SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4762-14T2

ALAN RICCARDI,

Plaintiff-Appellant/
Cross-Respondent,

v.

JOSEPH BRUNO d/b/a NATIONAL FINANCIAL, LLC,

Defendant-Respondent,

and

MARK J. PARKER d/b/a A HOME INSPECTOR, EASTWOOD CONTRACTING, LLC, ROBBIE CONLEY ARCHITECT, LLC,

Defendants,

and

ALL-WAYS AGENCY and NEIL VOGEL,

Defendants-Respondents/
Cross-Appellants.

Argued November 10, 2016 – Decided January 11, 2017

Before Judges Alvarez, Higbee and Manahan.[1]

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1124-11.

Stephen Guice argued the cause for appellant/ cross-respondent Alan Riccardi.

Robert J. Incollingo argued the cause for respondent Joseph Bruno.

Ralph Gerstein argued the cause for respondents/cross-appellants All-Ways Agency and Neil Vogel.

PER CURIAM

Plaintiff Alan Riccardi appeals from an order awarding attorney's fees relative to his prosecution of a claim pursuant to the Consumer Fraud Act (CFA). Riccardi argues that the quantum of fees awarded by the trial court was erroneous. We affirm.

We discern the following facts taken from the trial record as essential to our determination. Riccardi entered into a contract of sale for the purchase of a residential property located in Pitman, New Jersey, from Joseph Bruno. The contract sale price was $215,000. Bruno, in his capacity as managing member of National Financial, LLC, previously purchased the residence as an investment property. Prior to Bruno's purchase, the home was

[1] Hon. Carol E. Higbee participated in the panel that decided this appeal. The opinion was approved for filing prior to Judge Higbee's death on January 3, 2017.

damaged in a fire and required extensive renovations. Bruno hired Robbie Conley Architect, LLC to prepare plans for a complete repair and renovation. Thereafter, Bruno retained Eastwood Contracting, LLC to perform the work associated with the renovation. After the renovation work was completed, the property was listed for sale as a "remodeled Victorian" by Neil Vogel through his brokerage company, All-Ways Agency.[2] The listing did not indicate the residence had been fire damaged.

After the closing of title, Riccardi alleged he discovered numerous problems with the residence including the presence of mold, burnt and fractured joists, a previous oil leak, asbestos, and damaged foundation walls.[3] Riccardi filed a complaint naming Bruno and National Financial, LLC, Eastwood Contracting, LLC, Neil Vogel, All-Ways Agency, Robbie Conley Architect, LLC, and Mark J. Parker, d/b/a Home Inspector,[4] as defendants. The complaint averred: breach of contract, violation of good faith and fair

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[2] Since All-Ways Agency is respondent Vogel's brokerage company, we refer to both as "Vogel."

[3] Riccardi is a former home improvement contractor and union carpenter. Also, Pitman Township issued a certificate of occupancy at closing noting "rehab after fire."

[4] The record also refers to Mark J. Parker, d/b/a A Home Inspector, as "A" Plus Home Inspector. It is unclear which name is correct, however, we will refer to this defendant as Mark J. Parker, d/b/a A Home Inspector.

dealing, rescission, and a violation of the CFA, N.J.S.A. 56:8-1 to -198, directed against all defendants. One count averred negligent hiring directed solely against the "Real Estate Broker." In connection with the CFA cause of action, Riccardi demanded actual damages valued at the home's contract price, closing and repair costs, and statutory remedies available under the CFA.

In May 2012, Riccardi moved for entry of default against Mark J. Parker d/b/a A Home Inspector, Neil Vogel, All-Ways Agency, and Eastwood Contracting, LLC for failure to answer the complaint. The court granted the entry of default. Robbie Conley Architect, LLC was dismissed by summary judgment premised upon Riccardi's failure to provide an Affidavit of Merit. N.J.S.A. 2A: 53A-27.

A jury trial commenced on July 7, 2014, with Bruno and National Financial, LLC as defendants. At the conclusion of Riccardi's case-in-chief and upon motion, the court dismissed a number of Riccardi's claims "down to what was the resulting ascertainable loss" suffered by Riccardi.[5] At the conclusion of the trial, the jury returned a verdict finding no cause for action on the surviving claims but found Bruno and National Financial,

[5] The lack of proof relating to loss was the result of Riccardi's damage expert failing to appear at trial. While other experts provided testimony relating to deficiencies in the residence, none provided monetary amounts to repair or replace the deficiencies.

LLC violated the CFA. The jury awarded Riccardi the "very limited number of $4500" attributable to the cost to repair a damaged window frame and to dispose of buried construction litter.[6] As a result of the verdict, the court ordered Riccardi's counsel to provide a calculation of counsel fees.

Riccardi's counsel supplied the court with a certification of attorney's fees on August 5, 2014, totaling $129,466.28 in services. On August 22, 2014, the court entered the jury verdict of $4500 in ascertainable damages as to the violation of the CFA, trebled the damages to $13,500 plus costs of $229.12 and added prejudgment interest of $154.58. The court also denied the request of $129,466.28 in attorney's fees and directed plaintiff's counsel to submit bills to support counsel's claim that the bill was reasonable.[7]

Thereafter, Riccardi's counsel submitted a revised bill for $116,603.78. Oral argument regarding counsel fees took place on October 24, 2014. Following oral argument, the court vacated the

[6] The jury's CFA verdict was premised upon a knowing concealment, suppression, or omission of a material fact with the intent that others would rely upon that fact. The jury found no cause for action under the CFA based upon an unconscionable commercial, deception, fraud, false pretense, false promise or misrepresentation.

[7] Riccardi filed a direct appeal of this order which was voluntarily dismissed.

August 22 order and awarded attorney's fees of $6840 plus costs, for a total of $7069.12. On November 10, 2014, the court placed its reasons on the record for the award.

The court first addressed the history of the action and attorney time devoted to claims against other parties:

> So the case started off as a contract claim, breach of contract, negligence, consumer fraud, fraud claims against Bruno[,] as well as other defendants, the contractors, some of the contractors, an architect. In fact, the claim against the architect was a professional liability claim. And against inspection companies.
>
> In fact, some of the defendants defaulted, never having participated or answered, even though some of them appeared as witnesses in the case at trial. And that is listed for Wednesday for a [p]roof [h]earing as to those defendants.
>
> And so a lot of the time that is incorporated deals with those other entities. And they deal with discovery as to those other entities. Deal with motions that were filed, numerous motions that were filed in the case with regard to those other entities. With the professional malpractice type claims, with the Affidavit of Merit, with the management orders you would handle in a professional malpractice case.
>
> And so there was a lot of time that was devoted to other issues, other defendants, that I just cannot include as – in the bill against Bruno.

The court then addressed the limited result attained by Riccardi:

> The other type of time that is of concern is that it relates to the fact that the [p]laintiff would be entitled to an attorney fee that relates to the claims on which it was successful. You file consumer fraud claims.
>
> But at trial, the [c]ourt dismissed a number of the liability claims, and also more significantly, had narrowed the case down to what was the resulting ascertainable loss, which was a very limited number of $4500. And that is the number that the jury found.
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> And so the claim initially was upwards of a couple hundred[-]thousand dollars, and the end result was $4500. And so not a significant amount of success as it relates to the monetary claim. And as a result, the claims on which the [p]laintiff was successful pursuant to the consumer fraud, which would be the [f]ee-[s]hifting [s]tatute, were very limited.

The court then engaged in a detailed analysis of the itemized billing entries. As a product of that analysis, the court eliminated entries unrelated to the successful claim as well as for paralegal time and expert fees. The court noted the difficulty in the task because Riccardi's counsel did not adequately explain the fees he sought and counsel did not focus the request on the time expended that produced the successful claims.

Following the counsel fee hearing, the court held a proof hearing regarding defaulted defendants Mark J. Parker, d/b/a A Home Inspector, Neil Vogel, All-Ways Agency, and Eastwood Contracting, LLC. At the hearing, the court advised Vogel that

due to his default by not filing a responsive pleading, he could only challenge the amount of damages. The court also dismissed claims against Mark J. Parker, d/b/a A Home Inspector, with prejudice.

On May 15, 2015, the court entered default judgment in favor of Riccardi against Vogel, All-Ways Agency, and Eastwood Contracting, LLC for consumer fraud in the amount of $51,000 plus counsel fees and costs of $8269.12. In arriving at the amount of damages, the court considered the expert report prepared by the individual who failed to appear at trial. The court noted his consideration of the report at the default hearing, despite the hearsay nature of the proofs, was discretionary. Riccardi filed a notice of appeal on June 26, 2015, regarding the court's award of attorney's fees and costs. On July 23, 2015, Vogel and All-Ways Agency filed a notice of cross-appeal.

Plaintiff raises the following points on appeal:

POINT [I]

> THE PLAINTIFF IS AUTHORIZED TO RECOVER ATTORNEY'S FEES AND COSTS UNDER THE FEE-SHIFTING PROVISION OF THE NEW JERSEY [CFA].
>
> > A. The [a]ppellant is entitled to [attorney's] fees and costs; the [a]ppellant was the prevailing party, the lawsuit was essential in securing the relief obtained and the relief granted has some basis in law.

B. Appellant's counsel proved an ascertainable loss and is thereby entitled to attorney's fees and costs because fee awards and costs are mandatory upon proof of a violation of the New Jersey [CFA] which causes a [p]laintiff to suffer an ascertainable loss.

C. Appellant counsel's calculation of attorney's fees and costs constituting the lodestar were reasonable under Rule 4:42-9 and the [t]rial [c]ourt abused [its] discretion by drastically reducing the amount of fees and costs awarded.

POINT [II]

THE TRIAL COURT ABUSED ITS DISCRETION BY REDUCING THE LODESTAR FOR THE MAIN PURPOSE OF PROPORTIONALITY BECAUSE THE AMOUNT OF DAMAGES RECOVERED BY APPELLANT AND THE FEE AWARD SOUGHT BY APPELLANT'S COUNSEL ARE NOT REQUIRED TO BE PROPORTIONAL.

POINT [III]

THE TRIAL COURT ABUSED [ITS] DISCRETION BY MECHANICALLY REDUCING THE LODESTAR TO ACCOUNT ONLY FOR APPELLANT'S SUCCESSFUL CLAIMS RATHER [THAN] TIME SPENT ON APPELLANT'S OTHER CLAIMS WHICH INVOLVED A COMMON NUCLEUS OF FACTS AND WERE BASED ON RELATED LEGAL THEORIES.

POINT [IV]

THE TRIAL COURT ABUSED [ITS] DISCRETION IN ELIMINATING ALL BILLING FOR THE WORK PERFORMED BY THE APPELLANT'S COUNSEL'S PARALEGALS WHICH CONTRIBUTED TO THE SUCCESS THE APPELLANT OBTAINED IN PROVING A VIOLATION OF THE NEW JERSEY [CFA].

POINT [V]

APPELLANT IS ENTITLED TO [ATTORNEY'S] FEES AND COSTS INCURRED WHILE ATTEMPTING TO SATISFY THE JUDGMENT AGAINST RESPONDENT JOSPEH BRUNO D/B/A NATIONAL FINANCIAL[,] LLC.

A reviewing court should not set aside an award of attorney's fees except "on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). Where the lower court's determination of fees was based on irrelevant or inappropriate factors, or amounts to a clear error in judgment, the reviewing court should intervene. Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) (citing Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

New Jersey generally follows the "American Rule," which requires that each party pay its own legal costs. Rendine, supra, 141 N.J. at 322. Fees may be shifted when permitted by statute, court rule, or contract. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001). Regardless of the source authorizing fee shifting, the same reasonableness test governs. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009).

Fee shifting is permitted statutorily by the CFA. N.J.S.A. 56:8-19. Our Supreme Court has noted that the CFA's fee-shifting provision advances the statute's policy of ensuring that plaintiffs with bona fide claims are able to find lawyers to

represent them and encourages counsel to take on private cases involving an infringement of statutory rights. Coleman v. Fiore Bros., Inc., 113 N.J. 594, 598 (1989).

Where a party presents "distinctly different claims for relief" in one lawsuit, work on those non-CFA claims are not counted against a defendant. Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40, 51 (1983)). A court may shift fees on the CFA claim or claims that involve the common core of CFA-related facts. See ibid. Such a suit should not be viewed as a series of discrete claims, rather the attorney's fees related to the common core of CFA-related work may be considered by a court when calculating the award. See ibid.

When fee shifting is permissible, a court must ascertain the "lodestar"; that is, the "number of hours reasonably expended by the successful party's counsel in the litigation, multiplied by a reasonable hourly rate." Litton Indus., Inc., supra, 200 N.J. at 386 (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)). To compute the lodestar, courts must first determine the reasonableness of the hourly rates charged by the successful party's attorney in comparison to rates "for similar services by lawyers of reasonably comparable skill, experience, and

reputation" in the community. Rendine, supra, 141 N.J. at 337 (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)). After evaluating the hourly rate, the court must then determine the reasonableness of the hours expended on the case. Furst, supra, 182 N.J. at 22. "Whether the hours the prevailing attorney devoted to any part of a case are excessive ultimately requires a consideration of what is reasonable under the circumstances" and should be informed by the degree of success achieved by the prevailing party. Id. at 22-23. The award need not necessarily be proportionate to the damages recovered. Id. at 23.

As we noted in Grubbs v. Knoll, 376 N.J. Super. 420 (App. Div. 2005):

> Our Supreme Court has declined to construe New Jersey's various fee-shifting statutes to require proportionality between the damages recovered by a plaintiff and the fees awarded.
>
> In such cases, the trial court's responsibility to carefully review the lodestar fee request is heightened. The court must evaluate "not only the damages prospectively recoverable and actually recovered, but also the interest to be vindicated . . . as well as any circumstances incidental to the litigation that directly or indirectly affected the extent of counsel's efforts." The lodestar should be decreased "if the prevailing party achieved limited success in relation to the relief he had sought."

> [Id. at 432 (internal citations and quotations omitted).]

Rules of Professional Conduct (RPC) 1.5(a), requires that "[a] lawyer's fee shall be reasonable in all cases, not just fee-shifting cases[.]" Furst, supra, 182 N.J. at 21-22. In determining reasonableness, RPC 1.5(a) requires the court to consider:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

In reaching the determination of the attorney's fees, the court employed the appropriate considerations under RPC 1.5(a). The court limited recovery for the attorney's fees to those related

to the CFA claim based upon a verdict which found that defendants violated one provision of the CFA while finding no cause for action on the remaining claims.[8] Although Riccardi prevailed on the CFA claim and, therefore, qualified for statutory fee-shifting, due to the very limited success attained, the court reduced the fees recoverable pursuant to RPC 1.5(a)(4). See Furst, supra, 182 N.J. at 23.

When there is a stark disparity between the attorney's fees sought and those fees awarded, the award should be subjected to careful review by this court to ensure its reasonableness. Pursuant to that review, we are satisfied that the court, which presided over the entirety of the proceedings, subjected the request to the appropriate scrutiny requisite to the determination of a reasonable fee. As such, we discern no clear abuse of discretion. Rendine, supra, 141 N.J. at 317.

We now turn to Vogel's cross appeal. Vogel makes the following points on appeal:

POINT I

THE COURT BELOW IMPROPERLY BASED ITS DAMAGES AWARD AGAINST VOGEL UPON INADMISSIBLE EVIDENCE.

[8] The court also noted as its rationale the discrete nature of the other claims despite the arguable common core of facts that produced the complaint. Were we to decide this appeal solely on this determination, we may have reached a different result. See Silva, supra, 267 N.J. Super. at 556.

POINT II

PLAINTIFF DID NOT EVEN MAKE OUT A PRIMA FACIE CASE AS TO LIABILITY, SO THAT THE DEFAULT JUDGMENT SHOULD BE VACATED.

[POINT III]

REGARDLESS OF ANY LIABILITY THAT VOGEL MAY HAVE TOWARDS RICCARDI, HE SHOULD BE ENTITLED TO PURSUE CROSS-CLAIMS OR THIRD[-]PARTY CLAIMS AGAINST THE OTHER DEFENDANTS.

The type of evidence that may be considered by a court during a proof hearing lies with that court's discretion. Douglas v. Harris, 35 N.J. 270, 276-77 (1961). If a particular document, that may be considered hearsay at trial, is offered at a proof hearing without dispute as to its accuracy, the trial court may admit the document. See Moschou v. DeRosa, 192 N.J. Super. 463, 467, n.2 (App. Div. 1984).

During the proof hearing on November 12, 2014, the court considered a report relative to damages that was not admitted during trial based upon the author's failure to appear. The report specifically delineated the damage the home suffered prior to Riccardi's purchase. In the exercise of discretion, we conclude the court properly considered the report to assess the totality of damages in the post-default hearing. Douglas, supra, 35 N.J. at 276-77.

After our review and consideration, we conclude that Vogel's remaining arguments, not specifically addressed herein, lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.