fees and costs for any violation of the Act, even if that violation caused no harm to the consumer. Relief from this strict liability, if any, must be granted by the Legislature.

Contrary to that position is the Appellate Division holding in *Pron v. Carlton Pools, Inc.*, 373 N.J. Super. 103 (App. Div. 2004). In *Pron*, the Appellate Division held that the consumer was not entitled to attorneys fees where the technical violation of the CFA resulted in no ascertainable loss to the consumer. The Appellate Division agreed with the *Branigan* analysis recently in the unpublished decision of *Dream Builders v. Estate of Todd Paton*, Superior Court of New Jersey, Appellate Division, Docket No. A-0493-08T3, where the court held that although there was no ascertainable loss to support the homeowner's CFA claim, they were entitled to attorneys fees for defending against the contractor's claim where the contractor had committed technical violations of the CFA.

The CFA provides for treble damages, refunds of payment and attorneys' fees where there has been a violation of the CFA which results in "ascertainable loss." However, in order to successfully prove an affirmative CFA claim, the plaintiff must demonstrate a "causal relationship … between the ascertainable loss and the unlawful practice." *Roberts v. Cowgill*, 316 N.J. Super. 33,41 (App. Div. 1998). The law is more unsettled with regard to the award of attorneys' fees for an affirmative CFA claim.

While *Pron* held that ascertainable loss is required for an award of attorneys fees, the New Jersey Supreme Court, two years prior, held differently. In *Weinberg v. Sprint Corporation*, 173 N.J. 233, 253 (2002), the Supreme Court of New Jersey held that a plaintiff with a bona fide claim of ascertainable loss that raises a genuine issue of fact that survives a summary judgment motion would be entitled 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 CFA.

One issue that *Weinberg* does not directly address is whether attorneys' fees can be awarded when a technical violation occurs, the homeowner never moves for summary judgment, and at trial the fact-finder determines there is no ascertainable loss. However, *Weinberg* states:

> The legislative intent to permit a private cause of action under the act would be frustrated if a private litigant, who succeeds in bringing such a claim to a jury, must gamble on whether he or she will prevail ultimately on proof of the loss in order to obtain attorneys' fees, when he or she otherwise proves unlawful conduct.

Thus, it would appear, according to *Weinberg*, that if the issue of a technical violation reaches the jury, even if the jury finds the technical violation is not causally connected to an ascertainable loss, the homeowner may be able to recover attorneys' fees.

An issue that still needs to be settled by the courts concerns the question of what constitutes ascertainable loss. While the HIP Regulations clearly require that change orders over $500 be in writing, the courts are unclear about whether the failure to do so results in damages. In *Dream Builders*, supra, the Appellate Division recognized that there were unsigned change orders, which violated the CFA. However, it held that the unsigned change order resulted in no ascertainable loss because they were not paid, implying that payment of unsigned change orders may be sufficient to establish ascertainable loss. In *Unique Custom Landscaping v. Dalit Sterman*, 2009 WL 2461171 (App. Div. 2009), however, the Appellate Division held that, while the change order undoubtedly violated the regulations since it was not signed, there was no ascertainable loss because the homeowner received the value of the work contained in that unsigned change order.

This brings us full circle to the *Blake* decision, where Judge Harris held that no payment was due because the failure to reduce an agreement to writing violated the CFA. While one would think that there would be some consensus on whether payment is due when a contract, or change order, is not signed, there is not. Cases come out on both sides of the issue. The line between the CFA as an affirmative claim and as a defense is blurred. When ascertainable loss is required, through what stage of the litigation it must survive and even what ascertainable loss means is confused and distinguished. Contractors who engage in home improvement are operating in murky waters, where the perils are great and the stakes are high. While attorneys who represent their interests may have an expertise in the field, they are hard-pressed to give definitive advice upon which their clients can rely. ■