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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1694-16T2

DOLORES SMYTHE and CHRISTINA
CUNNINGHAM (Power of Attorney
for Dolores Smythe),

Plaintiffs-Appellants,

v.

WESTINGHOUSE REDEVELOPMENT
ACT, INC. and MAURICE BETHEA,
INFINITY HOME MORTGAGE CO.,

Defendants.

Argued January 23, 2018 – Decided February 23, 2018

Before Judges Fisher and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No.
L-8244-15.

Kevin B. Kelly argued the cause for appellant
(Seton Hall University School of Law, Center
for Social Justice, attorneys; Kevin B. Kelly,
of counsel and on the brief).

Respondent Infinity Home Mortgage Company has
not filed a brief.

PER CURIAM

Plaintiff appeals from the trial court's order, following the entry of default judgment and subsequent proof hearing, dismissing her Consumer Fraud Act (CFA)¹ claims against defendant Infinity Mortgage Company with prejudice. We agree with plaintiff's argument that the judge misapprehended the standard used to determine whether a prima facie case was established at a proof hearing and reverse.

We will disturb a trial judge's determinations only if they represent a clear abuse of discretion. Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). An abuse of discretion results where a decision was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002). "If the judge misconceives or misapplies the law, [the judge's] discretion lacks a foundation and becomes an arbitrary act" requiring this court to view "the matter in light of the applicable law to avoid a manifest denial of justice." In re Presentment of Bergen Cty. Grand Jury, 193 N.J. Super. 2, 9 (App. Div. 1984).

¹ N.J.S.A. 56:8-1 to -20.

When a trial court requires a plaintiff to provide proof of liability as to a defaulted defendant,² courts generally apply the prima facie standard to plaintiff's proofs, "thus not weighing evidence or finding facts but only determining bare sufficiency." Kolczycki v. City of E. Orange, 317 N.J. Super. 505, 514-15 (App. Div. 1999) (citing Heimbach v. Mueller, 229 N.J. Super. 17, 20-24 (App. Div. 1988)); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.2 on R. 4:43-2 (2018) (stating "unless there is intervening consideration of public policy or other requirement of fundamental justice, the judge should ordinarily apply to plaintiff's proof the prima facie case standard of [Rule] 4:37-2(b)^[3] and [Rule] 4:40-1^[4]"). That exercise is "mechanical" and "[t]he trial court is not concerned with the worth, nature or

² The trial court has discretion to require a plaintiff seeking a default judgment to prove "the amount of damages or . . . the truth of any allegation" at a hearing. R. 4:43-2(b); Heimbach, 229 N.J. Super. at 20-21.

³ Rule 4:37-2(b) provides in pertinent part that a defendant "may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor."

⁴ Rule 4:40-1 provides in pertinent part, "[a] motion for judgment, stating specifically the grounds therefor, may be made by a party either at the close of all the evidence or at the close of the evidence offered by an opponent."

extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). Even if the trial court judge finds a failure of proof, the judge should "point out the omissions and give [the] plaintiff the opportunity to remedy them." Heimbach, 229 N.J. Super. at 27.

The judge's consideration of whether plaintiff presented a prima facie case should have been limited to whether plaintiff demonstrated some evidence to support each of the three elements of her CFA claim: "(1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003).

Instead of determining whether plaintiff established a prima facie case as to those elements, the judge improperly determined credibility and weighed the evidence. "No reported case has approved the entry of a judgment in favor of a defaulted defendant on the ground that the court doubted the credibility of the testimony presented." Heimbach, 229 N.J. Super. at 23.

Plaintiff submitted to the court her certification, testimony and supplemental letter brief with documentary evidence in support of her contention that Infinity's appraiser overvalued the

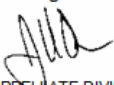
property at \$315,000, justifying the approval of a mortgage on a much-inflated purchase price of the property.⁵ The judge's finding that plaintiff voluntarily signed the purchase agreement and mortgage documents, and that there was no proof she was "induced, or forced, in any way into signing the documents" ignored the proofs that – as the judge found – established the mortgage plaintiff entered into was "incontrovertibl[y]" in excess of the true value of the property, and that defendant had a "history of fraudulent lending practices." The appraisal – which was, although subject to a program underwriter's review, not reduced – resulted in an over-inflated purchase price and consequent mortgage payment in excess of that which plaintiff wanted to pay or should have paid. The judge apparently disregarded those proofs in determining whether plaintiff established Infinity's unlawful conduct under the CFA. The judge, in finding no proof of inducement, ignored evidence of fraud, and that the CFA does not require plaintiff's reliance on the unlawful conduct. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607-08 (1997) (quoting N.J.S.A. 56:8-2, in holding that liability can be established where "any person has in fact been misled, deceived or damaged thereby").

⁵ Plaintiff submitted appraisals valuing the property at \$145,000 and \$160,000; and proof of the municipal assessed value: \$84,900.

In considering plaintiff's testimony regarding Maurice Bethea, Infinity's alleged civil coconspirator, the judge improperly weighed the evidence and judged plaintiff's credibility. Plaintiff testified that Bethea paid partial property taxes because the monthly payment due Infinity exceeded the maximum amount plaintiff, from the inception of the transaction, said she could pay. The judge found it was not plausible for "this [p]laintiff" to prove she was a victim of fraudulent practices. The trial court judge also determined during the proof hearing, "[I]t does seem possible, more than probable[,] that [Bethea] might have paid" the extra \$400 in property taxes.

Plaintiff was entitled to have her proofs considered under the Heimbach standard – without any judgment as to weight or credibility. Even if the judge found plaintiff's proofs lacking, she should have advised plaintiff of any perceived omissions and given plaintiff the opportunity to remedy any deficiency. We therefore reverse the order dismissing plaintiff's complaint with prejudice and remand the case for a proof hearing. Inasmuch as we perceive the judge's views are entrenched on this matter, we order the hearing be conducted before a different judge. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION