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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5171-10T1

PRECISION MIRROR & GLASS, INC.,

Plaintiff-Respondent,

v.

LIBERTY VIEW CONSTRUCTION CORP.,

Defendant-Appellant.

Submitted September 11, 2012 - Decided September 25, 2012

Before Judges Reisner and Harris.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3268-08.

Shannon Garrahan, attorney for appellant.

Respondent has not filed a brief.

PER CURIAM

Defendant Liberty View Construction Corp. appeals from a May 11, 2011 order, entered after a bench trial, granting a $115,775 judgment in favor of plaintiff Precision Mirror & Glass, Inc. and dismissing defendant's counterclaim. On this appeal, defendant contends that the verdict was against the weight of the evidence, the trial judge misapplied the Uniform

Commercial Code (UCC), N.J.S.A. 12A:1-101 to 2-725, and the judge misconstrued the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. Having reviewed the record, we find no merit in any of these contentions, and we affirm.

I

Plaintiff sued defendant, a general contractor, on a book account for the delivery and installation of mirrors and glass shower enclosures in a newly-constructed residential complex on the Jersey City waterfront. Defendant filed a counter-claim for breach of contract and violation of the CFA.[1] In his opening statement, plaintiff's counsel asserted that the case involved a "classic textbook UCC case" involving a "business to business transaction." He also asserted that defendant did not conform to the UCC's notice provisions. Defense counsel did not disagree that the UCC governed the case.[2]

[1] The counterclaim alleged additional causes of action that defendant chose not to pursue at trial.

[2] At the April 4, 2011 pre-trial conference, defense counsel also stipulated into evidence all of plaintiff's pre-marked trial exhibits. Plaintiff's counsel agreed that the defense exhibits could be marked for identification, and admitted in evidence subject to authentication. Defense counsel reserved no such possible objection to plaintiff's exhibits. We note that, throughout the trial, the judge was scrupulously careful to ensure that documents admitted in evidence were either admitted by stipulation or otherwise admitted pursuant to specific evidence rules.

According to defense counsel, the CFA claim was based on allegations that defendant was "billed for items that were not received" and that "some of the items received did not conform to the . . . proposal or the invoice." Specifically, defendant claimed that plaintiff sent defendant $68,000 worth of invoices for items that were not delivered, and either caused damage or installed goods in a defective manner, which cost defendant $13,000 to repair or correct. Liberty also claimed a $27,000 credit for defective work for which Liberty already paid plaintiff.

This was the most pertinent trial evidence. Plaintiff presented testimony from its president, Thomas Basile. He testified that his company manufactured "frameless glass shower enclosures and custom mirrors and glass." Plaintiff was the only company in the industry that made frameless glass doors, and was able to produce them to order and install them within short time frames. Basile described the parties' course of dealing as follows. In 2007, defendant solicited a preliminary quote for glass doors and mirrors for its project. Plaintiff sent a proposal for "only the units that were ready at the time," and defendant accepted it. Thereafter, the parties proceeded on the basis of phone calls with documents to follow. "They would call us up and say we need units, Building 3, units

5 through 12." After its employee took measurements in those units, plaintiff would send defendant a written proposal. On acceptance, defendant would "produce a purchase order for each of those units . . . accepting the price and the product that we described." According to Basile, "[w]e have a purchase order for everything that was ever sent to them." Plaintiff would then manufacture the required doors and mirrors, install them, and send defendant a bill. The work primarily involved installing one shower door and several mirrors in each unit. Each door and mirror was custom made, specifically for the job for which it was ordered, and was cut to fit the measurements of the unit in which it would be installed.

The arrangement proceeded without incident, with defendant making timely payments, until late December 2007, when Basile received a phone call from someone at Liberty telling him that the payment check would be delayed but "not to worry." When a handwritten check arrived, instead of the usual computer-generated check, Basile worried that perhaps Liberty was running short of funds. Defendant sent one more computer-generated check for $56,794, on March 19, 2008, and then stopped making payments.

Between December 2007 and March 2008, the job site became "chaotic," after defendant replaced all of its staff on the

project. In "early 2008," defendant's president Peter Moccia told Basile that defendant was having some financial problems and asked for a discount on the price defendant had already agreed to pay, for mirrors defendant had already ordered. In an attempt to preserve the parties' ongoing business relationship, Basile agreed to the discount. During his testimony Basile identified a summary his office had prepared from its computerized records, showing the proposals submitted, the invoices sent, and payments received. He also identified the invoices that defendant had not paid.

According to Basile, in March 2008, defendant became delinquent in paying the invoices and Basile demanded payment. In response, for the first time, defendant's new project manager notified Basile that items were "missing." Basile testified that on a large job site, it was not unusual for mirrors to be missing from individual units; sometimes they were stolen from the job site or installation might be delayed due to ongoing work by other construction professionals. However, he and the project manager reached an agreement on a payment plan, in return for which plaintiff would supply or replace mirrors defendant claimed were missing from certain units.

However, defendant failed to pay the outstanding invoices and, apart from the one phone call about some missing mirrors,

defendant never gave plaintiff notice as to any items that were nonconforming or work that was substandard. Defendant never provided a "punch list" of work that needed to be corrected.

Basile also testified that although plaintiff's proposals included the cost of installation in the price of the goods, even if defendant decided not to accept delivery, defendant was still obligated to pay for the items once they were manufactured because the mirrors and doors were custom-made. Plaintiff introduced in evidence its invoices and the signed packing slips documenting defendant's receipt of the goods for which it failed to pay.

Defendant's first witness, Don Leenig of Anthony's Custom Closets (Anthony's), provided glass shower doors and mirrors to the project starting in March 2008. His company followed the same business practice as plaintiff, i.e., providing and installing the product based on a written proposal that defendant had accepted. However, unlike plaintiff, Anthony's did not manufacture the products but instead bought them from a manufacturer. Like Basile, Leenig confirmed that once a shower door was custom-made, he would expect the client to pay the entire price quoted in the proposal, even if the client refused to accept delivery or permit installation. Although his company essentially replaced plaintiff on the project, Leenig did not

testify that his company was asked to cure any deficiencies in plaintiff's work or even that he noticed any such problems while his company was working on the job.

Defendant next called Brian Murray, who was hired to replace defendant's prior project manager in mid-February 2008. Murray testified that when he took over the job, he reviewed invoices and concluded that plaintiff's prices were too high. His staff also reported to him that there were some problems with plaintiff's work, such as too much caulking around some of the mirrors and some mirrors being smaller than the proposals called for. He testified that he back-charged plaintiff for these defects. However, he admitted on cross-examination that he never notified plaintiff in writing of these alleged problems or gave plaintiff an opportunity to cure the deficiencies. He claimed he made a couple of phone calls to plaintiff, but did not describe any problems "in specificity." He admitted that "[w]e never had a face to face or a sit-down or a review of any particular item. That just didn't happen." Murray also identified his signature and that of his predecessor on several of the packing slips that accompanied plaintiff's delivered materials.

Defendant also presented testimony from Peter Mocco, Jr. (Mocco), who in 2007 was the "finish super" on the project,

overseeing the completion of construction from the "rough construction" (installation of electric, plumbing and HVAC) "to the finished [unit]" which would be sold or rented. He was responsible for inspecting the work done by the various subcontractors, including plaintiff, and reporting any problems to then-project manager Robert Feaster. According to Mocco, he provided Feaster with a written report on problems with plaintiff's work, including excessive caulking and mirrors being chipped, scratched or out of alignment. He did not know, however, what action Feaster took after receiving the report. In February or March 2008, he also created a report estimating the cost of replacing all of the damaged mirrors that plaintiff had installed and fixing problems with the caulking of the shower doors. He estimated the cost at about $27,000 to replace the mirrors and about $13,000 to have defendant's own employees fix missing caulk. He sent that report to Murray and to Donald Wuertz, the head of defendant's accounting department.

Mocco testified that plaintiff billed defendant for about $14,000 worth of tempered glass stair railings that were not delivered or installed, and about $13,000 for four shower enclosures that were not installed. He also testified to additional missing mirrors and other missing work, totaling about $68,000.

Mocco further testified that he obtained a $58,000 quote from Anthony's to replace 100 allegedly defective mirrors, but admitted that defendant had not actually replaced those mirrors. Responding to the judge's questions, he also admitted that defendant had already sold all of the units in which the 100 allegedly defective mirrors were located. On cross-examination, Mocco further conceded that the $58,000 estimate allegedly provided by Anthony's was actually a document that Mocco himself prepared in September 9, 2009 "for this litigation." Mocco testified that his written report to Feaster about alleged chipped or defective mirrors was based on handwritten notes that defendant did not turn over in discovery. He did not know whether Feaster ever brought the alleged problems to plaintiff's attention and gave it an opportunity to cure the defects. He further conceded that Feaster signed a packing slip for the custom-made stairway glass that Mocco contended was never delivered or installed in Building G.

Defendant next called Peter Mocco, Sr. (Mocco, Sr.), who testified that he was defendant's general manager, as well as the developer for the Liberty Harbor project. He explained that the project was designed to create a "Greenwich Village" style neighborhood of brownstones and relatively low-rise apartment buildings, in what had been a blighted area of the Jersey City

waterfront. In 2007, defendant was under pressure to complete the first phase of construction, many units of which were already under contract with buyers. He described in detail the importance of completing the stairway glass in one of the six-unit buildings, because Jersey City would not issue a certificate of occupancy unless the building had stair railings. Plaintiff was to specially fabricate and install the railings, but there were repeated delays. According to Mocco, Sr., despite his two anxious phone calls, plaintiff did not deliver or install the railings, and therefore Mocco, Sr. decided to bring in another contractor to perform the remaining glass work on the project.

Mocco, Sr. testified that he believed Feaster had a "corrupt" relationship with the subcontractors on the job, leading to overpayment for the work. Therefore, Mocco, Sr. fired Feaster and directed his replacement, Murray, to rebid all of the subcontracts. Murray was able to obtain lower bids from all of the existing subcontractors, including plaintiff. According to Mocco, Sr., he and Murray also had a speaker-phone conference with a representative of plaintiff, who refused to fix or replace the out-of-level or scratched mirrors unless defendant first paid the outstanding invoices.

Mocco, Sr. insisted that the satisfaction of the first buyers in this development, which would eventually have 10,000 units, was critically important for future sales. But he also contended that defendant sold many units without fixing the allegedly defective mirrors, because defendant had no funding to pay for repairs. He testified that he had promised complaining homeowners that as soon as defendant resolved this litigation, the mirrors would be fixed.

Finally, defendant presented testimony from John Sedlock, one of the owners of Bergen County Glass, who testified that his company was paid about $26,000 to supply and install glass stair railings in two Liberty View buildings.

II

After receiving post-trial briefs, Judge Linda Grasso Jones issued a 100-page oral opinion, which she placed on the record on May 6 and 11, 2011. In her opinion, Judge Jones made detailed factual and credibility findings. She determined, largely based on admissions from defendant's own witnesses, that defendant never gave plaintiff notice of, or an opportunity to cure, any of the allegedly defective work and therefore was not entitled to withhold payment for that work. She also found, based on her review of plaintiff's invoices and signed delivery slips for the stairway glass, as well as the July 2008 proposal

from Bergen Glass, that Bergen Glass could not possibly have installed the stairway railings that were the subject of the dispute in this case. She found that the glass stairway pieces "that Mr. Mocco, Sr. recalls complaining to Precision about, arrived at the job site and were signed for."

She did not find Peter Mocco, Jr., to be credible on important points. She found that the substance of the alleged homeowner complaints about defective mirrors was undocumented hearsay, and defendant failed to prove that it had any legal obligation to repair allegedly defective mirrors in units it had already sold. In particular, she did not believe that the "anxious" first-time homebuyers to whom he referred in his testimony would completely overlook "alleged scratches and chips in bathroom mirrors during the walk through held prior to closing" and would fail to demand that "monies be held in escrow at closing."

Addressing defendant's contention that it had no enforceable, formal signed contract with plaintiff, the judge found that Feaster, who was defendant's agent, "often worked with contractors without utilizing the AIA form contract." She also found that there were sufficient writings (e.g., proposals, purchase orders, and packing slips) to support most of plaintiff's claims. However, after reviewing in detail all of

the contested invoices, the judge found that plaintiff had not proven its right to payment for $9870 for shower doors in three specific units, as to which defendant produced invoices from Anthony's. She noted that perhaps plaintiff had manufactured those doors and installed them in other units, but she was unwilling to grant plaintiff judgment based on speculation. She likewise found plaintiff did not prove a $5305 claim for mirrors as to which defendant produced a corresponding purchase order from Anthony's.

With respect to a series of additional invoices, the judge found that defendant had produced no legally competent evidence to support its claims that the materials referenced in those invoices were either defective or not provided. Based on those detailed factual findings, the judge determined that plaintiff was entitled to $115,775.

The judge then further addressed defendant's claim for a $27,000 set-off for allegedly scratched, chipped or improperly installed mirrors. She reasoned that the transactions between the parties were governed by N.J.S.A. 12A:1-102. She found that a formal written contract was not required, and defendant did not prove that it entered into such contracts with any of its suppliers. Relying on Quality Guaranteed Roofing, Inc. v. Hoffman LaRoche, 302 N.J. Super. 163, 166 (App. Div. 1997), the

judge found as fact that "the contracts in question in this matter were predominantly for the provision of goods and that the UCC applies." She credited Basile's testimony that while installation was included in the contract price, "the contract price would not be reduced if the customer did not want installation." She also credited Leenig's testimony that if a customer ordered a custom product but later declined to accept installation, "there would be no reduction in price based upon the lack of installation."

The judge also rejected defendant's argument that the Statute of Frauds barred enforcement of the contracts, and that plaintiff's written proposals and defendant's purchase orders were insufficient to constitute a contract for the sale of goods. Relying on N.J.S.A. 12A:2-201, concerning contracts for custom-made goods, the judge found

> that the purchase orders which were produced by Liberty View are writings and that appears to be the manner in which Liberty View conducted business. . . . Additionally the items that were manufactured in this case, in accordance with the testimony of Mr. Basile, were custom items. The court is satisfied that pursuant to [N.J.S.A.] 12A:2-201, the contract [is] enforceable.

She found "absolutely not credible" Mocco's testimony that defendant's purchase orders were internal documents that were never issued to the suppliers. Rather, she found that the

purchase orders were issued to plaintiff and that defendant's practice was to send the signed purchase orders to plaintiff to authorize the purchase and installation of the goods. She also found it was defendant's practice to sign and return plaintiff's written proposals.

The judge then explained in further detail why she did not credit defendant's claim for an approximate $68,000 set-off based on alleged damaged or defectively installed mirrors, or its $13,000 claim for defects in the shower door installations. She found that defendant's witnesses on those issues were either not credible or lacked personal knowledge of the alleged defects. She also credited Basile's testimony that defendant never provided plaintiff with a punch-list of items that needed to be fixed. Citing N.J.S.A. 12A:2-605, and N.J.S.A. 12A:2-607, the judge reasoned that defendant was barred from seeking a credit for goods it had already accepted, due to its failure to give plaintiff timely or specific notice of any alleged defects and an opportunity to cure. In that discussion the judge specifically noted Mocco, Sr.'s lack of credibility concerning his alleged complaints about defective work.

Addressing defendant's CFA claims, the judge found that defendant improperly relied on portions of the statute and regulations governing home improvement contractors. See N.J.A.C.

13:45A-16.2(a)(12). Relying on Splash of Tile, Inc. v. Moss, 357 N.J. Super. 143, 154 (App. Div. 2003), she concluded that those enactments did not govern new construction. The judge also expressed doubt whether the CFA would apply to this contract because it did not appear to be a "consumer transaction" within the intendment of the Act. However, she did not base her decision on that ground. Instead, the judge found as fact that there was no consumer fraud within the meaning of the CFA.

Relying on Cox v. Sears Roebuck & Co., 138 N.J. 2 (1994), the judge reasoned that a breach of contract, without more, did not establish a CFA violation. And, defendant "has failed even to prove that Precision committed a breach of contract." She also noted that, to the extent she rejected a few of plaintiff's claims, it was not because defendant had established fraudulent billing for undelivered goods. Rather, the evidence was in equipoise. Plaintiff failed to prove that the goods "were in fact delivered to the site" but defendant also failed to prove that "the goods were not delivered." She noted testimony that the goods could have been stolen after they were delivered to the job site, or they could have been installed in a different housing unit than the one for which they were intended.

She also found no credible evidence that defendant "ever contacted Precision to inform it" about any alleged defects in the goods or services provided. She found no proof of "fraudulent invoicing," noting that the one $40 error she found in one bill did not constitute consumer fraud. Finally, she did not credit Mocco, Sr.'s testimony concerning the alleged late delivery of the stairway glass.

III

On this appeal, our review of the trial judge's decision is limited. We are bound by her factual findings so long as they are supported by sufficient credible evidence. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). And we owe particular deference to the trial judge's evaluation of witness credibility. Cesare v. Cesare, 154 N.J. 394, 412 (1998). On the other hand, we owe no special deference to a trial judge's legal interpretations. Manalapan Realty v. Manalapan Twp. Commission, 140 N.J. 366, 378 (1995). Having reviewed the record, we find that the trial judge's factual determinations are amply supported by the evidence, and in light of those factual findings, her legal conclusions are unassailable.

On this appeal, defendant raises the following points for our consideration:

POINT I: THE TRIAL COURT'S JUDGMENT IN FAVOR OF THE PLAINTIFF WAS NOT SUFFICIENT NOR SUBSTANTIAL, CONSIDERING THE PROOF AS A WHOLE; THEREFORE FINDINGS REACHED BY THE TRIAL COURT WERE NOT SUPPORTED BY THE CREDIBLE EVIDENCE AND SHOULD BE REVERSED.

A. THE TRIAL JUDGE ERRED IN RELYING UPON THE PLAINTIFF'S DOCUMENTARY EVIDENCE WHICH WAS ILLEGIBLE AND LACKING IN TESTIMONY.

B. THE TRIAL COURT ERRED IN FINDING THE PLAINTIFF'S DIRECT CASE WAS SUPPORTED BY SUBSTANTIAL AND SUFFICIENTLY CREDIBLE EVIDENCE.

POINT II: THE TRIAL JUDGE IMPERMISSIBLY ALLOWED THE PLAINTIFF TO PROCEED PURSUANT TO THE UNIFORM COMMERCIAL CODE, ERRONEOUSLY INTERPRETED THE UNIFORM COMMERCIAL CODE, AND INACCURATELY APPLIED THE UNIFORM COMMERCIAL CODE.

A. THE TRIAL COURT'S ANALYSIS WAS INCORRECT WHEN IT PREMATURELY CONCLUDED THAT THE UNIFORM COMMERCIAL CODE APPLIED TO THE TRANSACTIONS.

B. THE TRIAL COURT ERRONEOUSLY FAILED TO EVALUATE PLAINTIFF'S PERFORMANCE UNDER THE UCC AND ERRONEOUSLY INTERPRETED THE UNIFORM COMMERCIAL CODES SECTIONS ON "CURE."

C. EVEN ASSUMING THAT THE UCC GOVERNS THE TRANSACTIONS, THE TRIAL COURT ERRED IN FAILING TO CONSIDER WHETHER OR NOT PLAINTIFF SATISFIED THE PERFORMANCE ELEMENT UNDER THE UCC.

POINT III: THE TRIAL JUDGE ERRONEOUSLY LIMITED THE APPLICATION OF THE CONSUMER FRAUD ACT; THEREFORE ITS ANALYSIS WAS INCOMPLETE.

A. THE SUPERIOR COURT ERRED AS A MATTER OF LAW WHEN IT ERRONEOUSLY HELD THAT THE

CONSUMER FRAUD ACT APPLIED NARROWLY AND DID NOT APPLY TO THIS CONSUMER TRANSACTION.

B. THE TRIAL COURT ERRONEOUSLY INTERPRETED THE CONSUMER FRAUD ACT IN FINDING THAT DEFENDANT DID NOT ESTABLISH FRAUD UNDER THE STATUTE.

We conclude that these arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated in the trial judge's comprehensive opinion. We add the following comments.

We agree with the trial judge that plaintiff produced sufficient evidence to prove its book account claim, based on documents that were introduced in evidence by stipulation and based on Basile's credible testimony.

We also find no basis to second-guess the judge's decision to credit Basile's testimony over that of Mocco, Sr. and his son. Indeed, even on a cold record, we perceive significant weaknesses in their testimony. For example, given Mocco, Sr.'s insistence that it was critically important to keep the initial purchasers happy so they would encourage others to buy units, it defies belief that he would tell those purchasers that he could not replace defective mirrors until this litigation was resolved. His son's testimony was equally questionable.

Defendant's arguments concerning the application of the UCC

are likewise insubstantial. Defense counsel did not object at the pre-trial conference to plaintiff's reliance on the UCC to support its claim. Further, the court properly considered the parties' course of dealing and the usage in the trade, in determining that the parties had an enforceable contract and that the contract was primarily one for the sale of custom-made goods. See N.J.S.A. 12A:1-205; N.J.S.A. 12A:2-201(1), -201(3)(a). The testimony of both sides' witnesses supports the judge's findings. Substantial evidence also supports the judge's findings that, if there were any defects, defendant neither timely rejected the goods nor gave plaintiff an opportunity to cure the defects. N.J.S.A. 12A:2-508, -606(b).

Defendant's remaining arguments, under both the UCC and the CFA, are premised on its version of the facts, which the judge reasonably rejected.

Affirmed.