SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2959-16T4

THRIFT INVESTMENT CORPORATION,

Plaintiff-Respondent,

v.

ROUTE 88 AUTO SALES, LLC,
and LINDA DIBELLA,

Defendants-Appellants,

v.

BRUCE KERZIC and CRAIG
DIBELLA,

Third-Party Defendants-
Respondents.

Argued March 20, 2018 – Decided May 14, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0638-15.

Linwood H. Donelson, III, argued the cause for appellant Linda DiBella (Rutgers Law Associates, attorneys; Andrew L. Meaker, on the brief).

Donna L. Thompson argued the cause for respondents Thrift Investment Corporation and Bruce Kerzic (DL Thompson Law, PC, attorneys; Anthony Cambria, of counsel and on the brief).

PER CURIAM

Defendant Linda DiBella (Linda)[1] appeals from a January 23, 2017 order: granting third-party defendant Craig DiBella's (Craig) motion for summary judgment; denying her cross-motion for reconsideration of two October 2016 orders granting summary judgment to plaintiff Thrift Investment Corp. (Thrift) and third-party defendant Bruce Kerzic; and denying her request for court-reporter costs and attorneys' fees.

Linda argues the motion judge erred in granting judgment in favor of Thrift, enforcing her personal guarantee of a loan made by Thrift to Route 88 Auto Sales, LLC (Auto),[2] because there are disputed issues of material fact whether she was aware she was signing a guarantee "and whether she was induced to sign such a guarantee by fraud." In response to Thrift's breach of contract

[1] We use the DiBellas' first names for convenience and to avoid confusion, not to connote familiarity.

[2] Linda is the sole member and founder of Auto, a used car dealership; she allegedly signed the guarantee and the note on Auto's behalf. We note that only Linda filed an appeal; she is the only party named on the notice of appeal, the civil case information statement and the notice of appearance filed by her attorney. We therefore decline to address any issues relating to Auto because it has not joined this appeal.

complaint seeking repayment on the loan, Linda filed an answer, a counterclaim, and a third-party complaint against Bruce Kerzic — Thrift's president and majority shareholder — and her son Craig; she denied Thrift's allegations and asserted breach of contract, civil conspiracy, violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, civil racketeering, fraud, and conversion claims against Thrift, Kerzic and Craig.

The trial judge, in an October 31, 2016 written opinion supporting summary judgment, determined Linda's CFA claim against Kerzic did not preclude entry of summary judgment, and explained, although he was initially concerned that Linda, during her conversations with Kerzic, was unaware she was signing a promissory note,

> [t]he papers filed in support of this [summary judgment] motion, however, refute such a claim and contradict [Linda's] allegations against . . . Kerzic.
>
> The [c]ourt finds . . . no genuine issue of fact exists as to whether [p]laintiff[3] owes the full alleged[ ] amount of $105,450.31. Plaintiff accurately points out that neither [d]efendant Auto nor [d]efendant [Linda] questioned the [n]ote until [d]efault was declared. Defendants Auto and [Linda] accepted the initial $150,000 check, deposited the proceeds within a checking account, and

[3] Obviously the judge meant defendant or defendants.

> thereafter made timely payments under the terms of the [n]ote for a number of due dates.

In granting Craig's motion on January 23, 2017, the judge — in another written opinion — found both Auto and Linda, "by initially depositing the [n]ote proceeds and further making timely quarterly payments, were aware of the terms of the [p]romissory [n]ote and were aware of the consequences of defaulting" thereon. After iterating Craig's counters to Linda's claims against him; acknowledging proffered evidence by Craig about a conversation[4] during which Linda is said to have admitted signing the note "of her own volition and in her own name"; and finding no proofs were offered to substantiate Linda's claims against Craig "regarding missing money, checks, and cars," the judge ruled:

> The papers filed in support of the instant motion and throughout the entirety of this case refute and contradict [Linda's] allegations against [Craig]. As previously noted in this litigation, . . . Auto and [Linda] accepted the initial $150,000 check, deposited the proceeds within a checking account, and thereafter made timely payments under the terms of the [n]ote for a number of due dates. Nothing in the record shows . . .

[4] The conversation was supposedly related in a deposition, the transcript of which was supplied to the motion judge as an attachment to Craig's affidavit in support of his summary judgment motion; that transcript was itself said to have contained a transcript of the tape recording of the conversation between the witness and Linda. The deposition transcript is not part of the record on appeal.

> Auto and [Linda] performed such actions under fraud or duress by [Craig].

"We employ the same standard that governs trial courts in reviewing summary judgment orders." Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998). Summary judgment must be granted if the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Summary judgment may be denied "only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.' That means a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting R. 4:46-2 (1995) (amended 1996)). We consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

We conclude summary judgment was precipitously granted because the disputed facts — which should have been considered in

the light most favorable to Linda — call into question Thrift's ability to enforce the guarantee and establish actionable conduct under the CFA.

Even though Linda was the sole member of Auto and the dealer license was in her name, Craig — an experienced used car salesman — managed the business. Linda had intended to be active in the business but chemotherapy treatment curtailed her participation. Craig used blank checks Linda signed to operate the business. Prior to Linda's involvement with Thrift, he discussed a business venture with Kerzic. That Craig also discussed the loan and personal guarantee with Kerzic is evidenced by the preparation of the loan documents prior to Linda's arrival at Thrift's office on the day the documents were allegedly signed.

Linda's other son, Robert, drove her to Thrift's office that day; Craig and Kerzic were there when Linda arrived. Craig did not permit Robert to enter the office claiming it could not accommodate all of them. With no one else in the room, Linda, who could not read the document because she had poor eyesight and was without eyeglasses, was told by Craig that the document — which was neither read nor explained to Linda — was a Dealer Finance

Agreement.[5] Kerzic, who was present at the time, did not comment on that misrepresentation although Thrift had prepared the document. Linda relied on Craig's misrepresentation and signed the document.[6]

The judge, in finding that the documents filed in support of the summary judgment motion refuted Linda's claim and contradicted her allegations against Craig and Kerzic, did not consider the foregoing facts in the light most favorable to Linda. Indeed, refutation and contradiction of facts indicate issues to be decided by a trier of those facts and summary judgment should not have been granted on a judicial determination of same.

Likewise, the judge's findings — that Linda did not question the note until Thrift declared a default, that she and Auto accepted and deposited the loan proceeds, and that they made a number of timely payments — did not properly consider her contentions that Craig — not she — accepted the check and made the payments while he managed the business; and that she thereafter

[5] Linda claimed Craig told her, "Ma, sign it. It's a dealer agreement, okay?"

[6] Although the document is signed in two places — one for the corporate borrower and the other for the guarantor — Linda claims she only signed once.

made payments to preserve her credit — not in recognition of the guarantee's viability — while Auto was still operating.

As to the recorded telephone conversation related during the witness's deposition, we do not know what part of that evidence, if any, the judge found compelling; he only related that Craig relied on it to support his motion. In any event, we see the conversation only as part of the evidence the judge found refuted and contradicted Linda's claim. She contends "[n]o part of the recorded phone call even mentions a promissory note, but rather a line of credit." Again, the record does not contain that evidence; but the vague and disputed nature of same cannot support summary judgment.

Finally, we note neither the parties nor the motion judge have parsed the various theories Linda advanced; the CFA was mentioned, but its elements were not analyzed. The generalized treatment given these motions did not specifically address Linda's separate defenses or her affirmative claims. We will not address arguments not made on appeal. W.H. Indus., Inc. v. Fundacao Balancins, Ltda, 397 N.J. Super. 455, 459 (App. Div. 2008). Linda's factual allegations ostensibly support CFA violations by Craig and Kerzic, rooted in their "unconscionable commercial practice, deception, fraud, false pretense . . . [or] misrepresentation," constituting an "unlawful practice." Lee v.

Carter-Reed Co., 203 N.J. 496, 521-22 (2010) (second alteration in original) (quoting N.J.S.A. 56:8-2). Craig's actions are "affirmative acts," and Kerzic's silence is a "knowing omission," both unlawful practices contravening the CFA. Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994). But we do not pass on the merits of that or any other defense or claim. Our reversal and remand is based on the failure to accord the proper view of Linda's asserted facts.

We determine Linda's arguments regarding the judge's denial of her motion for reporter costs and attorneys' fees to be without sufficient merit to warrant discussion here. R. 2:11-3(e)(1)(E). The judge's ruling was not a mistaken exercise of discretion. See Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001).

Reversed and remanded for further proceedings. We do not retain jurisdiction.