

New Jersey Law Journal

VOL. CXCII - NO.18 - INDEX 335

MAY 5, 2008

ESTABLISHED 1878

IN PRACTICE

REAL ESTATE LAW

By Michael J. Fekete

Contractors Be Warned: Don't Get Nailed

Avoid liability by complying with the New Jersey Home Improvement Contractors Act

Since the effective date of December 31, 2005, the regulations contained in N.J.A.C. 13:45A-16.1 et seq. and the New Jersey Home Improvement Contractors Act (the "Act"), N.J.S.A. 56:8-136 et seq., have governed those persons engaged in the business of making or selling home improvements. As a result, contractors in the industry were required to take affirmative steps to ensure they acted in compliance under the Act, for a number of reasons. First, the very term "home improvement" was given an expansive definition by the Act such that the regulations apply to nearly every conceivable aspect of improvement services offered to homeowners. See, N.J.A.C. § 13:45A-16.1 et seq.; See also, *Online Contracting, Inc. v. Tripuka*, 2007 W.L. 4258330 (App. Div. Dec. 6, 2007) (acknowledging that landscaping is generally considered home improvement). Secondly, since the Act was

Fekete is an associate with the Business & Corporate Group of Stark & Stark in Marlton.

intended to protect homeowners from sharp business violation of the Act constitutes as an unlawful practice under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. ("C.F.A."). For contractors, knowledge of the Act, coupled with compliance with the registration and contract requirements can save time and expense, should litigation arise.

The regulations require any person providing home improvement services to register annually with the Division of Consumer Affairs ("DCA"). The registration process is not particularly arduous, and the DCA maintains a Web site that provides contractors with an application package that contains step-by-step instructions for registration as well as a copy of the Act and regulations. Notwithstanding the DCA's instructional packet, as well as the overall success regarding compliance with the registration requirements, case law and experience confirms there is still a significant amount of uncertainty in the industry as a result of the Act. This uncertainty has and will continue to present problems for contractors, especially those still unaware of the Act, as well as those contractors who have registered but have yet to comply with the additional requirements established by the regulations. The following provides a basic understanding of the Act, the remedies available to consumers, and the

steps that may be implemented to minimize the likelihood of violations by contractors.

As a practical matter, any person performing home improvement work, regardless of the price to be charged, should reduce the contract to writing and have same signed by both parties. For the majority of homeowners, few will make a more significant purchase than the purchase of their home. It should come as no surprise, then, that homeowners will meticulously inspect a contractor's work. The great many contractors working in New Jersey hardly need be reminded of the foregoing. However, recognizing the microscope their work will be placed under, home improvement contractors also need to be extra-diligent with their documentation. Taking such steps will reduce the likelihood that minor workmanship issues will escalate into a consumer fraud claim. See, *Carboni v. Massimo*, 2007 W.L. 247884 (App. Div. Jan. 31, 2007) (home improvement contract totaling \$35,000.00, jury verdict of \$105,000.00 upheld).

The regulations require that home improvement contracts exceeding \$500.00 must be in writing and signed by the parties. The writing and signature requirement applies not only to the original contract, but also to any change orders. In *Online Contracting, Inc. v. Tripuka*, the home improvement contractor commenced a collection action seeking in excess of \$33,000.00 on a written contract for work performed pursuant to a verbal change order. Not surprisingly, the homeowner counterclaimed and asserted a claim under the C.F.A. The trial court granted summary judgment in favor of the homeowner and ordered that the Act and C.F.A.

precluded payment for work not agreed to in writing. On appeal, the Appellate Division upheld the decision of the trial court, in part, and reversed the trial court's refusal to award attorneys' fees.

To properly reduce the contract in writing, it is imperative that it contain basic and material information such as the contractor's name, address and phone number, the contractor's registration number, the contract price, the work to be conducted and the time frames for commencement and completion. While this information may seem obvious, it is not always provided. (See, *Coyle v. Williams*, 2005 W.L. 2708991 (App. Div., Oct. 24, 2005)(contract failed to contain contractor's address or telephone number); *Scianna v. Pillitteri*, 2006 W.L. 1642156 (Law Div. June 9, 2006)(contract did not include date or time when work was to be completed); *Block v. Plosia*, 390 N.J. Super. 543 (App. Div. (2007) (contract did not detail products and materials to be used or a time frame for commencement and completion).)

Equally as important, though presumably not as evident to the average contractor and homeowner, the contract must contain a copy of the contractor's certificate of commercial general liability insurance as well as the telephone number of the insurance company issuing the policy. In addition, all home improvement contracts must contain specific cancellation language, prominently displayed, that advises the homeowner of the right to cancel the contract within three (3) days of receipt of the contract. If the homeowner elects to cancel the contract under this provision, the contractor must refund all sums paid by the homeowner, within 30 days of the cancellation. If a contractor begins work during this period, it is likely that a claim for the reasonable value of work completed could be maintained. However, if the contractor's contract is not otherwise in order, the penalties and costs for such noncompliance, as described below, would quickly exceed any recovery based on the fair value of work performed.

Under the provisions of the Consumer Fraud Act, there are three types of violations: affirmative acts; knowing omissions; and regulatory violations. See *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994). Here,

we are particularly concerned with the latter. Sometimes, violations of the Act appear attributable to honest mistakes, such as failing to include a business name, phone number or home improvement registration number in the contract. In other cases, the violations are blatant, like failing to have a written contract altogether. As far as the CFA is concerned, when dealing with a regulatory violation, appearances are irrelevant. See, *Roberts v. Cowgill*, 316 N.J. Super. 33 (App. Div. 1998). A contractor who fails to comply with technical requirements of the Act, commits an unlawful practice under the Consumer Fraud Act. Contractors should be wary of such regulatory violations because the regulations call for civil and criminal penalties for violation of the Act. These penalties will be imposed regardless of the contractor's intent and knowledge. See, e.g., *State v. Rowland*, 396 N.J. Super. 126 (App. Div. 2007) (finding of guilt not dependent on proof of contractor's knowledge of law); *Artistic Lawn & Landscape Company, Inc. v. Smith*, 381 N.J. Super. 75, 80 ("Intent is not an element of an unlawful practice arising from a violation of the regulations promulgated pursuant to the statute. The regulations impose strict liability.").

Assuming that a violation has occurred and litigation is commenced, the homeowner would undoubtedly seek reimbursement of all reasonable attorneys' fees and costs related to the action as well as a refund of monies paid to the contractor. Trial courts do not have discretion not to award required counsel fees where a regulatory violation has occurred (award of attorneys fees required where "plaintiff can prove that defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages.") ("The refund provision of the C.F.A. is a statutory remedy, not based on proving damages.").

Contractors must also be aware that claims seeking treble damages can be raised by any homeowner asserting a claim under the C.F.A. Although, to obtain an award of treble damages, a homeowner would have to prove that the contractor's actions caused some "ascertainable loss." Contractors do not want to spend their time and resources defending claims based on the fact that a con-

tract omits a phone number, or in other words because of a technicality. Therefore, to minimize the chances that time and resources will be spent needlessly defending claims, contractors should employ the following steps to ensure their compliance with the Act and regulations.

While the Act imposes obligations on contractors, the challenges to meet such obligations are not insurmountable. A contractor, with moderate effort, can reduce the likelihood that disputes over workmanship will be exacerbated because certain information is not contained in the contract. First and foremost, the potential for the imposition of criminal liability demands that every contractor register with the DCA. As noted above, the application process is outlined in an easy-to-follow instruction guide provided by the DCA and available on the Web site. Once a contractor submits his application, he should immediately implement changes to company paperwork to ensure compliance with the regulations.

Contractors should review, or seek the assistance of counsel to review, the current contract forms in light of the regulations. If a contractor uses preprinted forms, it should be relatively easy to ensure that the paperwork contains the company's name, address, and telephone number, as well as having spaces on the form where terms such as price, commencement and completion dates, materials and products to be used, etc., can be inserted. Providing contact information for the contractor's commercial general insurance company and confirmation that the policy is in effect can also be accomplished with minimal disruption to the form. Finally, make sure that the contract contains the required three-(3) day cancellation notice to the consumer. Once this information has been included, it is up to the contractor to ensure that the form is used, all of the terms are included and that the contract and any changes thereto are agreed to and acknowledged by both parties, in writing.

While compliance with the regulations will not protect a contractor from claims regarding workmanship, compliance will limit the scope of such a dispute and reduce the likelihood that litigation will be more protracted and costly to the contractor. ■