

Appellate Division Enters Judgment for Contractor on Homeowner's CFA Claim for Poor Workmanship

by Donald P. Jacobs

When something goes wrong with a home improvement project, the homeowner may try to obtain an award of treble damages and attorneys' fees under the New Jersey Consumer Fraud Act (CFA).¹

A recent unpublished Appellate Division decision confirms, however, that in the typical construction dispute arising from a home improvement contract, there is no viable CFA claim based on allegedly poor workmanship. Rather, the homeowner's recovery, if any, is limited to traditional damages for breach of contract.

THE TRIAL COURT JUDGMENT

In *Dream Builders v. Estate of Todd Paton*,² the defendant homeowners hired the plaintiff to construct a first-floor extension and second-floor addition to their home. The parties' contract set the price at \$139,200, with installment payments to be made according to an attached schedule. Disputes arose after a significant amount of the work was done, and after the defendants made 12 installment payments totaling \$130,500. When the defendants refused to make the final two payments (totaling \$8,700), and refused to pay an additional \$15,000 in change orders, the contractor sued for breach of contract.³

In their counterclaim, the defendants asserted a number of claims, including alleged violation of the CFA. One of the defendants testified

that numerous problems existed after the plaintiff stopped working on the project. The defendants' construction and engineering expert testified that most of those problems were due to poor workmanship.⁴

For example, the defendants' expert opined that the siding and trim appeared not to be secured in a workmanlike manner; that one of the windows was the wrong size; that the staircase was "misframed;" and that some of the walls needed "minor spackling and painting." This testimony was in contrast to the opinion of the plaintiff's architectural expert, who testified that the plaintiff's work complied with the plans supplied by the defendants, and that many of the delays, change orders and extra costs were the result of problems with the plans themselves.⁵

At trial, the defendants also claimed various regulatory violations, which they had not alleged in the counterclaim. Specifically, the defendants claimed the plaintiff failed to display its registration number on the contract, most invoices and change orders;⁶ failed to display the Division of Consumer Affairs' toll-free number on its documents;⁷ and failed to reduce certain change orders to writing.⁸

The jury found the homeowners breached their contract with the plaintiff, and awarded the plaintiff \$8,700 for the breach. On the counterclaim, the jury found the plaintiff also breached the contract, and that the plaintiff violated the CFA. The jury found the defendants' "ascertainable loss for plaintiff's violation of the [CFA]" was \$15,000. It rejected the defendants' claims for unjust enrichment, intentional and negligent infliction of emotional distress, and fraud in the inducement. In response to a specific interrogatory—"What amount of money... will fairly and reasonably compensate defendants/counterclaimants?"—the jury answered \$60,000.⁹

The trial judge granted the defendants' motion for counsel fees and costs under the CFA, awarding the defendants the entire amount they sought. The final judgment was entered in favor of the defendants in the amount of \$161,964.63, comprised of the following: \$51,300 (\$60,000-\$8,700) in contract damages; \$45,000 (\$15,000 times three) in CFA damages; and \$65,664.63 in counsel fees and costs. The judge thereafter denied the plaintiff's motion for judgment notwithstanding the verdict or a new trial.¹⁰

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THE APPEAL

The plaintiff's trial counsel had not moved to dismiss the CFA claim under Rule 4:37-2(b), and had not sought judgment in the plaintiff's favor pursuant to Rule 4:40-1. The denial of the plaintiff's judgment notwithstanding verdict motion was therefore unassailable on appeal. Nevertheless, the plaintiff's appellate counsel argued the allegations of the complaint and the proofs at trial did not support a CFA claim, and that the defendants' ultimate theory of recovery under the

CFA rested upon alleged regulatory violations that were not pled at all. The plaintiff asked the Appellate Division to exercise its original jurisdiction under Rule 2:10-5, and enter judgment on the CFA claim in favor of the plaintiff.¹¹

The Appellate Division agreed to this request: "[B]ecause our review of the record firmly convinces us of the insufficiency of defendants' proofs regarding their CFA claim, we have chosen to exercise our original jurisdiction.... [W]e enter judgment in favor of plaintiff on defendants' CFA claim."¹²

Although the defendants did not prevail on their CFA claim, they were still entitled to an award of attorneys' fees "because they proved regulatory violations in defense of plaintiff's affirmative claim."¹³ This was so even though it was "quite clear that defendants suffered no damages as a result of plaintiff's failure to adhere to these requirements."¹⁴ The court remanded the matter for consideration of a counsel fee award "commensurate with the limited success defendants achieved on their CFA claim, and in accordance with other applicable precedent."¹⁵

Finally, the Appellate Division concluded that the judge's jury instructions with respect to the competing breach of contract claims did not constitute plain error. Nor did the court agree with plaintiff's appellate counsel that the jury's verdict on the contract claims was so inconsistent as to require reversal. The court, therefore, affirmed the portion of the judgment that awarded the defendants \$51,300 for breach of contract.¹⁶

WHY THERE IS NO VIABLE CFA CLAIM FOR POOR WORKMANSHIP ALONE

In reversing the CFA award in favor of the defendants and entering judgment in the contractor's favor on that claim, the Appellate Division reinforced the well-settled principle that not every breach of contract gives rise to a claim for

consumer fraud. The Appellate Division stated:

This was essentially a contractual dispute. As we have noted, "A breach of warranty or breach of contract is not *per se* unfair or unconscionable and does not alone violate the Consumer Fraud Act."¹⁷

In fact, our courts have long held that if treble damages, attorneys' fees and costs are to be awarded in addition to remedial damages for breach of contract, there must be "substantial aggravating circumstances."¹⁸ This standard applies to construction contracts as well as to other contracts, and it is a tough standard to meet.

In one case, for example, a new truck broke down on the date of delivery and repeatedly thereafter, and the seller disowned the problem by refusing to make repairs. Although a jury found this conduct violated the CFA, the Appellate Division held that the CFA claim should not have been submitted to the jury in the first place. The court found the determinative question to be "whether the recalcitrance of [the seller] in failing to honor its warranty and its intransigent and shoddy attitude toward plaintiff transcends the threshold of an 'unconscionable commercial practice.'"¹⁹ The court concluded, as a matter of law, that it did not, notwithstanding the clear breaches of contract.²⁰

The decision in *Dream Builders* should thus serve as a yellow flag for attorneys considering whether to assert a CFA claim with regard to problems that arose under a home improvement contract. For a claim of poor workmanship to justify a CFA claim, there must be much more than a breach of contract or a breach of warranty. If there are no substantial aggravating circumstances, the contractor's counsel should be able to obtain dismissal of the CFA claim, either on a motion to dismiss for failure to state a claim on which relief can be granted or on a motion for summary judgment. ■

ENDNOTES

1. N.J.S.A. 56:8-1 to -184.
2. No. A-0493-08T3 (App. Div. May 14, 2010).
3. *Id.*, slip op. at 3.
4. *Id.* at 4.
5. *Id.*
6. *Id.* at 10; see N.J.A.C. 13:45A-17.11(d)(2).
7. *Dream Builders*, slip op. at 10; see N.J.A.C. 13:45A-17.11(f).
8. *Dream Builders*, slip op. at 10; see N.J.A.C. 13:45A-16.2(a)(12).
9. *Id.* at 4-5.
10. *Id.* at 5.
11. *Id.* at 2, 5-7.
12. *Id.* at 13.
13. *Id.* (citing *Scibek v. Longette*, 339 N.J. Super. 72, 86 (App. Div. 2001) and *Brantigan v. Level on the Level, Inc.*, 326 N.J. Super. 24, 30-31 (App. Div. 1999)).
14. *Dream Builders*, slip op. at 10.
15. *Id.* at 14.
16. *Id.* at 14-17.
17. *Id.* at 12 (quoting *Palmucci v. Brunswick Corp.*, 311 N.J. Super. 607, 616 (App. Div. 1998) (citing *Gennari v. Weichert Co. Realtors*, 288 N.J. Super. 504, 533 (App. Div. 1996), *aff'd*, 148 N.J. 582 (1997)). The Court also cited *D'Ercole Sales, Inc. v. Fruehauf Corp.*, 206 N.J. Super. 11, 25 (App. Div. 1985).
18. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18 (1994). See also *Gennari v. Weichert Co. Realtors*, *supra* n.17, 288 N.J. Super. at 533 ("Our courts have made it plain that a simple breach of warranty or breach of contract is not *per se* unconscionable and does not alone violate the Act").
19. *D'Ercole Sales, Inc. v. Fruehauf Corp.*, *supra* n.17, 206 N.J. Super. at 28.
20. *Id.* at 31.

Donald P. Jacobs is a shareholder in Budd Larner, P.C. He handled the appeal in Dream Builders and devotes much of his practice to appellate matters.