New Jersey Law Journal

VOL. 202 NO. 3 OCTOBER 18, 2010 ESTABLISHED 1878

Real Estate Title Insurance & Construction Law

Sword or Shield, or Both?

The Consumer Fraud Act in construction litigation

By Charles F. Kenny and Kevin J. O'Connor

Since the enactment of the Consumer Fraud Act ("CFA") over 50 years ago, the Legislature has greatly expanded the scope of the CFA to apply in the broad sense to all sorts of circumstances in the construction field. The case law that has developed in recent years makes clear that the CFA can be either a sword or shield in litigation stemming from construction disputes. It has been effectively employed as either a sword or shield against construction firms and their principal officers, and its broad reach should be enough to cause anyone providing construction-related services to stand up and take notice.

When suing under the CFA, a litigant is required to plead an actionable fraud or affirmative misstatement. *Chattin v. Cape May Greene, Inc.,* 243 N.J. Super. 590, 598 (App. Div. 1990). When the alleged consumer fraud consists of an omission, the plaintiff must show that the defendant acted with knowledge and intent, essential elements of the fraud. *Cox v. Sears Roebuck & Co.,* 138 N.J. 2, 18 (1994). In addition to fraudulent misrepresentations and omissions of material fact, in the field of residential construction, the CFA and implementing regulations can result in liability for myriad statutory violations that have the practical result of imposing strict liability on companies and their individual owners. *Allen v. A&V Brothers, Inc.,* 414 N.J. Super. 152 (App. Div. 2010).

Although it was once the case that a litigant bringing both a breach-of-contract claim and CFA claim stemming from the same set of facts, was required to make a clear showing that the CFA claim was not simply a throw in to dress up an ordinary breach-of-contract claim (*Coastal Group v. Dryvit Sys*., 274 N.J. Super. 171, 180 (App. Div. 1994); *D'Ercole Sales, Inc. v. Fruehauf Corp.,* 206 N.J. Super. 11, 31 (App. Div. 1985)), it is increasingly clear that the line between a CFA claim and a breach-of-contract claim is oftentimes blurred beyond any meaningful distinction.

The need for the plaintiff to plead the specifics of "substantial aggravating factors" was described in detail in the court's decision in *Naporano Iron & Metal Co. v. American Crane Corp*., 79 F. Supp.2d 494 (D.N.J. 1999), where the court summarized the gatekeeper function of the courts to discriminate between legitimate CFA claims, and garden variety breach-of-warranty claims. In *Naporano*, the court considered defendants' motion to dismiss, and closely analyzed the case precedents and facts of the case in deciding that such factors existed. In that case, it was specifically alleged in detail that the defendant manufacturers had sold a crane that they later determined to be defective. They then informed the buyer to cease using the crane, only to later reverse themselves once again. They refused to provide replacement parts, and the crane later collapsed on several occasions, causing significant property damages. The court found that there were "substantial aggravating factors" pleaded above and beyond an ordinary breach of warranty.

In *Hunt Construction Group, Inc. v. Hun School of Princeton*, 2009 WL 1312591 (D.N.J. May 11, 2009), Judge Wolfson adhered to the long-standing rule that there must be some substantial aggravating circumstances in a construction case before a contract claim can be transformed into a CFA claim, and dismissed CFA claims by the Hun School of Princeton against a construction firm that had built a new athletic building at the school. The opinion makes clear that

Kenny is a partner and O'Connor is a senior litigation associate at Peckar & Abramson in River Edge.

with a commercial, nonresidential construction project, the CFA should have no applicability where the allegations are for ordinary contract breaches.

A recently decided and unpublished Appellate Division case, *Dream Builders v. Estate of Paton*, 2010 WL 1924776 (App. Div. May 14, 2010), demonstrates that a litigant may be able to obtain a significant award of attorneys' fees and costs against a residential builder by raising a statutory violation as a defense, even in the absence of any proof of an ascertainable loss associated with the violations in question.

Even where both parties are sophisticated commercial parties, it is becoming increasingly clear that that fact does not, in and of itself, equate with dismissal of a CFA claim. Several recent decisions show a departure from the past where such cases would not proceed beyond the start gate. *BOC Group Inc. v Lummus Crest, Inc.,* 251 N.J. Super. 271 (Law Div. 1990) (dismissing claims under the CFA, holding "[t]he three parties involved in this case are large corporations who negotiated for years before entering into a multi-million dollar contract for the sale of a design and for services collateral thereto."). In two recent decisions, both unpublished, the courts have shown a reluctance to dismiss CFA claims prior to the summary judgment stage, in the context of purely commercial disputes where the connection with a mass-produced consumer product was, by any measure, quite attenuated. *Touristic Enterprises Co. v. Trane, Inc.,* 2:209-cv-02732 (D.N.J. Nov. 13, 2009) (refusing to dismiss defect claims in commercial context); *Mamacita, Inc. v. Colborne Corp.,* 2010 WL 2793781 (App. Div. July 15, 2010)(rejecting trial court's rationale that commercial equipment "was not intended to be available to 'the public at large,' but was manufactured by defendant to meet plaintiff's specific business needs," and remanding case for fact-finding on CFA claims between the commercial parties).

In addition to the threat of an award of attorneys' fees and costs in construction litigation, recent case law emphasizes that litigating claims of construction defects on residential projects can lead to personal liability against construction company owners, which should give any contractor cause to reflect on whether to even sue on that unpaid contract balance.

In *Allen v. A&V Brothers*, the Appellate Division recently reversed the dismissal of CFA claims against principal officers of a construction company and articulated that all that is needed to impose personal liability on officers is some proof of their knowledge or "personal participation" in the regulatory violation. There, homeowners had brought claims against a landscaping company and its individual owners for property damage that resulted from a wall collapse on their property. The homeowners claimed that the wall was poorly constructed and that inferior backfill was used, in breach of the contract. The homeowners raised statutory violations against the construction company and its owners, including that there was no written contract in violation of N.J.A.C. § 13:45A-16.2(a)(12), and that defendants accepted final payment without permission from the homeowners even though the construction plans had been changed, in violation of N.J.A.C. § 13:45A-16.2(a)(10(ii). The lower court had dismissed the individual owners from the case and the homeowners obtained a total damage award of $490,000 once the damages were trebled. On appeal, the Appellate Division ruled that the principals of the company were presumed to be familiar with the applicable regulations and that plaintiffs need not prove intent for the principal officers to be liable.

It will be the rare case that a litigant cannot find an individual officer or owner to name, with an allegation that he/she had knowledge of the regulatory violation, or somehow participated in the violation. The decision in *Allen* points to the need to ensure that construction firm clients are well-versed on the veritable thicket of regulations that apply in the residential context (N.J.A.C. § 13:45A-16.1 and § 13:45A-16.2 (implementing regulations)), as well as their obligations under the Contractor's Registration Act, N.J.S.A. § 56:8-136 et. seq. Operating without registering can result in criminal liability as well as form the basis for substantial civil liability against not just the construction company, but also its principal officers.

The CFA should be considered at all times when contemplating suit on a residential-construction contract as a legal tool to maximize recovery on behalf of an aggrieved homeowner (or perhaps a business owner). It should always be viewed as a statute that will be raised as a formidable shield against any such claim, with the significant exposure that could result if a showing is made that the CFA and its implementing regulations have been violated. The CFA's applicability on purely commercial projects is not as prevalent given the applicability of the regulations to only residential projects. Still, as the *Hunt* case illustrates, parties are not reluctant to raise the specter of a CFA violation in attempts to increase their recovery and possibly obtain an award of attorney's fees. The net result of this developing body of case law is that the CFA is increasingly becoming a formidable sword or shield to be used in construction-related litigation, and may even come into play where the connection to the consumer is tenuous at best, such as in construction litigation between commercial businesses where some connection to the consumer can be drawn. ■