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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-o

RICHARD WILLIAMS and CHRISTIE
WILLIAMS,

Plaintiffs-Appellants,

v.

CHASE HOME FINANCE LLC, LaSALLE

BANK NATIONAL ASSOCIATION, as

Trustee for Certificateholders

Of Bear Stearns Asset Backed

Securities I Asset Backed

Certificates, Series 2005-HE6,

and EMC MORTGAGE CORP.,

Defendants-Respondents,

and

NJ REO ASSET MANAGEMENT & REALTY, INC.

and RALPH BARONE, Individually,

Defendants.

May 20, 2014

Submitted April 29, 2014 –
Decided

Before Judges Fisher and
Espinosa.

On appeal from the Superior
Court of New Jersey, Law Division,
Monmouth County, Docket No. L-
3366-11.

Lueddeke Law Firm, attorneys for
appellants (Karri Lueddeke, on the
brief).

Parker Ibrahim & Berg LLC,
attorneys for respondents (Sanjay P.
Ibrahim and Evan Molloy, on the
brief).

PER CURIAM

Plaintiffs Richard and Christie Williams commenced this action in connection with their purchase of a Keyport home from defendants Chase Home Financial, LaSalle Bank National

Association, and EMO Mortgage Corp.;¹ sellers were aided in the sale of the foreclosed property by realtors NJ REO Asset Management & Realty, Inc. and Ralph Barone, also joined as defendants. Plaintiffs allege the property's Multiple Listing Service (MLS) listing – specifically its water sewer description – constituted an affirmative misrepresentation in violation of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -166. Because nothing in the listing or contract of sale could be viewed as a false representation, we affirm the dismissal of plaintiffs' claims.

The listing stated the property was "BEING SOLD AS IS[,] BUYER IS RESPONSIBLE FOR ALL INSPECTIONS AND CERTIFICATES" – i.e., "BEING SOLD IN AS IS CONDITION." The MLS listed the property's water sewer description as "[p]ublic [s]ewer, [p]ublic water, [s]eptic," and contained a disclaimer that the information presented in the listing was "reliable but not guaranteed." Plaintiffs claimed that in September 2009 – after reviewing the listing and assuming the water sewer description meant the property had "started out on [a] septic system" but had later been connected to "the public sewer" – they purchased the home for \$75,000 without conducting a title search or obtaining any inspections of the property.

The contract and incorporated addenda confirmed that the "[p]roperty [wa]s being sold [a]s-[i]s with buyer responsible for municipal and state certifications" and that "[b]uyer waive[d] all inspections." The contract documents also advised that "[b]uyer [was to] rely solely on [b]uyer's inspection and review to evaluate the [p]roperty" and clarified that the sellers had obtained the property through a foreclosure proceeding and had not conducted any inspections of the property. No sewer charge was included in the sale. In short, as the contract documents unambiguously disclose, "[b]uyer acknowledge[d] that there ha[d] been no representation(s) by [s]eller or any other person acting as [s]eller's representative . . . regarding the condition of the [p]roperty."

After taking title, plaintiffs discovered in November 2009 that the property was not linked to the public sewer system and its septic tank was defunct. Connecting the property to the public sewer system cost plaintiffs \$30,732, plus alleged accrued interest in the amount of \$1,050 and the loss of an \$8,000 tax credit. In seeking recovery of these damages, plaintiffs filed a complaint against the sellers and realtors asserting CFA violations, breach of contract, common law fraud, equitable fraud, and negligence. The listing's water sewer description formed the basis for these causes of action.

The realtors did not file a responsive pleading. The trial judge conducted a proof hearing, and later dismissed the claims against the realtors for "failure to establish a cause of action." The sellers thereafter successfully moved for summary judgment.

Plaintiffs' appeal is limited to the dismissal of their CFA claims. The CFA prohibits

[t]he 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 (emphasis added).]

To sustain such a claim, plaintiffs were required to demonstrate unlawful conduct, an ascertainable loss and a causal relationship between the two. Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 389 (2007); N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003).

Claims alleging misrepresentation "do not require proof of intent to mislead" in order to succeed; "[t]he capacity to mislead is the prime ingredient." Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 378 (1977). And "[n]ot just 'any erroneous statement' will constitute a misrepresentation prohibited by [the Act]. The misrepresentation has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607 (1997).

Plaintiffs argue that the words "public sewer" in the listing's phrase "[p]ublic [s]ewer, [p]ublic [w]ater, [s]eptic" was an affirmative misrepresentation because it had the capacity to mislead them into believing the property was linked to the public sewer system. We reject this argument. The quoted phrase, which appears to incorporate all possible water systems, is not inherently misleading, only inherently ambiguous. The listing provided no basis upon which to presume the property possessed either public sewer or septic. Both systems appeared on the listing without explanation. The duality of the water sewer description confused the matter; that confusion deprives that description of the capacity to mislead.

The description's ambiguity aside, plaintiffs' claim ignores the listing's unambiguous disclaimer, which declared the "[i]nformation reliable but not guaranteed." Plaintiffs argue this disclaimer is of no consequence because reliability is not a factor in the misrepresentation analysis required by the CFA. Although true, this argument ignores the relevant portion of the disclaimer: "not guaranteed." The disclaimer was sufficient to prevent the listing from possessing the capacity to mislead. See Fenwick, supra, 72 N.J. at 378. Because the listing does

not constitute a misrepresentation, plaintiffs failed to satisfy the "unlawful conduct" prong of a successful CFA claim. Int'l Union of Operating Eng'rs, supra, 192 N.J. at 389.²

Affirmed.

¹While the identity of the actual seller of the property has not been made clear, our disposition of the appeal renders that uncertainty irrelevant.

2If the listing was misleading to these particular buyers, it was only because they elected to purchase a previously foreclosed-upon home in as-is condition without examining the property, despite the fact that sellers made no representations or assurances as to condition, and the realtors disclaimed the information they did provide about the property. In spite of an admitted awareness that the water sewer description was peculiar, plaintiffs waived all inspections. A mere title search would have revealed – as demonstrated when the search was later conducted at the trial judge's request – that the property's "sewer account [number]" had "[n]o account listed for the . . . owner or property location."

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