NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6120-08T1

SOOM DAT POKHAN and
GANGAWATTIE POKHAN,

Plaintiffs-Appellants,

v.

TYRONE PETERS, Individually
and as Owner and Operator
of TYRONE PETERS AND ASSOCIATES,

Defendant-Respondent.

Submitted November 29, 2010 - Decided March 18, 2011

Before Judges Lisa and Sabatino.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3538-06.

Jay Chatarpaul, attorney for appellant.

Respondent has not filed a brief.

PER CURIAM

This case arises out of a builder's incomplete effort to construct a house on plaintiffs' lot. After the construction stalled, the property-owners sued the builder for damages. The builder defaulted in the litigation, and a proof hearing was conducted. Following the proof hearing, the trial court

dismissed the complaint with prejudice because the property-owners had failed to establish the essential terms of an enforceable contract. The property-owners now appeal that dismissal.

For the reasons that follow, we affirm the trial court's determination that the property-owners did not prove the builder's liability for breach of contract. However, we remand for further proceedings so that the trial court may consider more fully (1) whether the property-owners may recover damages under an alternative theory of quantum meruit, and (2) whether a recovery is warranted under the Consumer Fraud Act, even in the absence of an enforceable contract.

I.

These are the pertinent facts contained in the limited record before us. Appellants Soom Dat Pohkan and Gangawattie Pokhan, husband and wife ("plaintiffs" or "the property-owners"), own a house in Morris Plains. Respondent[1] Tyrone Peters ("defendant" or the "builder") is in the business of home construction.

In May 2005 the parties each signed what is styled as an "agreement" for defendant to build a separate two-story house

[1] As noted on the first page of this opinion, defendant is in default and he did not file papers in opposition to the appeal.

next to plaintiffs' existing home. The agreement recites what is denominated as an "estimated" contract price of $315,489. That estimated price was to be paid in seven installments, corresponding to various specified phases of the construction. The job was to be completed in twenty-two weeks.

As it turned out, the construction was delayed, in part because plaintiffs needed to resolve some permitting issues with the township. Plaintiffs paid defendant several installments totaling $288,389, a sum about $26,000 short of the original estimated price.

Defendant stopped construction in April 2006, having only progressed to the fourth of the seven construction phases. He then asked plaintiffs for another $77,000 payment, asserting that his costs had risen due to inflation. Plaintiffs refused to pay the extra amount, and the project came to a halt. The record contains photographs showing that the work essentially did not progress beyond framing.

In July 2006, plaintiffs filed an action in the Law Division against defendant, principally alleging breach of contract. In support of that claim, plaintiffs obtained a price quote from another builder, Mendham Design-Build Contractors, LLC, estimating that the house would cost an additional $168,395.73 to complete. Plaintiffs also allege that defendant

violated the Consumer Fraud Act because he misapplied portions of installments of $42,950 paid in February 2006 and $50,161 in March 2006.

Defendant initially was represented by counsel, who filed an answer and a counterclaim against plaintiffs. The counterclaim alleged that plaintiffs are responsible for the incomplete work because they delayed the start of the project and also because they refused to advance funds that were needed by the builder to finance the completion of the construction. At some point, defendant became pro se and he failed to appear at the trial date. This led to a default, which defendant never cured.

Plaintiffs appeared with their counsel before the trial court for a proof hearing in August 2008. They presented no expert testimony at the hearing, other than Mendham's written estimate of the costs of completion. Defendant was present for the hearing, but he did not participate in the questioning.

After plaintiffs rested their case in the proof hearing, the trial judge concluded that there was no enforceable agreement because the parties had no meeting of the minds as to the total price of the construction. The judge then invited plaintiffs' counsel to submit a memorandum of law explaining what the damages alternatively would be under a quantum meruit

measure. Plaintiffs' counsel apparently furnished the trial court with such a post-hearing memo, although the record is unclear as to whether it was routed to the trial judge's attention.

On June 26, 2009, the trial judge issued a bench ruling, reaffirming, upon further review, that plaintiffs had failed to sustain their burden of proving an enforceable contract and any compensable damages. He dismissed plaintiffs' complaint in its entirety, in a corresponding order of that same date. This appeal ensued.

Plaintiffs contend on appeal that the trial court erred in dismissing their contractual claims, and further erred in dismissing their statutory claims under the CFA. Plaintiffs also argue that the trial judge was unfairly biased against them because they had complained to the court about the time it took to obtain a final decision.

II.

A.

We concur with the trial judge with respect to his finding that no enforceable contract was established at the proof hearing. It is well settled that "[a] contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained

with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting W. Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)). To be enforceable, a contract must "agree on essential terms and manifest an intention to be bound by those terms." Ryan, supra, 128 N.J. at 435.

"Where the parties do not agree to one or more essential terms . . . courts generally hold that the agreement is unenforceable." Ibid.; see also Pop's Cones, Inc. v. Resorts Int'l Hotel, Inc., 307 N.J. Super. 461, 467-68 (App. Div. 1998) (upholding a trial court's ruling that no lease agreement existed where specific terms were not agreed upon); Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank, 163 N.J. Super. 463, 474 (App. Div. 1978) (finding no contract where the agreement was "so deficient in the specification of its essential terms that the performance by each party cannot be ascertained with reasonable certainty"), certif. denied, 79 N.J. 488 (1979).

Price is an essential term of a contract, as to which there must be a clear manifestation of mutual assent. Associates Discount Corp. v. Palmer, 47 N.J. 183, 187 (1966) (noting that the buyer's obligation to pay an agreed-upon price is "an essential element of all sales"). This is a basic principle of hornbook law, long recognized in this State.

> The price is an essential term, and where the contract specifies a mode of ascertaining it, the undertaking is conditional until the price is so ascertained, and is absolute only when it has been determined. 'If there be default in this respect the contract remains imperfect, and incapable of being enforced.'
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> [Goerke Kirch Co. v. Goerke Kirch Holding Co., 118 N.J. Eq. 1, 7 (E. & A. 1935) (quoting Woodruff v. Woodruff, 44 N.J. Eq. 349, 356 (Ch. 1888)).]

The trial judge reasonably concluded here that no mutual agreement was ever attained by the parties establishing a price to build the house on plaintiffs' lot. The price figures set forth in the documents signed by the parties were couched only as "estimates." As the trial judge noted, there was "no mechanism in the [alleged agreement] as to how the final fixed number was going to be arrived at." Given this patent deficiency as to an essential element of an agreement, the trial judge had a sound basis to reject plaintiffs' claims for breach of contract.

This leads us to an examination of quantum meruit, an alternative basis for recovery, which was the subject of colloquy between the court and plaintiffs' counsel at the end of the proof hearing.

The concept of quantum meruit concerns the difference between the value that a party conferred upon another and the

value, if any, that the party received in return. "Quantum meruit" literally means "as much as he deserved." Kopin v. Orange Prods., Inc., 297 N.J. Super. 353, 367 (App. Div.) (quoting La Mantia v. Durst, 234 N.J. Super. 534, 537 (App. Div.), certif. denied, 118 N.J. 181 (1989)), certif. denied, 149 N.J. 409 (1997). In the absence of an enforceable contract, courts may award quantum meruit damages when "'one party has conferred a benefit on another and the circumstances are such that to deny recovery would be unjust.'" Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 286 (App. Div.) (quoting Weichert, supra, 128 N.J. at 437), certif. denied, 192 N.J. 74 (2007).

The damages recoverable under principles of quantum meruit are distinct from, and frequently less than, the expectancy (or benefit-of-the-bargain) damages that a promisee may recover for the breach of an enforceable contract. In the present setting involving a partially-constructed building, expectancy damages would compensate the homeowners for the value that was promised by the builder but not provided, minus the portion of the contract price that was not yet paid. Such expectancy damages would therefore take into account the costs to the homeowners of having the work completed and their bargain fulfilled. See,

e.g., St. Louis, L.L.C. v. Final Touch of Glass & Mirror, Inc., 386 N.J. Super. 177, 188 (App. Div. 2006).

By contrast, the recovery in quantum meruit would represent the shortfall, if any, between the amount paid to the builder by the homeowners (here, $288,389) and the fair market value of the construction that was performed. Under the latter scenario, the homeowners would not realize the full "upside" value of what had allegedly been promised to them, but simply recover what they may have overpaid for the partial construction that was performed. More specifically, a quantum meruit measure would consider the value of the materials (e.g., lumber, concrete, sheetrock, plumbing and electrical supplies, hardware, etc.) and the labor (e.g., site clearance, foundation work, framing, etc.) actually provided by the builder, and whether that combined value is less than the $288,389 that the homeowners paid him.

The evidence at the proof hearing did not develop what damages would be recoverable under the alternative theory of quantum meruit. Plaintiffs and their counsel apparently anticipated or assumed that the court would find that an enforceable contract had been breached, and that they accordingly would be entitled to recover benefit-of-the-bargain damages. The cost-of-completion estimate from Mendham was tendered by plaintiffs to support such contract-based damages.

Defendant was in default, therefore plaintiffs had received no opposing papers. In fact, in defendant's counterclaim he had asserted the existence of a contract, albeit not with the same terms advanced by plaintiffs. It was not until the end of the proof hearing that plaintiffs learned that the court would conclude that no contract existed. For the reasons we have already stated, the court's legal conclusion in that respect was sound. However, it left plaintiffs theoretically with a potential alternative basis for quantum meruit recovery, but without them having developed proofs at the already-concluded hearing to support such an alternative measure.

We recognize that the trial judge invited plaintiffs' counsel to submit a post-hearing brief on the issue of quantum meruit. However, legal briefing alone would not have not closed the gap in plaintiff's case, because the proofs adduced at the hearing had been aimed at proving contract-based damages, not quantum meruit recovery. As we have already noted, there is also some uncertainty in the record as to whether the trial judge received counsel's post-hearing brief before issuing the final judgment of dismissal.

Under these circumstances, we conclude that it is fairest to remand this unopposed appeal to the trial court, so as to afford plaintiffs the opportunity to reopen the proof hearing

and attempt to establish damages based upon an alternative measure of quantum meruit.

We anticipate that such proofs will require a competent opinion from an expert witness in construction, attesting to the fair market value of what plaintiffs received through the partial work that defendant performed. The market value of that work may not necessarily be defendant's actual incurred costs of labor and materials, but instead would be what a willing buyer (or builder) would pay at arm's length for the partial construction itself. It is conceivable that what defendant left behind on the job site is not actually worth, in fair market terms, what it cost him to put it there. For example, some of defendant's work might have to be redone or removed. The labor he provided also may be worth less in market terms than defendant's invoices suggest, particularly if the time expended is shown to be excessive. An expert witness could also comment upon inflationary factors that may bear upon the value of the materials and labor provided. All of these questions may be explored at a resumed proof hearing, with appropriate evidence directed to quantum meruit concepts.

B.

We also find that a remand is warranted to address plaintiffs' statutory claims under the CFA. The CFA makes the following acts unlawful, in connection with sale or advertisement of merchandise or, as here, real estate:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]
>
> [N.J.S.A. 56:8-2.]

"The term 'merchandise' shall include any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale[.]" N.J.S.A. 56:8-1(c) (emphasis added).

A contract between the consumer and the seller is not required to trigger the statute. See Marrone v. Greer & Polman Const., Inc., 405 N.J. Super. 288, 296 (App. Div. 2009) ("privity of contract is not required in a CFA claim."); Katz v. Schachter, 251 N.J. Super. 467, 474 (App. Div. 1991) ("[P]rivity is not a condition precedent to recovery under the New Jersey

Consumer Fraud Act, N.J.S.A. 56:8-1 et seq., since section 19 clearly grants a remedy to '[a]ny person who suffers any ascertainable loss.'" (quoting N.J.S.A. 56:8-19 (2010))), certif. denied, 130 N.J. 6 (1992); see also Neveroski v. Blair, 141 N.J. Super. 365, 376 (App. Div. 1976), alternate issue in holding superseded by statute, N.J.S.A. 56:8-2 ("There is no provision that the claimant thereunder must have a direct contractual relationship with the seller of the product or service.").

Violations of the CFA can arise under three different scenarios: (1) "[a]n affirmative misrepresentation, even if unaccompanied by knowledge of its falsity or an intention to deceive"; (2) "[a]n omission or failure to disclose a material fact, if accompanied by knowledge and intent"; and (3) "violations of specific regulations promulgated under the [CFA]," which are reviewed under strict liability. Monogram Credit Card Bank of Georgia v. Tennesen, 390 N.J. Super. 123, 133 (App. Div. 2007) (internal citations omitted). Here, plaintiffs claim that defendant violated the CFA by allegedly misrepresenting that he would use additional funds that plaintiffs paid him in February and March 2006 for sheetrock, drywall, rough plumbing, electrical supplies, and other specified items, and that he instead used most of those funds

for other purposes. Plaintiffs contend that such misrepresentation comprised an unconscionable commercial practice under the CFA.

The CFA limits private causes of action to instances where a plaintiff can "'allege each of three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss.'" Dabush v. Mercedes-Benz USA, L.L.C., 378 N.J. Super. 105, 114 (App. Div.) (citing New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003)), certif. denied, 185 N.J. 265 (2005). Thus, not only would plaintiffs need to prove a CFA violation by defendant, but also that they proximately sustained an "ascertainable loss."

N.J.S.A. 56:8-19 specifies that in order to have standing to sue under the CFA, a consumer must prove an "ascertainable loss of moneys or property." Ibid.; see also Laufer v. U.S. Life Ins. Co., 385 N.J. Super. 172, 186 (App. Div. 2006). Given the enhanced remedies of treble damages and counsel fees available under the Act, "[t]he ascertainable loss requirement operates as an integral check upon the balance struck by the CFA

between the consuming public and sellers of goods." Thiedemann v. Mercedes-Benz USA, L.L.C., 183 N.J. 234, 251 (2005).

Although the term "ascertainable loss" is not defined within the CFA, our Supreme Court has ascribed to it the common notion of "ascertain," i.e., "to make (a thing) certain; establish as a certainty; determine with certainty." Thiedemann, supra, 183 N.J. at 248 (2005) (quoting Webster's Third Int'l Dictionary 126 (1981)). While the loss does not have to have been paid out of pocket by the consumer, it still must be "quantifiable or measurable." Thiedemann, supra, 183 N.J. at 248. An "'estimate of damages, calculated within a reasonable degree of certainty,' will suffice." Id. at 249 (quoting Cox v. Sears Roebuck & Co., 138 N.J. 2, 22 (1994)). The evidence of loss must not be "hypothetical or illusory." Thiedemann, supra, 183 N.J. at 248. Mere inconvenience to a consumer is not enough to prove ascertainable loss under the Act. Perkins v. DaimlerChrysler Corp. 383 N.J. Super. 99, 109 (App. Div. 2006) (citing Thiedemann, supra, 183 N.J. at 251-52). Also, "non-economic damages are not recoverable under the CFA." Cole v. Laughrey Funeral Home, 376 N.J. Super. 135, 144 (App. Div. 2005) (citing Gennari v. Weichert Co. Realtors, 148 N.J. 582, 612 (1997)).

In this case, the existence of ascertainable loss under the CFA would hinge upon plaintiffs' proofs of damages, which, as we have already stated, may be developed further on remand. The proofs on quantum meruit damages will be relevant to plaintiffs' claims of ascertainable loss under the CFA. If, for example, the trial court concludes on remand that plaintiffs received less in value than the $288,389 that they paid to defendant, then the shortfall could logically comprise an ascertainable loss. However, the loss would still have to be shown under the CFA to have been proximately caused by misrepresentation or by other unconscionable commercial practices on the part of defendant. If that loss was not, in fact, caused by conduct violative of the CFA, but instead stemmed from defendant's negligence, incompetence, or other non-fraudulent behavior, then the remedies under the statute would not apply.

On the other hand, if no such shortfall in value is established on remand, then plaintiffs would need to demonstrate some other form of ascertainable loss to satisfy the CFA's requirements. Again, the record should be developed on remand to address these CFA issues.[2]

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[2] We do not consider here the potential impact of a 2004 amendment to the CFA, which instructs that "the provisions of this act shall not apply to . . . [a]ny person required to register pursuant to 'The New Home Warranty and Builders' (continued)

C.

The balance of plaintiffs' arguments on appeal, including their claim that the trial judge was unfairly biased against them, lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). We are confident that, should the trial judge continue to be assigned this matter on remand, he will resolve the open issues conscientiously and expeditiously.

Affirmed in part, and remanded in part. We do not retain jurisdiction.

(continued)
Registration Act[.]'" Contractor's Registration Act, N.J.S.A. 56:8-140; see also Czar, Inc. v. Heath, 198 N.J. 195, 201, 208-10 (2009) (discussing whether the CFA or the New Home Warranty Act, N.J.S.A. 46:3B-1 to -20, applied to plaintiff's claim). The New Home Warranty Act provides that "[n]o builder shall engage in the business of constructing new homes unless he is registered with the [Department of Community Affairs]." N.J.S.A. 46:3B-5. The regulations promulgated under the 2004 amendment provide that only home improvements are covered by the CFA, and the term "'home improvement' . . . does not include the construction of a new residence." N.J.A.C. 13:45A-16.1A. These issues, which were not previously addressed, are reserved for the trial court in its further consideration of plaintiffs' CFA claims.