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Beware What You Say, Don't Say and What You Print and Promise

Understanding of broad scope of potential liability under the Consumer Fraud Act

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It goes without saying that New Jersey has a reputation as being a consumer-friendly state when it comes to litigation. Just ask any contractor, builder or developer who operates in New Jersey and has been sued by a homeowner, condominium or homeowner association in a construction defect case. On the other hand, those same contractors, builders or developers will likely also admit that the plaintiff-friendly slant of New Jersey courts is normally not, by itself, enough to stop them from working in our state. They might tell you in a moment of candor that their potential liability for alleged construction defects is something that can be reflected in their bottom line as a business risk, since construction defect claims typically have a direct correlation to relatively known and controllable factors, i.e., their contract performance and the quality of their eventual work product. Many contractors, builders or developers, however, have faced lia-

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bility under another category of claims being made with increasing success by plaintiffs in construction defect cases that may have them thinking that New Jersey is a liability minefield too risky to continue navigating. These are claims made under New Jersey's Consumer Fraud Act ("CFA"). (N.J.S.A. 56:8-1 et seq.)

The CFA is aimed at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate. *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267 (1978). It was intended to give New Jersey one of the strongest consumer protection laws in the nation and it receives liberal interpretation from the courts in favor of consumers. *Cox v. Sears Roebuck Co.*, 138 N.J. 2, 15 (1994). The CFA declares as an unlawful practice "[t]he 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." *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 605 (1997). Affirmative misrepresentations under the

act do not require proof that the alleged violator actually intended to deceive the consumer. *Jewish Center v. Whale*, 86 N.J. 619, 625 (1981). Concealment or omission claims require only that the alleged violator knowingly concealed a material fact with the intent that the omission be relied upon by consumers. *Fenwick v. Kay Am. Jeep. Inc.*, 72 N.J. 372, 377(1977); *Zorba Contractors, Inc. v. Housing Authority, City of Newark*, 362 N.J. Super. 124, 139 (App. Div. 2003).

The broad scope of the CFA's protections for consumers can be seen in its language that provides that "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 this act . . . may bring an action . . ." (N.J.S.A. 56:8-1). According to courts that have interpreted this language, an "ascertainable loss" occurs simply when a consumer receives less than what was promised. *Miller v. American Family Publishers*, 284 N.J. Super 67 (App. Div. 1995). In addition, there is no proof required under the CFA that a consumer actually relied upon any

alleged statement or conduct by a defendant to make out a claim. Rather, the Act specifically provides that consumers are protected “whether or not any person has been misled, deceived, or damaged thereby . . .” (N.J.S.A. 56:8-2). There is also no requirement that consumers have a contract with the alleged violator, or otherwise be in direct contact with a party who has allegedly violated the CFA, in order to assert claims under the act. *Katz v. Schacter*, 251 N.J. Super. 467 (App. Div. 1991).

These principles represent some of the broadest consumer protections in the country. What they mean for contractors, builders and developers is broad potential liability under the CFA for just about everything you say or don’t say, print or promise when building and selling homes in New Jersey. A review of some of the cases where courts in New Jersey have addressed claims under the CFA in construction defect cases makes the point.

For example, in *Chattin v. Cape May Greene*, 216 N.J. Super. 618 (App. Div. 1987), a developer had distributed a brochure to initial buyers of homes that indicated that the homes would contain “insulated aluminum windows.” The windows actually used in the construction of the homes had a double pane of glass, which obviously provided insulation. The aluminum frames of the windows, however, had no insulating features. The home-owners claimed that the frames of the windows allowed air infiltration, which caused condensation and damage to the window sills and woodwork. The home-owners who received the brochure won at trial because the court agreed that the representation about the windows in the brochure was misleading under the CFA. On appeal, the Appellate Court sent the case back for a new trial, but only because it wanted the jury to determine whether the average consumer would understand the term “insulated aluminum windows” to refer only to the glass or to the entire window unit.

In *DiLorio v. Structural Stone & Brick Co., Inc.*, 368 N.J. Super. 134 (App. Div. 2004), a homeowner made claims under

the CFA alleging that the builder of his home and a material supplier had knowingly concealed material facts about a stone veneer product installed on his home. The builder had arranged for the plaintiff to visit his stone veneer supplier, where he was shown displays of stone veneer products represented to be high quality and suitable for use on the exterior of a home. The plaintiff made a selection from the displays and the product was incorporated during the construction as part of plaintiff’s agreement with the builder for the cost of construction of the home. About a year after the closing, the stone began to flake and fall off the house, eventually leading to moisture infiltration. The homeowner filed suit asserting claims under the CFA related to the defective stone veneer product. The court held that the plaintiff’s claims that “the builder and his supplier knew the intended use, knew or should have known the stones were not fit for that purpose, but nevertheless failed to disclose that knowledge to him as the prospective homeowner,” were sufficient to make out a claim that the builder and supplier had committed omissions of material fact which may be actionable under the CFA.

In a more recent CFA case called *Matera et. al. v. M.G.C.C. Group, Inc. et. al.*, 402 N.J. Super. 30 (Law Div. 2007), a defendant bank concealed information from a local planning board regarding serious drainage problems connected to land it was selling to a developer, in order to gain approval from the planning board for construction of homes on the land. Homeowners in an adjoining property all began experiencing flooding after the developer bought the land from the bank and built the homes. Despite the homeowners having no direct contact with the bank, and despite the facts that the homeowners never heard any of the bank’s misrepresentations and were never directly exposed to any of its omissions, the court found that the homeowners could still maintain CFA claims against the bank for the flooding damages by reasoning that if the bank had not misrepresented facts to the planning board, the planning

board would not have granted the approvals for construction on the property, and consequently the home-owners’ drainage problems would not have occurred.

Cases like *Chattin*, *DiLorio* and *Matera*, which involved potential liability to homeowners under the CFA for a simple statement in a brochure, for the simple act of referring a homeowner to a material supplier to choose a product, and for statements made to a planning board that homeowners never heard nor had any knowledge of, may make it seem virtually impossible for a builder to avoid claims under the CFA. New Jersey courts, however, have placed at least some limits to CFA claims against builders in construction defect cases.

For example, in *Nickerson v. Quaker Group*, 2008 WL 2600720 (App. Div. July 3, 2008), homeowners who purchased a new home that was constructed by the Quaker Group and the K. Hovnanian Companies filed suit alleging various construction defects. The homeowners alleged that they were induced to purchase the home by misrepresentations, including that the Quaker Group was a quality builder that was willing to make all necessary post-closing repairs, among others. The plaintiffs also argued that the builder’s violations of the construction code could by themselves establish a violation under the CFA. The court disagreed, noting that “sloppy workmanship” by itself “falls short of an unconscionable commercial practice” prohibited under the CFA unless there is evidence of “bad faith or lack of fair dealing” connected to that workmanship. The court concluded that the construction deficiencies alleged by the plaintiffs, by themselves, had no connection to any claimed losses under the CFA because the defective workmanship was not coupled with an aggravating factor, such as conduct by the builder that would have delayed discovery of the deficiencies, substitution of inferior materials, or some other conduct that reflected “bad faith” by the builder. The court specifically rejected the plaintiffs’ reliance on the alleged statements made to them about

the builders' experience and quality as the "bad faith" conduct needed to make out a claim under the CFA.

The *Chattin*, *Dilorio* and *Matera* cases, along with many others decided by our state's courts, give builders and contractors good reason to be concerned with potential liability under the CFA. The act is liberally construed in favor of consumers and it seems from these cases

that plaintiffs need very little to make out allegations of conduct by builders and contractors that violates the CFA. Decisions like the one in the *Nickerson* case offer some respite by at least requiring something more than evidence of a simple construction defect in a home as the basis for a CFA case. That something, "bad faith" as stated by the *Nickerson* court, does not, however, have a clear

definition and is decided on a case-by-case basis. Builders, contractors and developers who decide to build and sell homes in New Jersey should at the very least have an understanding of the broad scope of potential liability under the CFA that these cases represent and use that knowledge as a filter for everything they say, don't say, print and promise to New Jersey home buyers. ■