IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-001073-23

ON APPEAL FROM ORDER AND FINAL DECISION SIGNED AND SERVED TO PARTIES ON APRIL 4, 2022, SEPTEMBER 14, 2023, AND OCTOBER 27, 2023 IN DOCKET NO. ATL-L-2959-19 SUPERIOR COURT OF NEW JERSEY, ATLANTIC COUNTY, LAW DIVISION

SAT BELOW:
THE HONORABLE STANLEY L. BERGMAN JR., J.S.C.
THE HONORABLE DANIELLE WALCOFF, J.S.C.

ICONA GOLDEN INN, LLC

PLAINTIFF-APPELLANT,

V.

STRUXURE OUTDOOR, INC. F/K/A ARCADIA LOUVERED ROOFS, INC.; POST TO POST LLC; AND JOHN DOES 1-10; ABC CORP. AND XYZ COMPANY, FICTITIOUS PARTIES,

DEFENDANTS-APPELLEES.

BRIEF OF PLAINTIFF-APPELLANT, ICONA GOLDEN INN, LLC SUBMITTED APRIL 19, 2024

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I. PROCEDURAL HISTORY AND SUMMARY OF ARGUMENT

This case arises out of the installation of a louvered roof system at the Icona Golden Inn Hotel in Avalon. Pa113. Plaintiff Icona asserts the system failed to perform as represented and brought suit against the manufacturer and installer. Id. Icona's complaint alleged violations of the Consumer Fraud Act, breach of contract and warranty, and unjust enrichment. Pa75.

Defendant, Struxure Outdoor, Inc., (hereinafter, "Struxure"), is a corporation formerly known as Arcadia Louvered Roofs, Inc. with a principal place of business in Georgia. 1T 119:9-14; 60:11-14[1]. Struxure manufactures and distributes Louvered Roofs throughout the United States, which are intended to provide adjustable coverage for outdoor structures. Pa2; 1T 93:9-22.

Post To Post LLC (PTP) is a Limited Liability Company located in New Jersey engaged in the business of contracting and specifically holds itself out as "The Specialist in Exterior Building products." Pa48; 1T 59:1-18. One of PTP's featured products and services is installing Struxure Louver Roof systems. Id.

[1] 1T refers to the August 2, 2023 Transcript of Trial; 2T refers to the September 14, 2023 Transcript of Hearing.

The Struxure Louver Roof system is a product that is marketed and distributed throughout the United States and is represented to provide adjustable coverage for outdoor structures. Pa2. The louvers open to allow sunlight through and close to provide rain and weather cover. Pa2. Specifically, the product is marketed to "bring the indoors out" and is "engineered and designed to withstand all types of weather conditions from heavy snow to high winds". Pa2.

According to Struxure, "the louvers open to allow sunlight in and close to provide shelter and shade. Water is directed from the louvers to gutters, and down through downspouts either independent or incorporated into columns." Pa7. Struxure indicates that its "system is engineered to exceed all standards and expectations. They're designed to meet Florida's stringent hurricane codes, as well as withstand heavy snow loads in the cold of winter. Plus, each [Struxure] system is fabricated and power coated to order, made to exact specifications, which makes for a better fit and finish and a cleaner looking system." Pa4. Struxure indicates these pieces come together "to make it all work perfectly." Pa7.

Struxure employs an aggressive marketing campaign toward commercial customers including golf courses, hotels, and restaurants to use their product as

a revenue generating improvement by allowing all-weather dining and utilization of outdoor spaces. 1T 142:20-23; Pa47.

Plaintiff Icona Golden Inn (Icona) is a beachfront hotel and resort located in Avalon, New Jersey. Pa79. In the fall of 2017, Icona began evaluating options for a functional indoor/outdoor event space that would be connected to the existing hotel building. Pa49-62.

Icona contacted PTP regarding the Struxure Louver Roof system and engaged in discussions with both PTP and the Sales Director for Struxure, who provided product specifications, architectural binder, customization options, and a manual for the Struxure product. Pa49-62; 1T 160-161.

The parties engaged in discussions over a period of months regarding the customization of the product to Icona's plans and the veranda it would cover. Pa49-62. Icona was to provide the structural support system on which the louver roof system would be placed. Id.; Pa65. Struxure and PTP knew Icona intended to utilize this area for events. 1T 64:7-12; 142:20-23. The parties discussed elimination of interior beams to provide for a more "open" layout for Icona's specific purposes. 1T 64:1-6. Icona hired a structural engineer to confirm proper structural support to withstand the load of the louver roof system. 1T 72:1-4. However, it is not customary for the customer (Icona) to plan for water management or drainage and Icona reasonably relied on

Struxure and PTP to identify any issues with the functioning of the system and its ability to manage water. 1T 130-131.

Immediately following the installation of the system in the early summer of 2018, Icona began to experience issues with the system functioning and its ability to manage rainfall as represented in the marketing and planning phase. 1T 180-181. Icona provided notice of these issues after paying $130,000.00 toward a failed system. Struxure and PTP then sought to rely on after-the-fact "disclaimers" that were not communicated during the sales, contracting, or design phase (or any documents provided to Icona during the sales phase). 1T 149-151.

On November 12, 2019, Icona filed their complaint against Post to Post and Struxure as defendants and alleging violations of the Consumer Fraud Act (Count I), Breach of Contract (Count II), Breach of the Implied Covenant of Good Faith and Fair Dealing (Count III), Unjust Enrichment (Count IV), and Breach of Warranty (Count V). Pa75.

On January 6, 2020, Post to Post Answered and raised Counterclaims asserting Breach of Contract (Count I), Unjust Enrichment (Count II), and for relief under the New Jersey Prompt Pay Act (Count III). Pa84.

On January 14, 2020, Icona answered Post to Post's counterclaims and raised affirmative defenses including the Consumer Fraud Act as bar to

recovery and recovery of attorney's fees and costs associated with the defense under the CFA. Pa97.

On February 27, 2020, Struxure Answered and asserted a cross claim against Post to Post for indemnification and contribution. Pa103.

Post to Post and Struxure both moved for Summary Judgment and Icona opposed. Pa111.

In its April 4, 2022 memorandum of decision, the Trial Court expressly found that "genuine issues of material fact exist as to the applicability of the CFA which require denial of denial of defendants' [motion for summary judgment]". Pa88. The Trial Court went on to dismiss Icona's complaint in its entirety on the perceived lack of damages. Id.

On August 2, 2023, a Trial proceeded before the Hon. Danielle J. Walcoff at Atlantic County Superior Court and was limited to the issue of whether PTP is able to meet their burden of proof as to their counterclaims for payment in full (the remaining balance of $57,619.92) where Icona maintains that PTP failed to fully perform and deliver on the system that was promised and has already been paid $130,000.00 toward the contract. Pa132.

In the Trial Court's written decision, the Court specifically noted and rejected consideration of the various representations and warranties made for

the product in the sales process due to dismissal of Icona's affirmative claims in the pre-trial summary judgment order. Pa170.

On September 14, 2023, the Trial Court entered Judgment in the amount of $112,070.82 in favor of Post to Post on its counterclaim representing the final contract balance and finance charges. Pa132. The Trial Court reserved final judgment pending a determination on the issue of attorney fees. Pa132.

On October 27, 2023 the Trial Court entered a final order awarding attorney's fees to Post to Post. Pa178. On December 8, 2023, Icona filed their Notice of Appeal. Pa179.

Plaintiff asserts two issues on appeal: (1) the Trial Court erred as a matter of law dismissing all counts of plaintiff's complaint on summary judgment where there were genuine issues of material fact as to the application of the Consumer Fraud Act and the Trial Court afforded no deference to Plaintiff, the non-moving party, and dismissed on the issue of damages, and (2) the Trial Court abused its discretion by entering judgment against the weight of the evidence.

This case is a dispute over representations, warranties, and workmanship related to a louvered roof system marketed by Struxure and installed by PTP at Plaintiff's Icona Golden Inn in Avalon, New Jersey. Plaintiff, the non-moving

party on the motion for summary judgment, should have been afforded all reasonable inferences both on the issue of liability and damages.

The Trial Court failed to consider the various remedies available to plaintiff in the event they were successful in showing wrongful conduct. A finding that there were genuine issues as to the CFA necessarily implicates the issue as whether plaintiff paid too much or must otherwise be compensated to correct deficiencies related to warranties and performance of the system.

In this case, the Trial Court eventually heard testimony from Mike Bierds, an expert witness on construction and construction management, that the estimated cost of removing the system and replacing it with a new fixed roof would involve demolition, removal, and replacement and the cost would exceed the amount of the balance of payment claimed by PTP. 1T 232:5-24. This testimony is in line with the principle that "[w]hile the loss must be a reasonably certain consequence of the breach, the exact amount of the loss need not be certain." See Model Civil Jury Charge 8.45.

Caveat emptor does not reflect current law in New Jersey. Here, the State has a more ethical approach in business dealings with one another. Each party may rely on representations made by another in a business transaction. See Model Civil Jury Charge 4.43. The Trial Court failed to view the evidence in the context of Icona as a consumer of the defendants' products and services,

and instead viewed them as a party possessing equal knowledge and expertise on a specialty product and failed to afford Icona all reasonable inferences on the issue of damages on summary judgment.

Accordingly, for the reasons set forth herein, plaintiff respectfully requests the Appellate Division reverse the April 4, 2022, September 14, 2023, and October 27, 2023 Orders entered by the Trial Court and order a new trial.

II. STATEMENT OF FACTS

Defendant, Post To Post LLC (PTP), is a New Jersey Limited Liability Company located and doing business in New Jersey as a contractor and holds itself out in its advertising materials as "The Specialist in Exterior Building products". Pa48; 1T 59:1-18. Defendant PTP listed Struxure Louver Systems as one of its featured products. Id.

Struxure Outdoor, Inc., (hereinafter, "Struxure" and formerly known as "Arcadia Louvered Roofs"), is a corporation with a principal place of business in Georgia. 1T 119:9-14; 60:11-14. For the avoidance of any doubt, "Struxure" and "Arcadia" are one and the same. Id.

Icona Golden Inn ("Icona") is a resort hotel located in Avalon, New Jersey. Pa111.

In the fall of 2017, Icona developed an interest in converting an existing outdoor space into a covered area and to be used in connection with major

events conducted on site such as weddings, life celebratory events, and other gatherings. Pa49-62; 1T 160-161.

During the fall and into the winter of 2017, Icona was in contact with both PTP and the regional sales director for Struxure/Arcadia regarding the specifications of the louver roof system and provided an architectural binder to Icona associated with the product. Pa49-62; 1T 160-161; Pa1.

The materials and representations provide by Struxure and PTP include the following: Struxure Louvered Roofs are sold throughout the United States and are designed and intended to provide adjustable coverage for outdoor structures. Pa2-4.

The product is designed to "bring the indoors out". Pa2. The product is marketed to commercial establishments to "maximize outdoor seating potential", "double ROI" (return on investment), and "turn underutilized space into a revenue-generating asset." Pa47; 1T 142-143. The product is represented to be "a perfect enhancement for patron comfort at Country Clubs, restaurants, hotels, resorts, theme parks and sports venues." Pa4.

The product is represented to be designed to "allow shelter from inclement weather conditions while receiving maximum airflow" and "engineered and designed to withstand all types of weather conditions from heavy snow to high winds". Pa3.

Struxure represents that its "system is engineered to exceed all standards and expectations. They're designed to meet Florida's stringent hurricane codes, as well as withstand heavy snow loads in the cold of winter. Plus, each [Struxure] system is fabricated, and power coated to order, made to exact specifications, which makes for a better fit and finish and a cleaner looking system." Pa4.

Struxure represents "The louvers open to allow sunlight in, and close to provide shade and shelter. Water is directed from the louvers to gutters and down through downspouts either independent or incorporated into columns." Pa7.

Struxure states that their "Commercial gutter has three (3) times greater rain water capacity than Arcadia's existing industry leading Standard Gutter". Pa10.

Struxure states "The unique louver profile allows the louvers to interlock, creating the largest rain channels in the industry. Thus, allowing for more water to flow freely into out 360 degree integrated gutter system. Arcadia's patented Pass Through Gutter technology allows for rain water to pass from one independent zone to the next allowing for superior drainage performance." Pa10.

In the course of installing a Struxure Louver System in commercial settings,

it is customary for the consumer to coordinate and plan for the structural support of the system to the be installed in accordance with local code requirements. 1T 130-131. However, it is not customary for the consumer to be responsible for the water management and resulting drainage associated with the system. Id. In other words, it is not expected that the customer will hire an engineer to oversee or plan for water management for the Struxure system. Id.

Based on its initial discussions with PTP and Struxure, Icona began evaluating options for a functional indoor/outdoor event space that would be connected to the existing hotel building to be utilized in connection with weddings and other special events. Pa49-62; 1T 64:7-12.

As is customary in commercial applications, Icona retained a structural engineer to develop a plan for a steel frame support system on which PTP would install the Struxure Louver System. Pa49-62. The early drafts of the structural support system included interior support columns. 1T 153:20-25.

Icona indicated in writing to PTP that it intended to evaluate an option to eliminate interior columns and consider an alternative that would provide an open span for better utilization of the space. Pa51.

On December 7, 2017, Icona's structural engineer sent a revised steel frame plan via email eliminating the interior columns in favor of 4 exterior columns with beam sizes sufficient to support the structural load. Id.

Later that day, Icona forwarded the email and attachment to PTP and posed the following question: "One question I had when reviewing the pricing was to confirm the downspouts that are provided and where each would be located under the various plans. I need to price the water management and how all this water is going to get out properly." Id.

Five days later, Icona sent a follow up email referencing the prior email and requesting an update. Pa53. On December 13, 2017, PTP responded to the email with 2 proposals but without indicating any response to the question regarding water management. Id.

On February 14, 2018, Icona executed the final proposal from PTP which indicates the following scope of work: "Install Arcadia Louver Roof on structural steel beams by others". Pa64. The total contract amount was $182,000.00. Id. Icona paid an $80,000.00 deposit upon execution and the work commenced. Pa74. Icona then paid a second draw of $50,000.00 on April 24, 2018. Id.

PTP proposed that its work was completed in May 18, 2018. 1T 23:24-25. Almost immediately thereafter, Icona began to experience issues with the function of the system and effective use of the space. 1T 182:1-23. On May 19, 2018 the General Manager of Icona, Randel Davis, took a video of the system leaking in the interior portions during a rain storm. Id.

On June 6, 2018, PTP sent a final payment request to Icona in the amount of $57,619.92. Pa74.

Three days later, on June 9, 2018 Icona was preparing for one of its first wedding events of the season in the new veranda space under the Louver system. 1T 184:18-24. However, water continued to leak from the system throughout the interior portions of the space where seating was to be provided. 1T 185:1-18.

Shortly thereafter, Icona notified Struxure and PTP of its dissatisfaction with the installed system and its function. 1T 121:4-10.

In response, on August 29, 2018, the regional sales director for Struxure appeared for a site visit with PTP and then followed up a letter to Icona indicating for the first time that the "Arcadia louvered roof" they had contracted for was in fact a "louvered adjustable pergola" which is designed to "control the sun and shade and can control the majority of typical rain fall" but that the "system is not designed to perform as a completely dry environment with the performance of a shingled roof". Pa63.

These attempted disclaimers regarding the performance of the system appeared in writing only after the expense and installation of the system and after months of planning and preparation. 1T 149-151.

In October of 2018, PTP then indicated that they were working on proposed

a redesign of the system. 1T 39:2-7.

In addition to the issues relating to the system's inability to capture and protect from rainfall, the louvers themselves began to fail to properly open and close leading to a disjointed and non-flush appearance. Pa65-67; 1T 191:13-22; 193:1-24; 194:4-18; 223:15-23. These additional concerns were expressed in writing and continued into July of 2019 the following summer. Pa73; 1T 234:1-25.

Since the time of installation, the system has failed to capture and redirect rainfall during seasonal storms and regular rainfall and causes interruption to the planned use of the veranda space. 1T 195:1-23. Icona routinely must relocate events that were planned to incorporate the veranda into the preexisting interior portions which disrupts planned operations, flow of events, and leads to additional customer service efforts on their part. Id.

When the space is not being used for events, it serves as a location for additional dining. However, Icona is forced to limit the location of tables to areas that will be less impacted by the leaks experienced from the louver system, which effectively cuts the usable space in half. 1T 210:17-25; 211:1-21.

At present, the space is largely enclosed with louvers in the closed position which functions as a leaky roof and prevents utilization of the space during

adverse weather conditions as marketed and as planned by Icona. 1T 233:13-17.

In addition to the failures of the system delivered by PTP, the cost of removing that system and replacing it with a new fixed roof would involve demolition, removal, and replacement and the cost would exceed the amount of the balance of payment claimed by PTP. 1T 232:5-24.

III. ARGUMENT

A. The Trial Court erred as a matter of law dismissing all counts of plaintiff's complaint on summary judgment where genuine issues of material fact were found to exist as to the application of the Consumer Fraud Act and the Trial Court afforded no deference to Plaintiff, the non-moving party, on the issue of damages. (Pa111; (April 4, 2022))

The issues on appeal relate to the trial court's legal conclusions, and the application of those conclusions to the facts. These issues are subject to plenary review by the Court. See Spangenberg v. Kolakowski, 442 N.J. Super. 529, 535 (App. Div. 2015) (quoting Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

On a motion for summary judgment, the Court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party."

See Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995)(emphasis added). Further, the trial court may not resolve contested factual issues; rather, it may only determine whether there are any genuine factual disputes. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005).

A determination of whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Id. at 540.

In this case, Plaintiff Icona asserted claims under the New Jersey's Consumer Fraud Act (CFA or the Act), N.J.S.A. 56:8-1 to -210. The CFA is a powerful "legislative broadside against unsavory commercial practices" in the marketplace. Real v. Radir Wheels, Inc., 198 N.J. 511, 514, 969 A.2d 1069 (2009). When initially enacted, the CFA addressed the elimination of sharp practices and dealings in the marketing of merchandise. Cox v. Sears Roebuck & Co., 138 N.J. 2, 16, 647 A.2d 454 (1994). Continuously expanded by the Legislature over the years, the CFA's reach now extends beyond "fast-talking and deceptive merchant[s]" to protect the public even when a merchant acts in

good faith. Ibid. (alteration in original) (quoting D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 23, 501 A.2d 990 (App. Div. 1985)).

Given the CFA's remedial purpose, courts liberally enforce the Act to fulfill its objective to protect consumers from prohibited unconscionable acts by sellers. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 11-12 (2004). The CFA provides that:

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, [or] fraud, ... in connection with the sale or advertisement of any merchandise..., whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]
>
> See N.J.S.A. 56:8-2.

Pursuant to the CFA, the term "merchandise" shall include “any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale.” See N.J.S.A. 56:8-1(c).

It is well established that the CFA is applicable to commercial transactions. See Coastal Grp., Inc. v. Dryvit Sys., Inc., 274 N.J. Super. 171, 175, 179-80 (App. Div. 1994) (holding that trial court erred when it dismissed CFA claim on the ground that "one commercial entity may not recover in tort for economic losses allegedly caused by a product purchased from another commercial entity"); Hundred E. Credit Corp. v. Eric Schuster Corp., 212 N.J.

Super. 350, 355 (App. Div. 1986) (same); D'Ercole Sales, 206 N.J. Super. at 23, 501 A.2d 990 (same).

The definition of "person" includes business entities such as a "partnership, corporation, company ..., business entity or association," N.J.S.A. 56:8-1(d), and the word "person," as used in N.J.S.A. 56:8-2, refers to not only the person who engages in an unconscionable commercial practice, fraud, or deception, but also the person who is the victim of such practice, N.J.S.A. 56:8-2 (referencing practice as unlawful "whether or not any person has in fact been misled, deceived or damaged thereby").

Furthermore, New Jersey Courts has repeatedly recognized that the CFA may apply to custom-made goods. See Czar, Inc. v. Heath, 198 N.J. 195, 197 (2009) (holding that the CFA can apply to the building and installation of custom kitchen cabinets); See Sprenger v. Trout, 375 N.J. Super. 120, 128, (App. Div. 2005) (holding that the "business of customizing and refabricating automobiles falls within the provisions of the CFA."); See also, Amboy Iron Works, Inc. v. American Home Assurance Co., 226 N.J. Super. 200, 205 (App. Div. 1988), aff'd, 118 N.J. 249 (1990).

In business-to-business transactions the "nature of the transaction" will determine whether it can fit within the CFA's definition of

"merchandise." See D'Agostino v. Maldonado, 216 N.J. 168, 187 (2013). The courts utilize the following considerations:

(1) the complexity of the transaction, taking into account any negotiation, bidding, or request for proposals process;

(2) the identity and sophistication of the parties, which includes whether the parties received legal or expert assistance in the development or execution of the transaction;

(3) the nature of the relationship between the parties and whether there was any relevant underlying understanding or prior transactions between the parties; and, as previously noted;

(4) the public availability of the subject merchandise.

See All the Way Towing, LLC v. Bucks Cnty. Int'l, Inc., 236 N.J. 431 (2019).

For example, in All the Way Towing, the plaintiff was a tow truck company. The defendant was in the business of truck sales, parts sales, and service. The parties spent "a couple of months" negotiating options and pricing on a truck that was to be custom-built according to requested specifications. After the truck failed to function properly, plaintiff sought return of their deposit and commenced an action under the CFA after the defendants refused. The Supreme Court *rejected* the defense argument that the customization of the product meant that it could not be interpreted as "merchandise" under the CFA. The Court found that any member of the public could purchase the

product or service, reviewed the above factors, and affirmed the Appellate Divisions reversal of a grant of summary judgment which was based on the argument that the "customized" goods did not satisfy the "merchandise" definition under the CFA. Id.

Here, the defendants' louver system meets the definition of "merchandise". In almost every case, the louver system will be subject to customization to fit a particular piece of property. Struxure's marketing materials contemplate its product being adapted to various residential and commercial properties and being engineered to "exact specifications". Months of discussions among the parties centered on matching the product to the property. In this case, the product was to be used for the event space on site and time was taken to eliminate beams to optimize the interior space. The emails back and forth reflect a dialogue regarding the customization of the product to fit the consumer's needs.

Second, Struxure manufactures and distributes Louvered Roofs, which are intended to provide adjustable coverage for outdoor structures. Struxure indicates in its marketing material that its products "bring the indoors out" and are "engineered and designed to withstand all types of weather conditions from heavy snow to high winds". According to Struxure, "the louvers open to allow sunlight in and close to provide shelter and shade. Water is directed from the

louvers to gutters, and down through downspouts either independent or incorporated into columns." Struxure indicates these pieces come together "to make it all work perfectly."

The parties engaged in discussions necessary to plan for the installation to occur at a particular piece of property. As indicated above, this type of "dialogue" is hardly unique to this contract. Revisions were made to the proposal to eliminate certain beams to provide a more open floor plan under the louver system. Throughout that process, plaintiff sought the comment of PTP given their representation that they are a "Specialist in Exterior Building products" and particularly holding themselves out as a purveyor and installer of Struxure's Louver System product. PTP knew Icona was specifically engineering the structural load for the system and was reasonably relying on Post to Post/Struxure to guide them as it related to the functionality of the defendants' system and its resulting drainage.

Plaintiff hired a structural engineer to design an adequate structural support system for the defendants' system. However, plaintiff was under the reasonable assumption that it would be given direction on the functionality and drainage of the system that was placed on top of the structural support system. Given that this system is designed to capture water, plaintiff asserts that defendants had a duty to speak on the issue of drainage where the consumer is

only advised that the system will work "perfectly" once the pieces are together. In the absence of an express disclaimer on this issue, the consumer is left to believe the issue has been vetted by either the design team (Struxure) or the installation team (Post to Post) who has experience with the final product.

As to the third factor, the communications among the parties demonstrate that it was clear plaintiff understood defendants were not structural engineers. However, neither the advertising and marketing materials nor the defendants clearly indicated that the system is only as good as the downspouts that it ties into. Defendants maintained a duty to advise or direct plaintiff to this issue during planning and design. The concept that the system had to manage rainfall may be "obvious" here; *what was not so obvious was the impact on functionality of the defendants' system resulting from customization and integration with its structural members*. Given the level of customization in this process, it was at least a genuine issue of material fact whether both defendants had a duty to speak on these issues as the purveyor and holding themselves out as "experts" in the marketplace.

As to the fourth factor, the merchandise is widely available and marketed to both residential and commercial consumers. Struxure maintains a website (www.struxure.com) with a "find a dealer" link prominently displayed for consumers in New Jersey and throughout the United States. Their online

pamphlet indicates "each Struxure system is engineered to exceed all standards and expectations. They're designed to meet Florida's stringent hurricane codes, as well as withstand heavy snow loads in the cold of winter. Plus, each Struxure system is fabricated and power coated to order, made to exact specifications, which makes for a better fit and finish and a cleaner looking system."

Struxure markets to business consumers depicting restaurant seating under its Louver systems on its website. With representations such as these in their marketing materials, consumers are led to believe the defendants would advise or direct them as to whether the *their system* would function properly.

Plaintiff is the operator of a hotel resort. *Plaintiff is not in the business of designing or constructing louver systems or calculating drainage*. That is the defendants' business and is the reason they were hired. Plaintiff paid more than $130,000 for a system that it reasonably expected would function properly based on representations by the defendants. Defendants failed to account for drainage and downspouts, which they knew or should have known is an essential element of their product's function. In addition, to the extent defendants argue they have no duty in this regard and customers are entirely on their own as to whether the system will properly drain, the defendants also completely fail to indicate this in their marketing materials, proposals, and

"months" of communications. Their attempted "disclaimer" on that issue appears for the first time only in the context of this litigation.

The Court in its April 4, 2022 Order dismissed plaintiff's affirmative claims on summary judgment. In its analysis, the Court agreed with plaintiff there was a genuine issue of material fact as to defendants' conduct under the CFA. Pa122. However, the dismissal was ultimately based on the perceived lack of damages. Pa131. This was a legal error.

On the issue of damages, the Court failed to consider the various remedies available to plaintiff in the event they were successful in showing wrongful conduct. New Jersey courts recognize four general categories of remedies for breach of contract: compensatory damages, restitution, reliance damages, and specific performance. See Donovan v. Bachstadt, 91 N.J. 434, 443-44 (1982); Pop's Cones, Inc. v. Resorts Intern. Hotel, Inc., 307 N.J. Super. 461, 473 (App. Div. 1998).

Compensatory damages, also known as "expectation" damages or "benefit-of-the-bargain" damages, put the non-breaching party into the position it would have achieved had the contract been completed. Totaro, Duffy, Cannova and Company, L.L.C. v. Lane, Middleton & Company, 191 N.J. 1, 13 (2007). Restitution damages return the non-breaching party to the condition it occupied before the contract was executed and allow the non-

breaching party recover for any unjust enrichment conveyed to another party. Id. Reliance damages allow an injured party to recover for expenditures incurred when that party relied to its detriment on the performing party. Holt v. United Security Life Ins. & Trust Co., 76 N.J.L. 585, 599-600 (E. & A. 1909). Specific performance seeks to make the non-breaching party reasonably whole by requiring the breaching party to fulfill its obligation under the agreement. See Donovan, 91 N.J. at 444.

The loss must be a reasonably certain consequence of the breach, even though the exact amount of the loss need not be certain. Kozlowski v. Kozlowski, 80 N.J. 378, 388 (1979). If a claim for loss is challenged as something less than the precise calculation of damages, it is sufficient that the plaintiff prove damages with such certainty "as the nature of the case may permit, laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate." Totaro, 191 N.J. at 14. In other words, upon a finding that damages have occurred, "a reasonable estimate" of the amount beyond "mere speculation" has been held to be sufficient. See Caldwell v. Haynes, 136 N.J. 422, 442 (1994).

The Trial Court also has the authority to make appropriate equitable adjustments and should have reserved that determination until after a full trial on all issues. For example, the doctrine of partial or substantial performance

would apply to adjust the contract price to reflect "a sum sufficient to compensate the other party for or cover correction of the defective aspects of the performance." See Amerada Hess Corp. v. Quinn, 143 N.J. Super. 237, 252 (Law Div. 1976). A finding that there were genuine issues as to the CFA *necessarily* implicates the issue as whether plaintiff paid too much or must otherwise be compensated to correct deficiencies related to warranties and performance of the system. See Model Civil Jury Charge 8.45; See Price v. B. Construction Co., 77 N.J. Super. 485 (App. Div. 1962) (involving a clause in a contract warranting that the cellar in a new home being sold would be free from water for a period of one year from date of closing title, the court concluded that the parties bargained (1) not for a one-year result, but (2) for work of greater expectable life but supported by a guarantee for a portion of that period; and that the proper measure of damages was the "entirety of such sums of money as were required to be expended by plaintiffs in correcting the defect complained of.").

In addition to the general categories of damages, Icona asserted claims specifically under the Consumer Fraud Act (CFA). If the finder of fact were to determine that either or both defendants violated the CFA, then Icona would be permitted to receive an award of money for their loss proximately caused by the defendants, in which case the amount "shall" be threefold and the Court

"shall also award reasonable attorney's fees, filing fees, and reasonable costs of suit" pursuant to N.J.S.A. 56:8-19. See also Model Civil Jury Charge 4.43.

Here, the Trial Court already determined that the defendants conduct under the CFA was a jury question. If there was a question as to whether what was promised was what was delivered - it necessarily follows that the question of damages and remedies should have also been left for trial. In determining otherwise, the decision on summary judgment left Icona to proceed to trial with one arm tied around its back being unable to fully confront the counterclaim for nonpayment with the extensive representations they were presented with during the sales and planning process. Notably, the Trial Court in its final judgment disregarded otherwise relevant information based on the previous summary judgment dismissal. Pa170.

In this case, the record reflects countless representations boasting about the performance of the system, subsequent attempts by the defendants to later disclaim, qualify, and walk-back those representations after performance became an issue, and testimony from an expert witness that the estimated cost of removing the system and replacing it with a new fixed roof would involve demolition, removal, and replacement and the cost would exceed the amount of the balance of payment claimed by PTP. If the trier of fact were to determine the defendants misled Icona, it can hardly be a surprise to the defendants that

Icona would then be entitled to damages to repair, replace, or otherwise address a failed system.

The Trial Court erroneously dismissed the entirety of Icona's complaint on the perceived lack of damages where that issue should have remained for trial in connection with the Trial Court's finding that there were genuine issues of material fact pertaining to the Consumer Fraud Act. The Trial Court's April 4, 2022 Order deprived Icona of their day in Court on all issues and led to an unjust result at trial. For these reasons, the Appellate Division should reverse and order a new trial.

B. The Trial Court abused its discretion by entering judgment against the weight of the evidence.(Pa133; (September 14, 2023)).

Any factual finding and legal conclusion of the trial judge that are manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice may be subject to reversal by the Appellate Division. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974).

Here, both PTP and Struxure held themselves out to be experts on a specialized building product that is marketed for commercial consumers as a revenue generating improvement.

The Trial Court includes in its September 14, 2023 memorandum of decision a finding that the impact of eliminating interior columns on stormwater management is a matter of "common sense" and that "The idea that the veranda would be used for a wedding during storm conditions, and be dry due to the louvered roof system, is not logical." Pa167; Pa174. The Court somehow came to this conclusion even with the defendants' marketing materials in hand boasting about it "bringing the indoors out" and its system being "engineered to exceed all standards and expectations. They're designed to meet Florida's stringent hurricane codes, as well as withstand heavy snow loads in the cold of winter" and that all these pieces come together "to make it all work perfectly." Pa4-7. According to Struxure, "when closed, the patented louver design interlocks, providing solid shelter from rain." Pa5.

The Trial Court essentially concludes that Icona, as the consumer, should have known as a matter of "common sense" how modifications to defendants' specialized system would impact its functionality. The Trial Court came to this conclusion after defendants offered, and the Court accepted, an expert "on the operation and installation of the Struxure louvered roof system". 1T 111:20-23. The Trial Court's reasoning conflicts with itself. The defendant's system was found to be a matter both requiring specialized knowledge, while also being a subject that should be understood utilizing only

"common judgment and experience." Only one of those two conclusions can be true and the defendants impliedly admitted the system is not a matter of "common sense" since they offered expert testimony on its operation and installation.

Here, the representations and statements made in the sales and planning phase are completely removed from the carefully crafted explanations that came only after issues were discovered and $130,000.00 had been paid toward the system. As a result of the Trial Court's orders, there are absolutely zero consequences for this conduct.

No doubt members of the bar and the judiciary bring a wealth of knowledge and experience to the cases they handle. However, louvered systems and stormwater management are not matters of "common sense" subject to judicial notice. See State v. LiButti, 146 N.J. Super. 565, 571 (App. Div. 1977) (holding that the Court is not to use from the bench, under the guise of judicial notice, that which they know only as an individual observer).

The Trial Court failed to consider the substantial evidence in the record regarding the defendants' "expertise" and their multiple representations and omissions to Icona and came to the cursory conclusion that Icona is simply a buyer that should have been beware.

Caveat emptor does not reflect current law in New Jersey. The State has

a more "ethical" approach in business dealings with one another. Each party may rely on representations made by another in a business transaction. See Model Civil Jury Charge 4.43. The Trial Court failed to view the evidence in the context of Icona as a consumer of the defendants' products and services, and instead viewed them as a party possessing equal knowledge and expertise on a specialty product. For these reasons, the judgment of the Trial Court must be reversed.

IV. CONCLUSION

The Trial Court erred as a matter of law in dismissing plaintiff's affirmative claims before trial where there exists genuine issues of material fact on the issue of liability and damages. Accordingly, for the reasons set forth herein, plaintiff respectfully requests the Appellate Division reverse the April 4, 2022, September 14, 2023, and October 27, 2023 Orders entered by the Trial Court and order a new trial in this matter.

Respectfully submitted,

GILLIN-SCHWARTZ LAW

By:_____

Dated:4/19/24 CHRISTOPHER GILLIN-SCHWARTZ, ESQUIRE

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

ICONA GOLDEN INN, LLC, Plaintiff-Appellant, vs. STRUXURE OUTDOOR, INC. F/K/A ARCADIA LOUVERED ROOFS, POST TO POST LLC, AND JOHN DOES 1-10; ABC CORP. AND XYZ COMPANY, FICTITIOUS PARTIES, Defendants-Respondents.	:	Docket No. A-001073-23 Civil Action ON APPEAL FROM: Order and Final Decisions Entered on April 4, 2022, September 14, 2023, and October 27, 2023 in the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. ATL-L-2959-19 SAT BELOW: Hon. Stanley L. Bergman Jr., J.S.C. Hon. Danielle J. Walcoff, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT, STRUXURE OUTDOOR, INC. F/K/A ARCADIA LOUVERED ROOFS

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Submitted May 15, 2024

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PRELIMINARY STATEMENT

This matter arises out of the installation of an Arcadia Louvered Roof System (hereinafter "louvered system" or "louvered roof") at Plaintiff, Icona Golden Inn, LLC's (hereinafter "Icona"), hotel in Avalon, New Jersey. The system, which is a louvered pergola that can be opened to let the sun in and closed to provide shade and some rain protection, was manufactured by Defendant, Struxure Outdoor, Inc. f/k/a Arcadia Louvered Roofs, Inc. (hereinafter "Struxure"), and installed by Defendant, Post to Post, LLC (hereinafter "PTP").

Icona claims the system was defective and failed to perform as represented by the manufacturer and installer. As a result, Icona filed a Complaint against both Defendants, alleging violations of the New Jersey Consumer Fraud Act, breach of contract, breach of implied covenant of faith and fair dealing, unjust enrichment, and breach of warranty. Proof of damages is an element of each of these claims, but there is no evidence that Icona suffered any financial damages in connection with the louvered system. Therefore, the Trial Court properly granted summary judgment in favor of Struxure, finding that Icona failed to meet its burden of proof as to damages on all counts of its Complaint.

PROCEDURAL HISTORY

On November 12, 2019, Icona filed a Complaint against Defendants, Struxure and PTP, alleging violations of the New Jersey Consumer Fraud Act, breach of contract, breach of implied covenant of faith and fair dealing, unjust enrichment, and breach of warranty. (Pa75). On January 6, 2020, PTP filed an Answer to Icona's Complaint with a Counterclaim against Icona for breach of contract, unjust enrichment, and violation of the New Jersey Prompt Payment Act. (Pa84). Icona filed an Answer to PTP's Counterclaim on January 14, 2020. (Pa97). On February 27, 2020, Struxure filed an Answer to Icona's Complaint, denying all allegations of wrongdoing. (Pa103).

After completion of the discovery period in this matter, Struxure and PTP filed Motions for Summary Judgment on January 20, 2022. (Pa199; Pa235). Icona filed Opposition to both Motions on March 10, 2022. (Pa267). On April 4, 2022, the Trial Court granted Defendants' Motions for Summary Judgment, dismissing all counts of Icona's Complaint with prejudice. (Pa112).

Thereafter, a trial was held on August 2, 2023 solely on the issue of PTP's Counterclaim. (Pa133). The Trial Court entered judgment in favor of PTP on its Counterclaim in the amount of $112,070.82 per its Order dated September 14, 2023. (Pa132). By way of Order dated October 27, 2023, the Trial Court

amended the judgment to add an award of attorney's fees and costs to PTP in the amount of $24,632.95. (Pa178).

On December 8, 2023, Icona filed a Notice of Appeal of the April 4, 2022 Order and Opinion granting Summary Judgment in favor of Defendants, the September 14, 2023 Order entering judgment in favor of PTP, and the Trial Court's final Order dated October 27, 2023. (Pa179). Icona filed an Amended Notice of Appeal of the September 14, 2023 Order entering judgment in favor of PTP. (Pa193).

COUNTERSTATEMENT OF FACTS

In or about March 2017, Icona contacted Defendant, PTP, regarding installation of a louvered system as part of an outdoor event space to connect to Icona's existing hotel building. (Pa246; Pa272 at 1). The system, which was manufactured by Struxure, consisted of panels that were to be placed in a pre-constructed framework designed by Icona's own engineer. (Pa206; Pa242; Pa273 at 3). Struxure never represented the louvered system to be completely waterproof.

After numerous negotiations over a period of approximately eleven months and six revisions of the initial proposal, Icona accepted a final proposal from PTP on February 14, 2018 for installation of the louvered system. (Pa203; Pa244; Pa246-262; Pa273 at 4-5). Prior to acceptance of the final proposal,

Icona retained a structural engineer, Robert Green, P.E. of R.D. Engineering (hereinafter "engineer"), to design a steel frame support system on which PTP would install the louvered roof. (Pa205-06; Pa251-262; Pa268 at 5). Icona's engineer and its Director of Construction were involved in the negotiation, planning, and design process. (Pa246-262). At no time did Struxure advise or direct Icona in the design, construction, or installation of the system. Struxure only manufactured the panels which were sold by PTP to Icona to be integrated into a system that was designed by Icona's own engineer.

PTP's original proposal called for six downspouts located in support columns to allow for proper drainage. (Pa273-74 at 7). Despite PTP's recommendation, Icona insisted that its engineer change the design and remove two interior columns containing downspouts to allow for an open space plan. (Pa251; Pa255; Pa260; Pa273-74 at 7). After PTP installed the louvered roof, Icona claimed it sustained damages due to leaks and improper drainage. (Pa75). However, Icona knew that it was responsible for providing the structural support system on which PTP would install the louvered roof. (Pa246-262; Pa268 at 5; Pa273 at 6). Icona's engineer, not Struxure, was responsible for designing an adequate support system that would allow for proper drainage of water and connection to the underground stormwater system. (Pa225; Pa246-262; Pa268 at 5; Pa273 at 6).

Icona never provided any evidence to substantiate its claim that it suffered financial damages as a result of the allegedly defective louvered system. After the discovery period ended in this matter, Struxure and PTP filed Motions for Summary Judgment (Pa199; Pa235). In its Motion, Struxure asserted Icona's Complaint must be dismissed because Icona failed to sustain its burden of proof as to damages on all counts and the opinion of Icona's proposed expert was nothing more than a net opinion[1]. (Pa199).

With respect to proof of damages, the Trial Court found that Icona did not dispute that it never provided any calculation of damages during the course of discovery or with its Opposition to Defendants' Motions for Summary Judgment. (Pa126). In his April 4, 2022 Opinion, Judge Bergman stated, "[P]laintiff has not presented adequate proof of ascertainable loss or other proof of damages that create any genuine issue of material fact to withstand summary judgment as to their consumer fraud claim, breach of contract claim, breach of implied covenant of good faith and fair dealing claim, unjust enrichment claim, or breach of warranty claim." (Id.). The Trial Court further found that Icona failed to show any quantifiable or ascertainable loss, nor did Icona provide so much as an estimate of its amount of claimed damages. (Pa127). Accordingly,

[1] For the sake of brevity, we have not provided the details of the net opinion argument as that is immaterial to the instant appeal.

the Trial Court granted Defendants' Motions for Summary Judgment and dismissed Icona's Complaint with prejudice. (Pa131).

LEGAL ARGUMENT

Icona asserts two issues on appeal: (1) the Trial Court erred as a matter of law dismissing all counts of Icona's Complaint on summary judgment where there were genuine issues of material fact as to the application of the Consumer Fraud Act and the Trial Court afforded no deference to Icona on the issue of damages; and (2) the Trial Court abused its discretion by entering judgment against the weight of the evidence at the time of trial. Since Struxure was no longer a party to the instant matter at the time of trial, Struxure is not replying to the second issue on appeal regarding the September 14, 2023 and October 27, 2023 Orders.

I. STANDARD OF REVIEW

Review of a Trial Court's Order granting summary judgment is *de novo* based on the same standard of review the Trial Court must adhere to when deciding a Motion for Summary Judgment. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 244 N.J. 189, 199 (2016); see also, Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). The Appellate Court must first decide whether a genuine issue of material fact exists and if not, then it must decide whether the Trial

Court's rulings on the law were correct. See Prudential Prop. & Cas. Ins. Co., 307 N.J. at 167; see also, Seaview Orthopaedics ex rel Fleming v. Nat'l Health Care Resources, Inc., 366 N.J. Super. 501, 505 (App. Div. 2004).

Summary Judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also, Aronberg v. Tolbert, 207 N.J. 587, 597 (2011). This requires a "searching review" of the record to ascertain whether a genuine issue of material fact exists. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 541 (1995). The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. The non-moving party has the "burden of producing in turn evidence that would support a jury verdict [and must] set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Bare conclusions and pleadings, without substantial factual support and tendered affidavits will not and should not defeat a meritorious application for summary judgment." Brill, 142 N.J. at 536.

Further, although the standard of review of a Trial Court's Order granting summary judgment is plenary, any evidence not before the Trial Court at the time summary judgment is decided may not be submitted to the Appellate Division. See Friedman v. Martinez, 242 N.J. 449, 475 (2020) ("[A]ll parties are entitled to have their case decided on the basis of the record before the trial court at the time summary judgment is decided."). Rule 2:5-4(a) provides that "[t]he record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court." R. 2:5-4(a). Therefore, "appellate review is confined to the record made in the trial court, and appellate courts will not consider evidence submitted on appeal that was not in the record before the trial court." Scott v. Salerno, 297 N.J. Super. 437, 447, 688 A.2d 614 (App. Div. 1997).

In the instant matter, Icona submitted evidence in support of its appeal of the April 4, 2022 Order and Opinion that was not part of the record before the Trial Court at the time summary judgment was decided. In the April 4, 2022 Memorandum of Decision, the Trial Court noted the only papers considered for purposes of summary judgment were all pleadings and submissions of the parties filed on and prior to March 18, 2022. (Pa113). That did not include the

following evidence which Icona submitted to this Court: Arcadia Architectural Binder (Pa1); Struxure Social Media Advertisement (Pa47); Post to Post 2018 Website (Pa48); August 29, 2018 Letter from Arcadia to Icona (Pa63); Louver Photos (Pa65); and July 10, 2019 Email from Bierds to Struxure (Pa73). Icona had the opportunity to submit the aforesaid evidence with its Opposition to Defendants' Motions for Summary Judgment but failed to do so. Icona also never filed a Motion for Reconsideration. Therefore, this Court lacks jurisdiction to consider any evidence that was not in the record before the Trial Court at the time of the Motions for Summary Judgment.

II. STRUXURE'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED WHERE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER ICONA MET ITS BURDEN OF PROOF AS TO DAMAGES

Icona's Complaint alleges violations of the New Jersey Consumer Fraud Act, breach of contract, breach of implied covenant of faith and fair dealing, unjust enrichment, and breach of warranty. Damages are an essential element of each of those claims, but Icona failed to present any evidence whatsoever of financial damages in connection with the louvered system. Therefore, the Trial Court properly granted summary judgment in favor of Struxure, finding that Icona failed to meet its burden of proof as to damages on all counts of its Complaint.

The New Jersey Consumer Fraud Act (hereinafter "CFA") applies to "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, [or] fraud, . . . in connection with the sale or advertisement of any merchandise." N.J.S.A. § 56:8-2. In business-to-business transactions, the "nature of the transaction" will determine whether it can fit within the CFA's definition of "merchandise." See D'Agostino v. Maldonado, 216 N.J. 168, 187 (2013). New Jersey Courts consider the following factors to determine whether the CFA applies to the merchandise at issue:

> (1) the complexity of the transaction, taking into account any negotiation, bidding, or request for proposals process; (2) the identity and sophistication of the parties, which includes whether the parties received legal or expert assistance in the development or execution of the transaction; (3) the nature of the relationship between the parties and whether there was any relevant underlying understanding or prior transactions between the parties; and . . . (4) the public availability of the subject merchandise.

All the Way Towing, LLC v. Buck's County International, Inc., 236 N.J. 431, 434 (2019).

In the instant matter, the louvered system does not meet the definition of "merchandise" under the CFA. First, PTP submitted an initial proposal to Icona only after Icona contacted PTP to inquire about installation of a Struxure louvered system at its hotel. Icona and PTP engaged in multiple negotiations

over a period of approximately eleven months, which resulted in multiple revisions of the initial proposal before Icona accepted a proposal on February 14, 2018. Second, Icona retained a structural engineer to design an adequate structural support system on which PTP was to install the louvered roof. PTP's original proposal called for six downspouts located in support columns, but Icona, who was involved in each step of the design process, specifically requested its own engineer to change the recommended design to optimize the interior space, which resulted in the removal of two of the downspouts. Icona's Director of Construction was also involved in the negotiation, planning, and design process. Third, as admitted in Icona's brief, Icona clearly understood that Defendants are not structural engineers. Icona knew that it was responsible for providing the structural support system on which PTP would install the louvered roof, and they retained an engineer to design a support system that would allow for proper drainage. Finally, as to the fourth factor, the louvered system is not widely available to the general public and can only be purchased through a local distributor and installer and only after acceptance of a proposal.

Moreover, Icona's assertion that Struxure was part of the "design team" and misled Icona to believe that it would advise or direct them in the design or construction of the entire system, including its drainage, is completely baseless. It is clear from the evidence in the record that Struxure was not involved in the

planning, design, or installation of the system at Icona's hotel. Icona did not hire Struxure to design the entire system, calculate drainage, or install any part of the system. It was the responsibility of their engineer, not Struxure, to account for drainage and downspouts. It is interesting to note that Icona never asserted any claims against its engineer. Struxure only manufactured the panels which were sold by PTP to Icona to be integrated into a structural support and drainage system that was designed by Icona's own engineer and built by a construction company hired by Icona.

However, even if the louvered system is found to fall within the definition of merchandise under the CFA, the CFA further requires a plaintiff to prove three elements: (1) unlawful conduct by the defendant; (2) an ascertainable loss by the plaintiff; and (3) a causal connection between the defendant's unlawful conduct and the plaintiff's ascertainable loss. N.J.S.A. § 56:8-1 *et seq.* Unlawful conduct includes affirmative acts, knowing omissions, and violation of regulations promulgated under N.J.S.A. §§ 56:8-2 and 56:8-4. Id. Ascertainable loss means that it is quantifiable or measurable. See Thiedemann v. Mercedes Benz USA, LLC, 183 N.J. 234, 244 (2004) (noting that "an objectively ascertainable loss or damage" could be measured by "expert proof of diminution of value" or "out of pocket expenses causally connected with the claimed defect perpetuated by the defendant."). "[A] claim of loss in value must be supported

by sufficient evidence to get to the factfinder. To raise a genuine dispute about such a fact, the plaintiff must proffer evidence of loss that is not hypothetical or illusory." Id. at 248-49.

For the reasons stated above, there is absolutely no evidence that supports Icona's allegation that Struxure engaged in any unlawful conduct under the CFA or made any misrepresentation about its product. Further, although the Trial Court found that a dispute existed as to whether the louvered system constitutes merchandise for purposes of the CFA, the Trial Court correctly concluded that no issue of material fact existed as to whether Icona could sustain its burden of proof of ascertainable loss, which is required to succeed on its CFA claim. There is no expert report or opinion pertaining to damages, documentation showing out of pocket expenses causally connected to the allegedly defective louvered system, or other evidence to show that Icona suffered an ascertainable loss. Although Icona asserts that a jury should determine the amount of damages, a jury should not be tasked with guessing an arbitrary number when a plaintiff has submitted absolutely no proof whatsoever as to any loss or damages. As stated by the Trial Court, "To permit plaintiff to assert that damages were generally incurred and leave the amount of said damages to the discretion of the jury would be an injustice to the defendants." (Pa131).

In addition to failing to submit proof of damages in connection with its claim for violation of the CFA, Icona failed to sustain its burden of proof as to compensatory damages on its claims for breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, and breach of warranty. It is well established that the purpose of compensatory damages is to compensate a plaintiff for an actual loss. See Nappe v. Anschclewitz, Barr, Ansell & Bonello, 97 N.J. 37, 48 (1984). A plaintiff always has the burden of proving damages. Caldwell v. Haynes, 136 N.J. 422, 436 (1994). No expert report as to damages, documentation containing an estimate for the cost to repair or replace any alleged deficiencies in the louvered system, or other quantifiable damages have been provided by Icona in order to show it sustained financial loss for which it seeks compensation. Icona even admits that it was able to mitigate its alleged damages and continues to use the space for events such as weddings as well as a location for outdoor dining. (Pb14). Therefore, no genuine issue of material fact exists on the issue of damages.

Moreover, there is no testimony, documentation, or other evidence that substantiates Icona's allegation, made for the first time on appeal, that the entire system would have to be demolished, removed, and replaced. To the extent Icona attempts to rely on evidence and testimony from the trial in this matter, Icona cannot support its claim for damages with evidence that was provided after

the motion for summary judgment was granted and after Struxure was dismissed from this case. In fact, the Trial Court noted in its Order and Opinion dated October 27, 2023 that Struxure was not a party to the August 2, 2023 trial and therefore any evidence presented by Icona at trial regarding Struxure was not relevant. (Pa170). At no time up to and including the date of the hearing on the Motion for Summary Judgment did Icona submit evidence or even claim that the entire system would have to be replaced, nor did they submit so much as an estimate as to how much this might cost. Icona was required to submit proof of damages to succeed on its claims but failed to do so, and the amount of any damages allegedly sustained by Icona remains unknown to this day. Absent proof of damages, the Trial Court properly granted summary judgment in favor of Struxure.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that this Court uphold the Trial Court's grant of summary judgment, dismissing Plaintiff's Complaint with prejudice as to Struxure Outdoor, Inc. f/k/a Arcadia Louvered Roofs, Inc.

Respectfully submitted,
SHIMBERG & FRIEL, P.C.

Date: May 15, 2024 By: Barbara E. Riefberg, Esquire
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July 1, 2024

Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
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Trenton, NJ 08625

Re: ICONA GOLDEN INN, LLC V. STRUXURE OUTDOOR, INC. F/K/A ARCADIA LOUVERED ROOFS, INC.; POST TO POST LLC; AND JOHN DOES 1-10; ABC CORP. AND XYZ COMPANY, FICTITIOUS PARTIES
DOCKET NO. A-001073-23

REPLY BRIEF PURSUANT TO R. 2:6-5

Honorable Judges:

On behalf of appellant Icona Golden Inn, LLC, please accept this letter brief in reply to the submission of respondents. R. 2:6-5.

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I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

Icona incorporates the procedural history and statement of facts from its principal brief.

II. ARGUMENT

The issues on appeal relate to the trial court's legal conclusions, and the application of those conclusions to the facts. These issues are subject to plenary review by the Court. See Spangenberg v. Kolakowski, 442 N.J. Super. 529, 535 (App. Div. 2015) (quoting Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

On a motion for summary judgment, the Court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." See Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995)(emphasis added). Further, the trial court may not resolve contested factual issues; rather, it may only determine whether there are any genuine factual disputes. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005).

A determination of whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most

favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Id. at 540.

The Trial Court in its April 4, 2022 Order correctly found there was a genuine issue of material fact as to defendants' conduct under the Consumer Fraud Act. Pa122. However, the Trial Court failed to afford Icona all reasonable inferences on the issue of damages.

Both Defendants Struxure and PTP appear to point to the lack of a specific figure as the antidote to the issue of damages being dismissed. This argument overlooks the context in which the issue of damages was abruptly dismissed: on a motion for summary judgment where issues of fact were already determined to exist on the underlying claims of defendants' performance – not after a full trial on the merits.

The New Jersey Supreme Court has held that even where "damages flowing from defendant's breach of contract are not ascertainable with exactitude, such is not a bar to relief." See Kozlowski v. Kozlowski, 80 N.J. 378, 388 (1979). The Court has held that "[w]here a wrong has been committed, and it is certain that damages have resulted, **mere uncertainty as to the amount will not preclude recovery** — courts will fashion a remedy even though the proof on damages is inexact." Id. (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975); Tessmar v. Grosner, 23 N.J. 193, 203 (1957)). This

is consistent with the long held equitable maxim recognized in New Jersey that "wherever a legal right has been infringed a remedy will be given." See Orlowski v. Orlowski, 459 N.J. Super. 95 (App. Div. 2019) (quoting Crane v. Bielski, 15 N.J. 342, 349 (1954)). In other words, if the Trial Court was convinced that defendants conduct and potential wrongdoing remained a genuine issue of material fact, the measure of resulting harm stemming from that conduct should have simply remained an issue for adjudication at trial.

Even so, from the commencement of this action, Icona set forth at least one measure of damages which is down to the penny but continues to be ignored by the defendants. Pa75. Plaintiff has paid $130,000.00 toward a system that fails to perform as marketed by the defendants. Pa74. New Jersey courts recognize four general categories of remedies for breach of contract: compensatory damages, restitution, reliance damages, and specific performance. See Donovan v. Bachstadt, 91 N.J. 434, 443-44 (1982); Pop's Cones, Inc. v. Resorts Intern. Hotel, Inc., 307 N.J. Super. 461, 473 (App. Div. 1998). *Giving Icona the benefit of all reasonable inferences*, if defendants were found in breach of their duties, *at the very least* a rational fact finder could conclude that Icona paid too much or must otherwise be compensated to correct deficiencies related to warranties and performance of the system. In other words, the amount paid for something that does not work is itself a measure of damages.

Furthermore, if either or both defendants were found to have violated the CFA, then Icona would be permitted to receive an award of money for their loss proximately caused by the defendants, in which case the amount "shall" be threefold and the Court "shall also award reasonable attorney's fees, filing fees, and reasonable costs of suit" pursuant to N.J.S.A. 56:8-19. See also Model Civil Jury Charge 4.43.

Here, the Trial Court already determined that the defendants conduct under the CFA was a jury question. If there was a question as to whether what was promised was delivered - it necessarily follows that the question of damages and remedies should have also been left for trial.

As to the second issue of the Trial Court accepting "operation and installation of the Struxure louvered roof system" as both a matter requiring specialized skill and knowledge while also being a matter of "common sense" about which plaintiff simply should have known better - the defendants briefs offer nothing new to explain this glaring contradiction. Icona, as a consumer in the market for defendants' specialized equipment, took them at their word that *they were the experts*. For that reason, Icona hereby incorporates by reference the analysis set forth in their initial brief on this point.

The Trial Court's April 4, 2022 Order deprived Icona of their day in Court on all issues and led to an unjust result at trial. For these reasons, the

Appellate Division should reverse and order a new trial.

III. CONCLUSION

The Trial Court erred as a matter of law in dismissing plaintiff's affirmative claims before trial where there exists genuine issues of material fact on the issue of liability and damages. Accordingly, for the reasons set forth herein, plaintiff respectfully requests the Appellate Division reverse the April 4, 2022, September 14, 2023, and October 27, 2023 Orders entered by the Trial Court and order a new trial in this matter.

Respectfully submitted,

GILLIN-SCHWARTZ LAW

By: _____

Dated: 7/1/2024 CHRISTOPHER GILLIN-SCHWARTZ, ESQUIRE