SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4188-15T3

DEEDRA L. BOWEN,

Plaintiff-Appellant,

v.

HYUNDAI MOTOR AMERICA,

Defendant-Respondent.

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Argued April 24, 2017 – Decided June 1, 2017

Before Judges Currier and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-6224-14.

Lewis G. Adler argued the cause for appellant (Mr. Adler and Paul DePetris, attorneys; Mr. Adler and Mr. DePetris, on the briefs).

David S. Haase argued the cause for respondent (White and Williams LLP, attorneys; Mr. Haase and Siobhan K. Cole, of counsel and on the brief).

PER CURIAM

In this appeal, we address the issue of whether an aggrieved consumer of a new automobile, who successfully pursued and was

granted a repurchase of her vehicle through a manufacturer's informal dispute settlement mechanism, may reject that settlement offer and file a court action for similar relief in order to pursue an attorney's fee award not available to the consumer under the manufacturer's settlement program. Because we find that the two recourses of action are not mutually exclusive, and an award of attorney's fees is mandatory under the New Jersey Motor Vehicle Warranty Act (Lemon Law), N.J.S.A. 56:12-29 to -49, we reverse.

Plaintiff Deedra Bowen purchased a new Hyundai Sonata manufactured by defendant Hyundai Motor America. The selling dealer issued the manufacturer's warranty. During the warranty period the vehicle experienced a recurring problem despite multiple attempts at repairing the issue.

Through counsel, plaintiff served a notice of demand for revocation of acceptance of the vehicle pursuant to the New Jersey Uniform Commercial Code (UCC), N.J.S.A. 12A:2-608, and the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Magnuson-Moss), 15 U.S.C.A. §§ 2301 to 2312. Plaintiff requested that defendant accept the return of the car, refund all payments made to date, including any down payment, and satisfy any outstanding financing or loan obligations. The demand requested attorney's fees of $1250. The letter concluded:

> If the aforesaid action proceeds, the consumer(s) shall seek the remedy of revocation and actual/incidental/consequential and statutory damages as well as attorney's fees and court costs. While the attorney's fees in this matter are currently small, as the case progresses through litigation, the attorney's fees and costs shall continue to accrue.

After requesting further information, defendant responded that its review of the repair history for the car did not warrant a repurchase. However, "in the interest of goodwill," defendant offered $2000 and a repair supervised by a Hyundai specialist if the problem recurred. Defendant also advised that plaintiff could participate in its alternative dispute program, BBB Auto Line (BBB), provided by defendant at no cost to its consumers. A decision rendered under the program was not binding on the consumer; a consumer was not entitled to attorney's fees, civil penalties or punitive damages.

Defendant's warranty, in fact, required plaintiff to submit any disputes regarding warranty coverage to BBB prior to seeking any Magnuson-Moss remedies in a court action. Although New Jersey's Lemon Law does not require consumers to submit their claims to an informal resolution program before instituting litigation in court, the BBB program is available for the resolution of Lemon Law claims. See N.J.S.A. 56:12-39.

Plaintiff submitted a customer claim form to the BBB program seeking revocation pursuant to Magnuson-Moss and the New Jersey UCC but specifically withholding her Lemon Law claims. The arbitrator rendered an award in favor of plaintiff, finding that a repurchase of the vehicle was the fair resolution and remedy for the dispute.

Plaintiff rejected the arbitration award and subsequently filed an action in Superior Court asserting claims under Magnuson-Moss, the New Jersey UCC and Lemon Law.

The parties engaged in discovery. Plaintiff answered interrogatories, produced requested documents, gave a deposition and retained an expert to provide a report. Plaintiff filed several motions to procure discovery from defendant. On the eve of arbitration, the parties entered into a stipulation of settlement in which defendant agreed to a Lemon Law repurchase of the vehicle, with the issue of plaintiff's entitlement to and amount of counsel fees to be submitted to the court for its determination.

Plaintiff argued before the trial judge that, as a prevailing party, she was entitled to attorney's fees under the Lemon Law, N.J.S.A. 56:12-42. Her counsel freely conceded that the only objective of rejecting the BBB arbitration award in favor of court litigation was the opportunity to recoup his attorney's fees. The

judge denied plaintiff's fee application in an oral decision on April 1, 2016, finding that plaintiff was not entitled to fees in the court action filed solely for the purpose of recovering counsel fees because such fees were not permitted in the BBB arbitration.

Plaintiff moved for reconsideration, and the judge issued a written decision and order on May 20, 2016, denying the motion. Although the court "[a]ssum[ed] that plaintiff's counsel is entitled to an award of fees by virtue of the fee shifting provision in the Lemon Law," he found that the level of success achieved in the litigation was a factor to be considered in determining an award of counsel fees under the Lemon Law. He reasoned that both the arbitration and the settlement of the court litigation had resulted in an award to plaintiff of the repurchase of her vehicle. "Therefore, there was no level of success achieved in the litigation, with the exception of generating an attorney's fee."

On appeal, plaintiff argues that she was a prevailing party in the Lemon Law litigation, and therefore, is entitled to attorney's fees, notwithstanding the results achieved in the BBB arbitration. We agree.

We review a trial judge's decision on an application for counsel fees and costs for an abuse of discretion. "[F]ee determinations by trial courts will be disturbed only on the rarest

of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (citing Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). We apply a similar standard to the court's denial of a motion for reconsideration. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). However, we owe no deference to an exercise of the trial court's discretion that is based on that court's misapprehension of the applicable law. Myron Corp. v. Atlantic Mut. Ins., 407 N.J. Super. 302, 309 (App. Div. 2009)

The Magnuson–Moss Act was enacted in 1975 "to aid consumers by ensuring significant guarantees of quality and performance of warranty provisions for purchased consumer goods, and 'to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.'" Fedor v. Nissan, 432 N.J. Super. 303, 311-12 (App. Div. 2013) (quoting 15 U.S.C.A. § 2302(a)). The Act also sought to advance the intent of Congress that warrantors "establish procedures whereby consumer disputes [could be] fairly and expeditiously settled through informal dispute settlement mechanisms." Id. at 312 (alteration in original) (quoting 15 U.S.C.A. § 2310(a)(1)). The Federal Trade Commission (FTC) was directed by Congress to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which

is incorporated into the terms of a written warranty." Id. (citing 15 U.S.C.A. § 2301(a)(2)).

The FTC Informal Dispute Settlement Procedures Rule, 16 C.F.R. § 703 (2015), governs the mechanism procedures to be followed in an informal dispute proceeding. The decision of an arbitrator is not binding, id. § 703.5(j), and a dissatisfied consumer may pursue all available state and federal legal remedies. Id. § 703.5(g)(1).

In addressing the issue of whether the informal dispute settlement mechanisms were required to include attorney's fees as a remedy, the FTC issued an advisory opinion in 2005. The FTC informed that: "Rule 703 does not require that all remedies that a court might award a plaintiff who prevails in a warranty lawsuit must be within the power of an [informal dispute settlement mechanism] decision maker." Fedor, supra, 432 N.J. Super. at 319 (alteration in original) (citing Unpublished Informal Advisory Opinion of Federal Trade Commission Staff re: Informal Dispute Settlement Procedure in 16 C.F.R. 703, Letter from FTC Acting Associate Director (October 25, 2005)). Specifically,

> [t]he FTC emphasized that an informal dispute settlement mechanism, "operating as a prerequisite to (but not a substitute for) legal action[,]" does not need to award attorney's fees to be fully compliant with the Magnuson-Moss Act and Rule 703, as the objective is informal settlement of the

> dispute. "Congress envisioned [the informal dispute settlement mechanisms] as a warrantor's opportunity to cure a possible breach of warranty" and avoid litigation. Accordingly, the FTC concluded the Magnuson-Moss Act "does [n]ot [c]ontemplate the [a]ward of [a]ttorneys' [f]ees or [c]osts" by informal dispute settlement mechanisms; such remedies are only available to consumers who prevail in an action before the court.
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> [Id. at 319-20 (alterations in original) (citations omitted).]

New Jersey also established its Lemon Law statute in an effort to simplify consumer efforts to remedy new automobile defects. A consumer may present a dispute for resolution to three forums: (1) a summary dispute resolution procedure established within the Division of Consumer Affairs (Division), N.J.S.A. 56:12-37; (2) a Superior Court action, N.J.S.A. 56:12-39; or (3) a manufacturer's informal dispute resolution procedure, N.J.S.A. 56:12-36. "A consumer 'shall be awarded reasonable attorney's fees' under the Lemon Law if he or she is successful in an action brought in the Superior Court or a summary proceeding before the Division." Fedor, supra, 432 N.J. Super. at 318 (emphasis added) (quoting N.J.S.A. 56:12-42).

The use of the word "shall" in the statute mandates an attorney fee award, see Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 325 (2000); it is not optional. However defendant argues, and the trial judge agreed, that plaintiff was not a

prevailing party because she obtained the same relief in the Lemon Law action as she did in the Magnuson-Moss BBB arbitration, and therefore, she is not entitled to counsel fees. We discern no support for this argument.

The parties agree that the repurchase value under the Lemon Law suit is greater than the BBB's repurchase award. That fact, however, is not the only determinant to our discussion of whether plaintiff achieved the status of a prevailing party. Under defendant's warranty, plaintiff was required to first pursue relief through the BBB program, which she did. The arbitrator's decision was not legally binding upon her. Plaintiff chose to reject the decision and pursue her state remedies under the New Jersey Lemon Law.

After full discovery between the parties and just prior to an arbitration proceeding, the parties entered into a stipulation of settlement. Defendant agreed to a Lemon Law repurchase of the vehicle and plaintiff was granted the relief she sought in her complaint. We have stated that a "plaintiff is considered a prevailing party when 'actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Warrington v. Village Supermarket, Inc., 328 N.J. Super. 410, 420 (App. Div. 2000) (alteration in original)

(citations omitted). "'[T]he magnitude of the relief obtained is irrelevant'; an award of nominal damages is sufficient to constitute a party as prevailing." Id. at 421. "When an action ends in settlement conferring relief sought, a prevailing plaintiff's claim for attorneys' fees is not relinquished." Id. at 422 (citations omitted).

When plaintiff achieved a favorable settlement in the court action, she was entitled to an award of counsel fees. As we have previously stated: "A consumer should be able to resolve his claim with the manufacturer without counsel fees, but where counsel is needed, the consumer is entitled to an award of reasonable counsel fees to obtain full relief under the statute." Casal v. Hyundai Motor America, 436 N.J. Super. 296, 303 (App. Div. 2014).

Defendant argues that if consumers are able to "exploit a loophole in the interplay between the Magnusson-Moss Act and the New Jersey Lemon Law," the informal dispute resolution mechanisms will cease to exist to the detriment of consumers and contrary to the intent of Congress and this State Legislature. We have been provided no evidence of that dire prediction in the decades that have passed since these laws were enacted.[1]

[1] Defendant described the informal dispute resolution program in its brief as "enormously successful."

To the contrary, we lauded the benefits provided by alternative dispute resolutions mechanisms in Fedor, supra, where we noted that:

> there are no filing fees or costs for the consumer to initiate use of the mechanism, 16 C.F.R. § 703.3(a); legal representation is not required and the proceedings are tailored to self-represented consumers; an independent expert inspects the vehicle and all records of complaints, at no cost to the consumer; decisions are swiftly made, unburdened by the formality of court process, id. § 703.5(d); and the result is non-binding, thus ensuring a dissatisfied consumer retains the ability to initiate full judicial review, id. § 703.5(g)(1), (j).
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> [432 N.J. Super. at 320-21.]

A consumer is free to reject the BBB award and proceed with a cause of action for breach of warranty under the Lemon Law with the hope of achieving additional relief, including attorney's fees.

We, therefore, remand to the trial court for a determination of the appropriate counsel fee and litigation costs award.

Although the amount of fees is not an issue for us to resolve, we note, and agree with, defendant's argument that plaintiff is not entitled to an award of counsel fees for counsel's time and participation pertaining to the BBB arbitration. Attorney's fees are not a permissible remedy in the dispute resolution process. As we have stated, plaintiff was entitled to reject the

arbitrator's award and pursue her Lemon Law claims, including counsel fees, in state court. It would be inappropriate for a plaintiff, however, to be permitted to assert as part of her claim, fees that were incurred in the dispute resolution proceeding. To allow otherwise would be contrary to the plain language of the Magnuson-Moss statute. Plaintiff and her counsel were fully aware that the BBB program did not permit an award of counsel fees.

We leave the appropriate determination of counsel fees to the trial court to be considered within the guidelines established by our Supreme Court. See Rendine, supra, 141 N.J. at 335. The court shall exercise its discretion to set a fair and reasonable fee for the work required in pursuing plaintiff's remedy under the New Jersey Lemon Law statute, other than the services related to the dispute resolution proceeding.

Reversed and remanded. We do not retain jurisdiction.