DR. HUMAYUN AKHTAR and YOSARIA AKHTAR, Plaintiffs-Respondents,
v.
JDN PROPERTIES AT FLORHAM PARK, L.L.C., and CASEY & KELLER, INC.,[1] Defendants, and
JDN PROPERTIES, L.L.C.,[2] Defendant, and
JOSEPH NATALE, RANDY DELUCA, and DELTRUS, L.L.C., Defendants-Appellants.

Nos. A-5907-11T3, A-6064-11T3.

Superior Court of New Jersey, Appellate Division.

Argued January 6, 2015.
Decided February 24, 2015.

David C. Stanziale argued the cause for appellant Joseph Natale.

Robert T. Lawless argued the cause for appellants Randy DeLuca and Deltrus, L.L.C. (Hedinger & Lawless L.L.C., attorneys; Mr. Lawless, on the brief).

Jay J. Rice argued the cause for respondents Humayun and Yosaria Akhtar (Nagel Rice, L.L.P., attorneys; Mr. Rice, of counsel and on the brief; Randee M. Matloff, on the brief).

JDN Properties at Florham Park, L.L.C., has not filed a brief.

Before Judges Koblitz, Haas and Higbee.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

This litigation stems from the construction of plaintiffs', Dr. Humayun and Yosaria Akhtar's, $1.56 million new home on soil of insufficient load-bearing capacity to hold the building, in spite of the architect's plan, which specifically called for testing of the soil. Plaintiffs contracted with JDN FP in 2005 to build the home in its development project, one of ten homes constructed. Joseph Natale, the 100% owner of JDN FP, which was formed in 2003 specifically to develop this property, entered into an oral agreement with the project manager, Randy DeLuca, of Deltrus, LLC (Deltrus). Pursuant to this agreement, DeLuca provided $600,000 in capital for the development project and became the on-site manager. DeLuca was to receive 40% of the profits and JDN FP 60%. DeLuca claimed to work for Deltrus, a company formed by members of his immediate family in 1994, which had no record of any salary paid to him, although he claimed to receive "commissions." Title to the home was conveyed to plaintiffs by JDN FP in 2006. Plaintiffs never moved into the home as it remains unrepaired and uninhabitable.

The court granted summary judgment with regard to liability under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to-20, against JDN FP and DeLuca. After defendants failed to comply with numerous orders to timely post sufficient security, the court dismissed defendants' pleadings and proceeded to a proof hearing. After the proof hearing, at which defendants were allowed to cross-examine witnesses, but not demonstrate affirmative proofs, the court pierced the corporate veil, finding Joseph Natale personally liable for the judgment against JDN FP, and awarded plaintiffs approximately $7.4 million in treble damages and counsel fees pursuant to the CFA. DeLuca was found to be an "alter ego" of Deltrus, having equal liability "for all matters at issue in this case." Natale, DeLuca and Deltrus appeal from this judgment.

Defendants maintain that because their dereliction did not involve discovery, but rather violations of orders requiring the posting of security, which was ultimately posted in the amount of $700,000, preventing them from defending themselves was an unsustainable penalty. They also maintain that the evidence of a violation of the CFA was insufficiently one-sided to allow for the grant of summary judgment. We agree with both arguments and reverse.

I

We first discuss the grant of summary judgment on the CFA claim, which occurred prior to the dismissal of defendants' pleadings. A court may grant summary judgment only if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The facts must be viewed in a light most favorable to the non-moving party. Polzo v. Cnty. of Essex, 209 N.J. 51, 56 n.1 (2012) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)). The slightest doubt as to an issue of material fact, Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994), or even simply an issue of credibility, D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 114-15 (App. Div. 1997), must be reserved for the factfinder, and precludes a grant of judgment as a matter of law. Summary judgment should be denied unless "the right thereto appears so clearly as to leave no room for controversy." Saldana, supra, 275 N.J. Super. at 495.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). Thus, we must first determine whether any genuine issue of material fact exists, and, if not, evaluate whether the trial court's ruling was correct as a matter of law. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010).

The trial court granted partial summary judgment on plaintiffs' consumer fraud claims. The CFA provides that 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[.]
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> [N.J.S.A. 56:8-2.]

The CFA is a remedial statute meant "to root out consumer fraud," Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 264 (1997), and must therefore be "liberally construed in favor of the consumer[.]" Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 576 (2011). Its promise of treble damages, costs, and attorney fees serves to ensure that injured plaintiffs are made whole for their actual damages, that wrongdoers are punished and discouraged from further fraudulent practices, and that competent counsel are provided incentive to prosecute even cases involving relatively minor loss. Scibek v. Longette, 339 N.J. Super. 72, 77 (App. Div. 2001).

An "unlawful practice" contemplated by the statute may be an affirmative act, as alleged here,[3] a knowing omission or concealment, or a regulatory violation. Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994). The sorts of affirmative acts prohibited by the statute, include unconscionable commercial practices, fraud, false promise or pretense, and misrepresentation. Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 598 (App. Div. 1990), aff'd, 124 N.J. 520 (1991). Notably, unlike acts of omission, consumer fraud violations by affirmative actions "do not require proof of intent to mislead." Vagias v. Woodmont Props., L.L.C., 384 N.J. Super. 129, 133 (App. Div. 2006). That is because the evils targeted by the statute are any commercial practices which have the "capacity to mislead." Cox, supra, 138 N.J. at 17; see also Lemelledo, supra, 150 N.J. at 263 (explaining that the statute is "intended to protect consumers `by eliminating sharp practices and dealings in the marketing of merchandise and real estate'" (quoting Channel Cos., Inc. v. Britton, 167 N.J. Super. 417, 418 (App. Div. 1979))).

To be sure, an unconscionable commercial practice under the statute "`necessarily entails a lack of good faith, fair dealing, and honesty.'" D'Agostino v. Maldonado, 216 N.J. 168, 189 (2013) (quoting Van Holt v. Liberty Mut. Fire Ins. Co., 163 F.3d 161, 168 (3d Cir. 1998)). "Our courts have been careful to constrain the CFA to `fraudulent, deceptive or other similar kind of selling or advertising practices.'" D'Agostino, supra, 216 N.J. at 189 (quoting Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 271 (1978)). Whether a particular act qualifies, remains a fact-sensitive inquiry. Judge v. Blackfin Yacht Corp., 357 N.J. Super. 418, 425 (App. Div.), certif. denied, 176 N.J. 428 (2003).

Generally, to succeed on a consumer fraud claim, a plaintiff must demonstrate "(1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003). Consequently, the plaintiff must show that "he or she suffered an ascertainable loss `as a result of' the unlawful practice," Lee v. Carter-Reed Co., 203 N.J. 496, 522 (2010) (quoting N.J.S.A. 56:8-19), but need not prove that the defendant's unlawful behavior was the sole cause of that loss. Varacallo v. Mass. Mut. Life Ins. Co., 332 N.J. Super. 31, 48 (App. Div. 2000).

Prior to plaintiffs' agreement to buy, DeLuca assured them verbally that the home could be constructed to accommodate a full walk-out basement. Plaintiffs then contracted with JDN FP to build the house "substantially in accordance with the plans and specifications prepared by [the architect]," which were attached to the contract and required that the house be built on soil with a bearing capacity of 4000 pounds per square foot and that the "contractor shall verify the soil bearing capacity per structural design load requirements." DeLuca testified at his deposition that he was not even aware of the testing requirement until construction had already commenced, and that he believed that virgin soil in this region ordinarily guaranteed the proper bearing capacity. DeLuca also reassured plaintiffs that cracks which appeared prior to closing were a normal part of the settling process. Defendants' own expert reported that a substantial portion of the house had been constructed on soil with a bearing capacity considerably less than that required.

The court reasoned that by means of the plans and specifications attached to the contract, defendants had made representations to plaintiffs as to the quality of the soil and that DeLuca knew or should have known the extent of his obligations. The court specified that DeLuca and JDN FP had knowingly violated the plans and specifications by failing to comply with their contractual obligation to test the soil before construction, which constituted a CFA violation.

Conduct constituting a breach of contract may certainly present grounds for a consumer fraud claim, Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248 (2005), but not invariably so. Josantos Constr. v. Bohrer, 326 N.J. Super. 42, 47 (App. Div. 1999). In that regard, the Court explained in Cox:

> 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.
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> [Cox, supra, 138 N.J. at 18 (citations and internal quotation marks omitted).]

Plaintiffs argued on their motion below and maintain on appeal that defendants' representation in the contract that the soil would be tested and their failure to conduct the test were sufficient circumstances in themselves to establish a consumer fraud violation. That reading of the CFA, however, cannot be squared with precedent which consistently establishes that a "simple breach of warranty or breach of contract is not per se unconscionable and alone does not violate the Act." Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 533 (App. Div. 1996), aff'd as modified, 148 N.J. 582 (1997); see also Cox, supra, 138 N.J. at 18 (noting that a "`breach of warranty alone does not violate a consumer protection statute'" (quoting D'Ercole Sales, Inc. v. Fruehauf, Corp., 206 N.J. Super. 11, 25 (1985))). There must be some

aggravating circumstance that qualifies the breach as a prohibited act. Id. at 18.

Here, defendants breached a requirement set forth in the architect's plan attached to the contract. The trial court did not identify the aggravating circumstances that render this breach a violation of the CFA.

"[T]he CFA may be violated by an affirmative misrepresentation so misleading as to a fact material to the consumer's decision that the consumer is effectively deprived of the ability to make an intelligent decision." Suarez v. E. Int'l Coll., 428 N.J. Super. 10, 32 (App. Div. 2012) (overturning the grant of summary judgment to defendants where a for-profit technical school misrepresented that upon graduation plaintiff could find a well-paying job as a sonographer in hospitals and clinics), certif. denied, 213 N.J. 57 (2013).

The case on which plaintiffs rely, Belmont Condo. Ass'n, Inc. v. Geibel, 432 N.J. Super. 52 (App. Div.), certif. denied, 216 N.J. 366 (2013), which was decided by a jury, is not persuasive. At issue there were misleading affirmative representations of facts in a public offering statement and accompanying marketing materials, not the breach of warranty discussed in Cox as an unconscionable commercial practice. Id. at 81. Consequently, in Belmont no showing of aggravating circumstances was required. Id. at 81-82.

Plaintiffs here, in contrast, identify, at least for purposes of summary judgment, no factual misrepresentation outside of the contractual term they allege was breached. Plaintiffs point to no case affirming the grant of summary judgment to plaintiff on a similar theory, nor have we found such a CFA case. In contrast, summary judgment is granted routinely where defendants acknowledge violation of a regulatory requirement. See Allen v. V & A Bros. Inc., 208 N.J. 114, 122 (2011)(stating that plaintiffs had been granted partial summary judgment, entitling them to recovery under CFA, for corporate defendant's failure to execute a written contract, in violation of N.J.A.C. 13:45A-16.2(a)(12)); BJM Insulation & Constr., Inc. v. Evans, 287 N.J. Super. 513 (App. Div. 1996) (finding plaintiff entitled to counsel fees following grant of summary judgment finding defendant violated CFA and Door-to-Door Home Repair Sales Act (N.J.S.A. 17:16C-95 to-103)).

A factfinder could find that the circumstances surrounding the breach were so egregious as to constitute a violation of the CFA. However, defendants constructed nine other homes in the development without evidence of soil stability problems. Due to the hilly nature of plaintiffs' property, testing the soil was of utmost importance to plaintiffs' home. Although the breach of contract here was devastating to the construction, the extent of damages does not in itself prove a CFA violation. We thus must remand the CFA claims for trial.

II

Defendants also argue that the court's decision to strike their answers for noncompliance with a long series of pre-trial orders constituted an abuse of discretion. In the context of noncompliance with discovery obligations, our courts have observed that the sanction of striking a pleading is "drastic" and should be resorted to only "sparingly." See, e.g., Georgis v. Scarpa, 226 N.J. Super. 244, 250 (App. Div. 1988). Application is appropriate only where a lesser sanction would be insufficient in light of the nature of the party's noncompliance with its obligation and the resulting prejudice suffered by the opposing party. Rabboh v. Lamattina, 312 N.J. Super. 487, 492-93 (App. Div. 1998) (reversing dismissal of a complaint based on plaintiff's counsel's unwillingness to call an expert when scheduled by the court), certif. denied, 160 N.J. 88 (1999). Such may be the case, for example, where the noncompliant party's refusal to comply is "deliberate and contumacious[.]" Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 339 (1951) (reversing an order dismissing a counterclaim for failure to produce books and records). Nonetheless, disposal of a case on its merits is generally strongly preferred. Connors v. Sexton Studios, Inc., 270 N.J. Super. 390, 395 (App. Div. 1994) (reversing the trial court's dismissal of a small claims complaint with prejudice because plaintiff arrived late, opining that even without a "just excuse," a lesser sanction would have sufficed). As we said in Georgis, "`[t]here is an absolute need to remember that the primary mission of the judiciary is to see justice done in individual cases. Any other goal, no matter how lofty, is secondary.'" Georgis, supra, 226 N.J. Super. at 250 (quoting Santos v. Estate of Santos, 217 N.J. Super. 411, 416 (App. Div. 1986)(reversing a dismissal of plaintiff's personal injury claim)).

A trial court generally exercises considerable discretion as to the manner of enforcing its orders or sanctioning parties for noncompliance. See Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005) (stating that a "trial court has an array of available remedies to enforce compliance with a court rule or one of its orders."). Its decisions in that regard are therefore reviewable for an abuse of that discretion. Ibid.

Plaintiff states that "noncompliance or belated partial compliance with [the trial court's] orders resulted in the [c]ourt ultimately striking pleadings and conducting the [p]roof hearing." While accusing defendants of citing inapposite cases relating to discovery violations in support of their argument that the dismissal of their pleadings was overly harsh, plaintiffs cite no case at all to support such a sanction in a situation comparable to this one.

Perhaps one reason no cases are available is because a pre-trial writ of attachment is such an extraordinary remedy, requiring the plaintiff to strictly meet all of the requirements of Rule 4:60-5(a), including the requirement that "there are statutory grounds for issuance of the writ[.]" R. 4:60-5(a)(2). See Wolfson v. Bonello, 270 N.J. Super. 274, 289 (App. Div. 1994). Plaintiffs convinced the court that a statutory basis existed for an arrest warrant, as required by N.J.S.A. 2A:26-2(a), pursuant to N.J.S.A. 2A:15-42(c) to (d), because defendant "assigned, removed or disposed of, or is about to assign, remove or dispose of, any of his property with intent to defraud his creditors[,]" or "fraudulently contracted the debt or incurred the demand." The court issued the writ of attachment against the proceeds of the sale or rent of the remaining new homes in the development. In light of our other determinations, we need not determine whether this was an appropriate exercise of the court's discretion. Whether appropriate or not, defendants were obligated to follow the orders of the court.

Discovery violations, in our view, might ultimately lead to a dismissal of pleadings in situations not applicable here, such as where one party is so disadvantaged by the lack of discovery as to be potentially deprived of a fair trial. R. 4:23-5. See Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 345 (1984) (stating that dismissal with prejudice "will normally be ordered only when no lesser sanction will erase the prejudice suffered by the non-delinquent party"). Such a lopsided trial would not result when sufficient security is not posted by defendants. Rather, plaintiffs would potentially have a difficult time collecting the judgment. We could find no case discussing this ultimate sanction of dismissal in connection with the failure to post security. We note also that of the $750,000 security ordered to be posted, $700,000 was actually posted by JDN FP[4] prior to the proof hearing.

We fully understand the argument that defendants' pre-trial efforts to avoid posting court-ordered security could well be viewed as "deliberate and contumacious." We will not relate in detail the tortured history of the ten orders entered in an effort to obtain sufficient security for plaintiffs. In brief, in August 2007 the court[5] granted a motion for a writ of attachment of up to $500,000 from the net proceeds of the sale of three homes in the project. JDN FP failed to escrow any of the proceeds of the following two sales. JDN FP offered to secure a line of credit instead, and did so from a bank started by Natale eighteen months earlier. The court then entered an order requiring that JDN FP post bond or submit a letter of credit from an independent bank approved by plaintiffs' counsel in the amount of $750,000 within fourteen days. JDN FP, under threat of dismissal of its answers by a subsequent order, ultimately remitted a letter of credit for $250,000 from a bank that was not pre-approved by plaintiffs' counsel.

Another letter of credit was provided from the same bank in July 2008 for an additional $500,000.[6] Additionally, after the court granted partial summary judgment in favor of plaintiffs against JDN FP and DeLuca on the CFA claims involving the substandard soil, the parties agreed to a consent order in December 2008 requiring that JDN FP escrow the net proceeds of rents collected on its remaining property at within ten days of receipt from the tenant.

Defendants did not remit any rent money, after which the court ordered the escrow of the gross rents, which also did not occur. Defendants' pleadings were dismissed, as threatened, for noncompliance. Ultimately, however, $200,000[7] was disgorged from Deltrus, where JDN FP sent the money upon sale of one of the properties, on the theory that the net proceeds were attached and these monies were owed Deltrus for the cost of building the home. JDN FP filed for bankruptcy. In July 2010, following a remand by the bankruptcy judge, the court ordered that defendants' pleadings be reinstated if they provided a new letter of credit for $250,000, to replace the earlier one that had expired, and remit approximately $23,000 in rents. A bond was posted in the amount of $250,000, procured by another of Natale's limited

liability companies, without the posting of collateral, and no rents were turned over.

After this long saga, the court determined that a fraud had been perpetrated by Natale based on the worthless bond. It continued to suppress defendants' answers and proceeded to the proof hearing. We express no opinion as to whether Natale, DeLuca and their companies were contemptuous, committed a fraud upon the court, or engaged in other criminal or civil misdeeds in the course of frustrating the orders of the court. We note that proof of contempt not in the face of the court requires that a defendant be afforded a trial before another judge "if the appearance of objectivity" so requires. R. 1:10-2(c). Certainly, other options for punishing defendants were open to the court. Safe & Sound Sec. Corp., supra, 185 N.J. at 115.

Defendants did not receive the opportunity to present their side of the case. Natale did not have the opportunity to present a defense to the piercing of the corporate veil. As a result, he is personally liable for the judgment, as is DeLuca. Particularly where damages may be multiplied due to fact-sensitive findings, as when a non-regulatory CFA violation is alleged, defendants should ordinarily be entitled to present their defense.

Reversed. We do not retain jurisdiction.

[1] JDN Properties at Florham Park, L.L.C. (JDN FP) is bankrupt and the bankruptcy trustee did not appeal. Plaintiffs' professional malpractice suit against Casey & Keller, Inc., engineer of plaintiffs' home's malfunctioning retaining wall, which resulted in a verdict for defendant, is the subject of a separate appeal filed by plaintiffs, A-2327-12.

[2] All parties agreed to dismiss JDN Properties, L.L.C. from this appeal as no relief was entered against this entity.

[3] Plaintiff argues that the CFA violation was defendants' "failure to test the weight bearing capacity of the soil[,]" and that they were pursuing the claim under the "affirmative act" prong of the statute.

[4] The $700,000 includes $200,000 disgorged by Deltrus.

[5] After this initial order, a different judge entered the subsequent orders and decisions discussed in this opinion.

[6] This letter of credit was subsequently honored and plaintiffs received the funds.

[7] These funds were ultimately received by plaintiffs.

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