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Not Every Breach of Contract Claim Is a Violation of the Consumer Fraud Act

While the motivation behind the CFA was, in part, protecting consumers, over time the path has deviated to such an extent that even garden-variety breach of contract claims against home improvement contractors almost always include CFA claims, causing unnecessarily complicated litigation.

By Joseph R. Haftek Jr. and Thomas N. Gamarello

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Since its introduction several decades ago, home improvement contractors in New Jersey have been rightly concerned about the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1. Known as one of the most aggressive consumer protection statutes in the nation, the CFA has sharpened its focus on home improvement contractors over the years. The CFA was enacted to protect consumers from improper selling and unconscionable commercial practices by "prevent[ing] deception, fraud or falsity, whether by acts of commission or omission, in connection with the sale and advertisement of merchandise and real estate." *Fenwick v. Kay American Jeep*, 72 N.J. 376, 377 (1977). Violators of the CFA face treble damages and attorney fee-shifting:

The act, use or employment by any person of unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation or the knowing concealment, suppression or omission of any material fact with the intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any merchandise … whether or not any person has in fact been misled, deceived or damaged thereby.

N.J.S.A. 56:8-2

While the motivation behind the CFA may be, in part, the laudable goal of protecting consumers from unscrupulous contractors, as with all things, the passage of time and the allure of increased leverage at the settlement table has altered the course of the CFA. In practice, the path has deviated to such an extent that garden-variety breach of contract claims against home improvement contractors almost always include claims under the CFA. This has significant impacts on homeowner expectations for "big money" resolution of CFA claims, unnecessarily complicated litigation, and insurance coverage issues for contractors.

Not every breach of contract case is a CFA claim, as plaintiffs must

prove more than a simple breach of contract to recover under the CFA. Courts have consistently held the CFA "is not intended to cover every transaction that occurs in the marketplace, but, rather, its applicability is limited to consumer transactions which are defined both by the status of the parties and the nature of the transaction itself." *Cetel v. Kirwin Fin. Group*, 460 F.3d 494, 514 (3d Cir. 2006) (quoting *Arc Networks v. Gold Phone Card Co*., 333 N.J. Super. 587 (App. Div. 2000)). Our Supreme Court has unambiguously articulated the impropriety of masquerading breach of contract claims as compensable CFA violations, a now common practice: "A breach of warranty or a breach of contract alone is not unconscionable and does not violate the [CFA]." *Cox v. Sears Roebuck & Co*., 138 N.J. 2, 11-12 (1994) (quoting *Skeer v. EMK Motors*, 187 N.J. Super. 465, 470 (App. Div. 1982)).

Breach of contract claims require the existence of a valid contract, a breach of that contract, and resulting damages related to that breach. *Murphy v. Implicito*, 392 N.J. Super. 245, 265 (App. Div. 2007). Damages in breach of contract actions are meant to make the injured party whole and generally preclude punitive damages. For example, if the contractor installed a ceiling fan centered on the master bed rather than centered in the room as written in the contract, the plaintiff may have a breach of contract claim and would be entitled to the cost of moving the fan and repairing the ceiling as damages.

On the other hand, CFA violations require proof of unlawful or unconscionable conduct beyond the ordinary breach of contract, i.e., more than that the contractor failed to install the ceiling fan in the center of the room. To state a prima facie claim under the CFA, a plaintiff must demonstrate: (1) unlawful conduct by the defendant; (2) an ascertainable loss; and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss. *Bosland v. Warnock Dodge*, 197 N.J. 543, 557 (2009). "Each of the elements of the prima facie case is found within the plain language of the statute itself; each is, without any question, a prerequisite to suit." *Ibid*.

By way of brief background, there are three kinds of CFA violations: (1) affirmative misrepresentations; (2) knowing omissions; and (3) violations of administrative regulations. Affirmative acts are defined as unconscionable commercial practices, deception, fraud, false pretense, false promise, or misrepresentation, and do not require proof of intent to mislead. *Cox v. Sears Roebuck & Co*., 138 N.J. 2, 17-18 (1994). In contrast to a standard breach of contract claim, where a plaintiff alleges a knowing omission in violation of the CFA intent is an essential element. Regulatory violations do not require proof of intentional conduct. Home improvement contractors that violate the CFA, including unintentional regulatory violations like failure to include their license numbers on their contracts or failing to obtain signed change orders, face damages under the CFA. If found liable such contractors will be precluded from profiting for rendered services and are limited to recovery under quantum meruit. *Marascio v. Companella*, 298 N.J. Super. 491, 501 (App. Div. 1997).

To satisfy the second prong of the CFA claim, i.e., ascertainable loss, a plaintiff "must suffer a definite, certain and measurable loss, rather than one that is merely theoretical." *Id*. at 558. "[T]he plain language of the Act unmistakably makes a claim of ascertainable loss a prerequisite for a private cause of action." *Weinberg*, 173 N.J. at 251. An ascertainable loss under the CFA is one that is "quantifiable or measurable," not "hypothetical or illusory." *Thiedemann v. Mercedes-Benz USA*, 183 N.J. 234, 248 (2005).

Finally, successful plaintiffs must satisfy the third prong and prove a causal relationship between the defendant's unlawful conduct and their ascertainable loss. *Bosland*, 197 N.J. at 557. There must be a causal connection between construction defects and the breach of the CFA's Home Improvement Practices regulations to permit recovery under the CFA. *Josantos Const. v. Bohrer*, 326 N.J. Super. 42 (App. Div. 1999).

New Jersey courts have held breaches of contract are not necessarily compensable under the CFA without this causal connection: "[T]o succeed on a consumer fraud claim, a plaintiff must demonstrate 'substantial aggravating circumstances,' such as the existence of bad faith or lack of fair dealing, sufficient to constitute an 'unconscionable business practice.'" *Petri Paint Co. v. OMG Americas*, 595 F. Supp. 2d 416 (D.N.J. 2008) (citing *Cox*, 136 N.J. at 2). "A Consumer Fraud Act violation, however, with

its concomitant trebling of ascertainable loss, requires more than the showing of a breach of contract. It requires a causal connection ….” *Josantos*, 326 N.J. Super. at 47.

In *Josantos*, the homeowners sought damages under the CFA from their home improvement contractor for construction deficiencies related to the construction of a patio and walkway. *Id*. at 45. The trial court trebled the homeowners’ incurred remediation costs as damages under the CFA due to a technical violation (i.e., the contractor issued a premature Certification of Completion before it finished installing the concrete steps and after which the homeowner found alleged additional deficiencies). The Appellate Division overturned the trial court’s determination to treble all of the homeowners’ damages (except the concrete steps), opining that:

We fail to see a causal connection between that technical violation of the Consumer Fraud Act and the subsequent discovery of additional defects in the work. The fortuitous occurrence that the signing of the Certificate of Completion preceded the discovery of the deficiencies does not supply the causal connection necessary to establish an “ascertainable loss.” The defects in the work would have been discovered in the same manner if the Certificate of Completion had not been presented prematurely or indeed if it had not been presented at all.

Id. at 46.

As the Appellate Division noted in *Akhtar*, conduct constituting a breach of contract may present grounds for a claim under the CFA, but “not invariably so.” *Akhtar v. JDN Props. at Florham Park*, No. A-5907-11T3, 2015 N.J. Super. Unpub. LEXIS 355, at *8 (App Div. Feb. 24, 2015); *see also Gennari v. Weichert Co. Realtors*, 288 N.J. Super. 504, 533 (App. Div. 1996) (observing that a “simple breach of warranty or breach of contract is not per se unconscionable and alone does not violate the Act.”):

In respect of what constitutes an “unconscionable commercial practice” … unconscionability is an amorphous concept obviously designed to establish a broad business ethic. The standard of conduct that the term “unconscionable” implies is lack of good faith, honesty in fact and observance of fair dealing. However, 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. Because any breach of warranty or contract is unfair to the non-breaching party, the law permits that party to recoup remedial damages in an action on the contract; however, by providing that a court should treble those damages and should award attorneys’ fees and costs, the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach.

Akhtar, 2015 N.J. Super. Unpub. LEXIS 355, at *8 (citing *Cox*, 138 N.J. at 18).

In other words, “[t]here must be some aggravating circumstance that qualifies the breach as a prohibited act”—beyond a simple breach of the construction contract. *Ibid*. (citing *Cox* at 18); *see also Beck v. Gomez*, No. A-1440-06T1, 2007 N.J. Super. Unpub. LEXIS 671, at *12 (App. Div. Nov. 9, 2007) (finding that the contractor’s failure to comply with the regulation prohibiting payment before issuance of a certificate of occupancy did not result in any ascertainable any loss).

Furthermore, plaintiffs must not only prove unlawful conduct and identify ascertainable losses, but they also must prove a causal link between those identifiable losses and the alleged CFA violations. CFA violations require proof all three elements. See N.J.S.A. 56:8-2.

In summary, lawyers defending home improvement contracts against CFA claims should appropriately scrutinize CFA violations, knowing their inclusion into the plaintiff’s playbook is sometimes dubious. As an added layer of protection to home contractors, consumers who establish a CFA violation may be equitably estopped from invoking the statutory remedies available to them under the CFA if they have knowledge of the potentially violative act. *Joe D’Egidio Landscaping v. Apicella*, 337 N.J. Super. 252, 257 (App. Div. 2001). In *D’Egidio*, the court refused to award treble damages or attorney fees to the plaintiff who purposefully induced the landscaper to violate the regulation requiring a written contract. *Ibid*.

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