SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5209-15T2

YURIKO ANDERSON and
JEFFERY KAYL,

Plaintiffs-Appellants,

v.

K. HOVNANIAN AT PORT IMPERIAL URBAN RENEWAL II, LLC, K. HOVNANIAN COMPANIES NORTHEAST, INC., K. HOVNANIAN HOMES, RTKL NEW JERSEY ARCHITECTS, PA, SAY SERVICE COMPANY, INC./MAX HVAC AND EASTERN WATERPROOFING & RESTORATION CO., INC. and FACE ASSOCIATES, INC.,

Defendants-Respondents.

K. HOVNANIAN AT PORT IMPERIAL URBAN RENEWAL II, LLC, K. HOVNANIAN COMPANIES NORTHEAST, INC. and K. HOVNANIAN HOMES,

Defendants/Third-Party Plaintiffs,

v.

RTKL NEW JERSEY ARCHITECTS, PC, SAY SERVICE COMPANY, INC./MAX HVAC AND EASTERN WATERPROOFING & RESTORATION CO., INC. and FACE ASSOCIATES,

Defendants/Third-Party Defendants.

RTKL NEW JERSEY ARCHITECTS, PA,

Defendant/Third-Party Plaintiff,

v.

FACE ASSOCIATES, INC.,

Third-Party Defendant.

Argued March 15, 2018 – Decided April 11, 2018

Before Judges Simonelli, Haas and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4849-13.

Alissa Pyrich argued the cause for appellants (Jardim Meisner & Susser, PC, attorneys; Kenneth L. Winters, on the briefs).

Donald E. Taylor argued the cause for respondents K. Hovnanian at Port Imperial Urban Renewal, II, LLC; K. Hovnanian Companies Northeast, Inc.; and K. Hovnanian Homes (Wilentz, Goldman & Spitzer, PA, attorneys; Donald E. Taylor and Daniel A. Cozzi, of counsel and on the brief).

Michael J. Notartomas argued the cause for respondent FACE Associates, Inc. (Marks, O'Neill, O'Brien, Doherty & Kelly, PC, attorneys; Michael J. Notartomas, on the brief).

Jordan S. Tafflin argued the cause for respondent RTKL New Jersey Architects, PA, (Chiumento McNally, LLC, attorneys; Gary C. Chiumento, on the brief).

PER CURIAM

Plaintiffs Yuriko Anderson and Jeffery Kayl appeal from: (1) an April 15, 2016 order denying their motion for a third extension of discovery; (2) a May 27, 2016 order denying their motion for reconsideration of the discovery order; (3) a May 3, 2016 order denying their motion to file a third amended complaint; (4) a June 2, 2016 order striking their untimely expert reports; (5) a series of July 8, 2016 orders granting summary judgment in favor of defendants K. Hovnanian at Port Imperial Urban Renewal II, L.L.C., K. Hovnanian Companies Northeast, Inc., and K. Hovnanian Homes (collectively KHOV), RTKL New Jersey Architects, P.C. (RTKL), and FACE Associates, Inc. (FACE); and (6) a July 8, 2016 order denying plaintiffs' motion for partial summary judgment.[1]

On appeal, plaintiffs present the following points of argument:

> POINT I
>
> THE COURT BELOW ERRED IN DENYING THE OWNERS' MOTION FOR SUMMARY JUDGMENT.

[1] Although plaintiffs only listed the July 8, 2016 summary judgment orders in their notice of appeal, they also stated they were contesting "certain pre-trial and discovery orders leading up to the final judgment" in the notice. Thus, we will consider all of the orders challenged by plaintiffs in their appellate brief. See Silviera-Francisco v. Bd. of Educ. of City of Elizabeth, 224 N.J. 126, 141 (2016) (noting that "[a]n interlocutory order is preserved for appeal with the final judgment . . . if it is identified as a subject of the appeal").

POINT II

THE DEFENDANTS DID NOT MEET THEIR BURDEN OF PROVING THEIR RIGHT TO SUMMARY JUDGMENT.

POINT III

THE OWNERS' CLAIMS AGAINST FACE AND RTKL WERE NOT BARRED BY THE STATUTE OF LIMITATIONS.

POINT IV

RTKL COULD NOT OBTAIN SUMMARY JUDGMENT ON COUNT EIGHT (NEGLIGENT SUPERVISION) DUE TO ITS ROLE IN SUPERVISING FACE AND SIGNING OFF ON DEFECTIVE DESIGNS.

POINT V

THE COURT ERRED IN GRANTING DEFENDANTS' MOTION TO BAR PLAINTIFFS' EXPERT REPORTS.

POINT VI

THE COURT ERRED IN NOT GRANTING AN EXTENSION OF DISCOVERY AND IN NOT RECONSIDERING THE APRIL 15, 2016 ORDER.

POINT VII

THE COURT ERRED IN DENYING THE OWNERS[']
MOTION TO AMEND TO ADD TWO COUNTS BASED ON FACTS KNOWN ALL ALONG BY THE DEFEND[AN]TS AND CONCEALED FROM THE OWNERS UNTIL AFTER THE SCHEDULED DATE FOR THE CLOSE OF FACT DEPOSITIONS.

After reviewing the record in light of the applicable law, we find no merit in any of these contentions. In particular, we discern no abuse of Judge Mary K. Costello's discretion in her decisions denying plaintiffs' motion for a third extension of discovery, or their motion for reconsideration of that order. We

are also unable to conclude that Judge Christine M. Vanek abused her discretion or made any other error by denying plaintiffs' motion to amend the complaint, or barring their untimely expert reports. Based on our de novo review of the summary judgment record, we conclude that summary judgment was properly granted to defendants, and denied to plaintiffs.

I.

We begin by summarizing the facts, viewed in the light most favorable to plaintiffs in our consideration of defendants' summary judgment motions. Polzo v. Cty. of Essex, 209 N.J. 51, 56 n.1 (2012) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)). KHOV developed a condominium building in West New York, New Jersey. It hired RTKL to perform the architectural design work, and FACE to perform the mechanical, electrical, and plumbing work on the project.

In June 2006, plaintiffs purchased a three-bedroom condominium on the top floor of the building from KHOV as an investment property. The unit featured three walls with large glass windows and doors.

In June 2007, plaintiffs rented the condominium to two tenants for $4500 per month. The following summer, the tenants complained that the air conditioning system in the condominium was not keeping the unit cool. Although the tenants temporarily withheld two

months' rent from plaintiffs for July and August 2008, an exchange of e-mails between the tenants and plaintiff Anderson on August 18, 2008 showed they paid the two months' rent on that date, and advised plaintiffs they would be vacating the condominium on November 1, 2008.

Plaintiffs then rented the condominium to another tenant, who testified at his deposition that he was not aware of any problem with the air conditioning system before he entered the lease with plaintiffs through their real estate agent. The new tenant, who has lived in the condominium ever since, paid plaintiffs $4200 per month in rent at the beginning of his lease.

This tenant testified that after he moved into the condominium in April 2009, he sent emails to plaintiffs complaining about the air conditioning and asserting that the penthouse was uncomfortably warm. At some point, three window air conditioners were installed in the condominium. Anderson testified she paid for these units, but she was unable to produce any documentation concerning the purchase at her deposition. In addition, plaintiffs failed to provide any other evidence in discovery concerning the make, model, size, or cost of the three units or even when they were purchased. The tenant testified he stored the air conditioners each year between October and April in a storage room he rented in the building.

On October 15, 2013, plaintiffs filed a complaint against KHOV. They alleged KHOV was negligent in the design and construction of the condominium, the hiring of subcontractors, and the representation of the building to buyers. Plaintiffs also alleged KHOV breached express and implied warranties, and violated the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 (CFA).

In May 2014, KHOV filed a third-party complaint against RTKL, the architect for the project, and asserted that "[t]he claims asserted by the plaintiffs all relate to aspects of the property and/or its design which would have been the direct responsibility of RTKL[.]" In June 2014, plaintiffs filed their first amended complaint, which added RTKL as a direct defendant.

In October 2014, RTKL filed a third-party complaint against FACE, which served as the mechanical engineer on the project. A year later, plaintiffs filed a second amended complaint naming FACE as a direct defendant.[2]

The essential allegation presented by plaintiffs against all three defendants was that the air conditioning component of the HVAC system installed in the condominium was defectively designed and installed because it did not provide adequate cooling for the

[2] Plaintiffs served Affidavits of Merit concerning its claims against KHOV and RTKL. However, they never served a similar Affidavit regarding their allegations against FACE.

three-bedroom unit.[3] However, plaintiffs both testified they had no independent basis for this allegation and explained they had hired experts that would provide the necessary supporting evidence. Anderson also testified she did not know the fair market rent for the condominium or the current value of the property.

During depositions, various representatives from defendants testified concerning "due diligence" discussions held in 2004 prior to the installation of the HVAC system in the condominiums. Chris Kilpatrick, a FACE engineer, testified that in the planning stage for a project, he would run calculations, specifically "wall insulating values, glass insulating values, roof insulating values, internal load facts, orientation of the building so we would know what the exposures are, review of codes, [and] what standards are going to be in play as far as ventilation air requirements."

As the result of these calculations and discussions between KHOV, RTKL, and FACE, defendants installed a 2.5 ton HVAC unit in plaintiffs' condominium. Kilpatrick testified he told the others that "a single [2.5] ton unit will not meet the peak load of [the condominium] without doing something about the solar load, like drawing the blinds and putting in heavy curtains." However, he

[3] Plaintiffs did not raise any issues concerning the heating elements of the condominium's HVAC system.

further stated that it would not be "an unusual circumstance for an occupant to be informed that they have a requirement to draw their blinds when they're on their peak solar load[.]"[4] Kilpatrick later advised KHOV's representative, Jerry Lala, that while a 2.0 ton HVAC unit would "not have sufficient capacity" for a three-bedroom apartment, a 2.5 ton system was "typical" for those homes.

Ronald Reed, a RTKL representative, testified that although there were discussions about recommending that the HVAC systems for "a couple [of] particular units" be "upsized[,]" FACE's calculations indicated that the 2.5 ton HVAC units "were adequate, given all conditions being normal[.]" In addition, Lala pointed out that a larger 3.0 ton HVAC unit, even if available, "could short cycle and cause other concerns including coils freezing and unwanted moisture in the homes." Lala also stated that an HVAC contractor had installed the same 2.5 ton units in "similar size" homes "with no concerns." Thus, contrary to plaintiffs' contentions on appeal, none of defendants' representatives admitted that plaintiffs' HVAC system was defectively designed or installed.

[4] Plaintiffs' current tenant testified he refused to install or employ drapes or any other type of window treatment during peak periods, or at any other time, because it would affect the view from his windows.

II.

We now address plaintiffs' challenges to the matters that are the subject of their appeal, beginning with Judge Costello's order denying plaintiffs' request for a third extension of discovery. To put this issue in context, we must review the procedural history of the litigation.

As noted above, plaintiffs filed their complaint in October 2013. They twice amended their complaint to add RTKL and FACE as defendants. Thus, between the date they filed their complaint and the denial of their extension motion, plaintiffs had 938 days of discovery.

After KHOV added RTKL to the litigation, and RTKL thereafter joined FACE, plaintiffs filed a motion for their first extension of discovery on May 1, 2015. Judge Costello granted this motion on June 12, 2015, and directed the parties to complete: all written discovery by mid-August[5] 2015; fact depositions by September 30, 2015; expert reports by January 2016; and expert depositions by February 5, 2016. The discovery end date was set for February 5, 2016, and Judge Costello ordered an April 11, 2016 trial date.

[5] Some of the dates on the June 12, 2015 order provided by plaintiffs in their appendix are not fully legible.

Plaintiffs did not meet these deadlines. Plaintiffs noticed the deposition of a KHOV representative for August 25, 2015, but then cancelled it. The deposition was rescheduled for October 19, 2015, but plaintiffs' attorney cancelled it on October 19.

KHOV, which had responded to plaintiffs' initial discovery request in January 2015, provided an additional 50,000 pages of documents on August 11, 2015. A month later, RTKL provided its response to plaintiffs' interrogatories. On September 18, 2015, Judge Vanek denied plaintiffs' motion to suppress RTKL's answer and defenses, finding that RTKL had responded to plaintiffs' discovery request. RTKL gave plaintiffs an additional 17,000 pages of discovery on October 13, 2015.

KHOV thereafter scheduled and completed depositions of plaintiffs and their current tenant. After plaintiffs joined FACE as a direct defendant, it gave plaintiff 5000 pages of discovery responses on November 6, 2015.

Plaintiffs responded to their receipt of this information by asking for a second extension of discovery. On December 2, 2015, Judge Costello granted plaintiffs' request and issued a case management order. The order noted that all "paper discovery" had been completed. The judge ordered the parties to complete the depositions of all remaining parties and fact witnesses by February 12, 2016. The order required plaintiffs to provide their expert

reports to defendants by March 25, 2016, with defendants' expert reports being due by April 29, 2016. Expert depositions had to be completed by May 27, 2016, which was set as the discovery end date. Judge Costello scheduled the trial to begin on August 8, 2016. The order specifically stated that "[t]he discovery schedule shall not be changed without a Notice of Motion and a showing of exceptional circumstances."

Plaintiffs did not meet the newly-established deadlines. Although paper discovery had ended months before, plaintiffs served a request upon KHOV for more specific discovery responses. Plaintiffs also asked KHOV to provide documents involved in a separate case. Judge Costello would later conclude that KHOV's previous responses were not deficient. In any event, KHOV gave plaintiffs an additional 20,000 pages of documents relating to the separate litigation on April 4, 2016.

Shortly before the February 12, 2016 deadline for the completion of depositions for parties and fact witnesses, plaintiffs deposed Kilpatrick, another FACE representative, and a KHOV representative. They did not schedule Lala's deposition until March 8, 2016, well after the expiration of the deposition deadline. Plaintiffs then cancelled that deposition and did not conduct it until March 24, 2016. Plaintiffs also did not depose

Reed until March 11, 2016, almost a month past the deadline for completing depositions.

Although all paper discovery and fact depositions were supposed to have been completed, and their expert reports should have already been served, plaintiffs filed yet another application to extend discovery on March 29, 2016. In this motion, plaintiffs alleged that defendants had been recalcitrant in providing them with discovery and, therefore, additional paper discovery and depositions were now necessary.

On April 15, 2016, Judge Costello denied plaintiffs' third discovery extension motion. The judge explained that plaintiffs failed to demonstrate any exceptional circumstances warranting another extension, especially after plaintiffs already had 938 days of discovery. From her review of the parties' respective papers, the judge stated she was satisfied that defendants complied with plaintiffs' discovery requests, and plaintiffs did not even raise an objection to KHOV's responses until February 11, 2016, well after KHOV provided those responses and months past the paper discovery deadline.

We review the judge's decision under a deferential standard, as we "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the

applicable law." Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div. 2005) (citing Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997)). The "abuse of discretion" standard "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)). The standard analyzes "whether there are good reasons for an appellate court to defer to the particular decision at issue." Ibid.

Under Rule 4:24-1, plaintiffs were required to show exceptional circumstances for an extension of discovery because Judge Costello had scheduled a trial date. See Rivers, 378 N.J. Super. at 78. "[E]xceptional circumstances generally denote something unusual or remarkable. The moving party must demonstrate counsel's diligence in pursuing discovery, establish the essential nature of the discovery sought, explain counsel's failure to request an extension within the original time period, and show that the circumstances presented were clearly beyond counsel's control." Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 479 (App. Div. 2012). "[W]here the 'delay rests squarely on plaintiff's counsel's failure to retain an expert and pursue discovery in a timely manner,' and the [above] factors are

not present, there are no exceptional circumstances to warrant an extension." Ibid. (alterations in original) (quoting Rivers, 378 N.J. Super. at 79).

Applying these well-established standards, we discern no basis to disturb Judge Costello's decision because plaintiffs failed to show exceptional circumstances. As the judge found, defendants had been responsive to plaintiffs' discovery demands. Plaintiffs had already received two extensions that provided them with ample time to prepare their case for trial.

In spite of this, plaintiffs delayed seeking depositions until that deadline was close to expiring and, even though they took several depositions after the deadline passed, still asserted that more discovery was necessary. Thus, unlike in Tucci v. Tropicana Casino and Resort, Inc., the case plaintiffs primarily rely upon, plaintiffs' delays in conducting and completing their discovery obligations were not clearly beyond their attorney's control. Tucci v. Tropicana Casino and Resort, Inc., 364 N.J. Super. 48, 54 (App. Div. 2003) (concluding that the "plaintiffs' attorney's personal situation by reason of his mother's terminal illness and death provided good cause, if not extraordinary circumstances, mandating a reasonable modicum of judicial indulgence").

In sum on this point, Judge Costello set clear and specific deadlines in the final case management order. Plaintiffs did not comply with its requirements. Nor did they show the exceptional circumstances needed to extend discovery yet another time. Therefore, we affirm Judge Costello's denial of plaintiffs' third motion to extend discovery.

III.

On May 9, 2016, plaintiffs filed a motion for reconsideration of the order denying their request for a discovery extension. They asserted that Judge Costello failed to appreciate or understand their prior arguments, but otherwise raised no new contentions. On May 27, 2016, the judge denied this motion and, in a written rider to her order, fully explained her reasons for denying the extension.

A trial court's order on a motion for reconsideration will not be set aside unless shown to be a mistaken exercise of discretion. Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016) (citing Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002)), certif. denied, 216 N.J. 7 (2017). Reconsideration should only be granted in those cases in which the court had based its decision "upon a palpably incorrect or irrational basis," or did not "consider, or failed to appreciate the significance of probative, competent evidence."

Ibid. (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

We discern no abuse of discretion on the part of Judge Costello in denying reconsideration here. Plaintiffs failed to present any new facts that were not available at the time of the extension motion, nor did they point to any controlling legal authority that the judge either overlooked or misapplied in denying that motion. Therefore, we reject plaintiffs' contentions on this point, and affirm the May 27, 2016 order denying their motion for reconsideration.

IV.

During the period after the deadline for fact discovery had expired, plaintiffs filed a motion to amend their complaint for a third time to add new claims, including fraud in the inducement, fraudulent concealment, and conspiracy to commit fraud, against all three defendants. Although, as a general matter, leave to amend a pleading is freely granted in the interests of justice, see Rule 4:9-1, the "determination of a motion to amend a pleading is generally left to the sound discretion of the trial court . . . and its exercise of discretion will not be disturbed on appeal, unless it constitutes a 'clear abuse of discretion.'" Franklin Med. Assocs. v. Newark Pub. Sch., 362 N.J. Super. 494, 506 (App. Div. 2003) (quoting Salitan v. Magnus, 28 N.J. 20, 26

(1958)). The trial court's exercise of discretion requires a two-step analysis: "whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006).

After employing this analysis, Judge Vanek denied plaintiffs' motion. In a thoughtful written addendum to her May 3, 2016 order, Judge Vanek explained that defendants would be prejudiced if another amendment were permitted at this late stage in the proceedings. The discovery end date was only a little more than three weeks away. Therefore, there was no time for defendants to depose the fact witnesses again or secure additional experts to review plaintiffs' newly-minted allegations.

In addition, the judge found that plaintiffs' draft complaint was deficient because it only made general allegations against defendant as a group, "without any level of specificity as to the alleged fraud as to each [d]efendant." Judge Vanek further noted that "[t]here are heightened pleading requirements for fraud counts," which plaintiffs failed to satisfy because their draft complaint did "not apprise the [c]ourt with the relevant information to determine whether or not the additional causes of action would be futile."

We conclude that Judge Vanek did not abuse her discretion by denying plaintiffs' motion to amend the complaint. She provided

ample reasons supporting her decision, including the fast-approaching discovery end date and trial. In addition, plaintiffs' proposed complaint did not even specify which defendant allegedly made a misrepresentation or even when the misrepresentation was made. Therefore, we affirm the judge's May 3, 2016 order.

V.

As stated above, Judge Costello's long-standing case management order required plaintiffs to serve their expert reports upon defendants no later than March 25, 2016. Plaintiffs did not abide by this deadline. Although defendants tentatively agreed to permit plaintiffs to serve the reports no later than April 11, 2016 on the condition the court granted them a similar extension, plaintiffs also failed to meet this unofficial and unsanctioned deadline. Instead, they belatedly served defendants with a report prepared by Daryl J. Smith, P.E. on April 29, 2016, which was the same day defendants' expert reports were due. A day or two later, defendants received a second expert report prepared by Robert Emert, Jr., AIA, LEED AP.

Still later, on May 12, 2016, plaintiffs sent defendants a third report prepared by Thomas J. Stack and Timothy J. Naiman. This report was dated thirteen days after defendants' rebuttal

expert reports would have been due under the case management order, and only fifteen days prior to the discovery end date.[6]

KHOV promptly moved to exclude the late expert reports. Plaintiffs opposed the motion, raising the same arguments they previously presented in support of their unsuccessful motion for an extension of discovery.

On June 2, 2016, Judge Vanek granted KHOV's motion and barred the plaintiffs' three expert reports. In an addendum to her order, the judge explained that Judge Costello had already denied plaintiffs' motion to extend discovery after expressly finding they failed to demonstrate exceptional circumstances warranting this relief. Similarly, Judge Vanek found that plaintiffs did not show any exceptional circumstances excusing the late submission of their expert reports.

We again apply an abuse of discretion standard in reviewing Judge Vanek's order excluding the expert reports, Rivers, 378 N.J. Super. at 80, and conclude that the judge did not mistakenly exercise her discretion when she ruled that the late-furnished

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[6] Rule 2:6-1(a)(1)(I) requires an appellant to provide us with "such . . . parts of the record . . . as are essential to the proper consideration of the issues[.]" However, appellants did not include a copy of the May 12, 2016 expert report in their appendix. Therefore, in addition to the grounds stated by Judge Vanek, we affirm the trial court's exclusion of this report for this reason as well. See Soc. Hill Condo. v. Soc. Hill Assoc., 347 N.J. Super. 163, 177-78 (App. Div. 2002).

reports could not be considered. Plaintiffs offered no persuasive justification for not submitting the reports in a timely fashion. They owned the condominium, and had a cooperative tenant. Thus, plaintiffs had full access to the HVAC system for the many months following the filing of their complaint in October 2013. Yet, they inexplicably failed to provide an expert report within that extended time period.

Therefore, we affirm Judge Vanek's June 2, 2016 order.

VI.

Finally, we turn our attention to Judge Costello's July 8, 2016 orders granting defendants' motions for summary judgment, and denying plaintiffs' motion for partial summary judgment. The judge determined that without expert testimony, plaintiffs simply could not prove any of their allegations. We agree.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court, namely, the standard set forth in Rule 4:46-2(c). Conley v. Guerrero, 228 N.J. 339, 346 (2017). Thus, we consider, as the trial judge did, 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." Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting Brill, 142 N.J. at 540). If there

is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007) (citing Prudential Prop. & Cas. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998)). We accord no deference to the trial judge's conclusions on issues of law and review issues of law de novo. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

Having reviewed the record, we conclude there are no genuine issues of material fact and that defendants were entitled to summary judgment as a matter of law, and plaintiffs were not. Plaintiffs based all of their claims, including those sounding in negligence and their allegations under the CFA, upon their belief that defendants designed a faulty HVAC system which was the sole reason for the tenants' complaint that the condominium was uncomfortably warm.

To prove their allegations in each count of their second amended complaint, plaintiffs were required to provide expert testimony establishing that the HVAC system was defective in some fashion, defendants caused the defect, and plaintiffs suffered damages. For example, to prove a claim of negligence, a plaintiff must establish: "(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages." Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. Cty. of Essex, 196 N.J.

569, 584 (2008)). A plaintiff must also demonstrate a "defect" in the defendant's work before a cause of action for breach of implied warranties may be sustained. McDonald v. Mianecki, 79 N.J. 275, 293-94 (1979).

Similarly, to prove a claim for negligent misrepresentation, a violation of CFA, or a violation of the Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-21 to -56 (PREDFDA), the plaintiff must establish some false statement of fact or active concealment of a material fact. See Green v. Morgan Properties, 215 N.J. 431, 457 (2013) (negligent misrepresentation); Cox v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994) (CFA); N.J.S.A. 45:22A-28(a) (PREDFDA). Thus, plaintiffs were required under these claims to show that the HVAC system was defective.

We agree with Judge Costello that in order to make this required showing, plaintiffs had to produce expert testimony. This is so because "the matter to be dealt with [in this case, namely, the design and installation of a complex HVAC system] [wa]s so esoteric that jurors of common judgment and experience [could not] form a valid judgment as to whether the conduct of . . . defendant[s] was reasonable." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982)).

As the judge observed in her thorough oral decision granting summary judgment to defendants, without expert testimony, there was

> no testimony explaining whether . . . plaintiffs properly maintained the system, whether the system was properly balanced, when [plaintiffs] had their own contractors . . . do work on the system, and whether their own contractors altered the system that was installed[,] and many other possible technical issues[,] . . . which could only be addressed by expert testimony.

Judge Costello also stated that "the real kicker" for her was plaintiffs' inability to demonstrate damages without expert testimony. Plaintiffs produced no evidence of the value of the condominium with and without the HVAC system and, as acknowledged in their depositions, had no information whatsoever about any issues relating to any costs they might incur in fixing the alleged issues with that system. Without such evidence, the judge correctly concluded that plaintiffs could not

> show what the market value [of the condominium] is. What are we starting off at? What is our base rent? What would the market value be for renting the unit . . . if it didn't have these cooling issues? How much [do] the cooling issues affect the market value?

As Judge Costello did, we also reject plaintiffs' contention that expert testimony was not needed to prove there was a defect in the air conditioning unit because defendants made admissions

that the HVAC system was faulty. As discussed in Section I of this opinion, plaintiffs' claim on this point is simply not supported by the record.

Like any reasonable contractors, defendants engaged in a period of due diligence prior to the construction of the building and the installation of the HVAC systems in the condominiums. As is typical in such large projects, meetings were held, issues were raised, and solutions were agreed upon. Although Kilpatrick, Reed, and Lala discussed the appropriate size of the HVAC unit to be used in plaintiffs' condominium, each concluded that the 2.5 ton system would do the job.

Thus, Kilpatrick testified the HVAC system would function even during the peak "solar load" if the tenant drew the blinds or closed their "heavy curtains[,]" a requirement that plaintiffs' tenant failed to undertake. Similarly, Reed testified that FACE's calculations demonstrated that the 2.5 ton units were adequate for normal conditions. Lala stated that a larger 3.0 ton system would have serious drawbacks, including the creation of unwanted moisture in the homes due to coils freezing. Thus, none of defendants' representatives "admitted" that plaintiffs' HVAC system was defective and, therefore, we reject plaintiffs' contention on this point.

Finally, plaintiffs argue that even if they could not prove the amount of damages they sustained for the alleged loss of value in the condominium or the costs they might incur to repair or replace the HVAC system because they did not produce an expert, they were nevertheless able to demonstrate damages for several lesser items through Anderson's testimony. Specifically, plaintiffs argue in their brief that they could prove damages for: (1) the money they paid for the three window air conditioners installed in the condominium; (2) the funds they expended "for specialist maintenance to be performed on the HVAC system on a yearly basis"; (3) the rent their first tenant withheld from them; and (4) the reduced rent their current tenant pays them.

These contentions lack merit. Although "[p]roof of damages need not be done with exactitude," Lane v. Oil Delivery, 216 N.J. Super. 413, 420 (App. Div. 1987), and must only be "ascertainable" under the CFA, N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003), some competent proof of the amount of damages is required. Thus, to withstand a motion for summary judgment, a plaintiff "must proffer evidence of loss that is not hypothetical or illusory. It must be presented with some certainty demonstrating that it is capable of calculation . . . ." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248 (2005).

Turning to plaintiffs' specific claims, there was no competent evidence in the record as to the value of the three window air conditioners plaintiffs allegedly purchased for the condominium. Anderson could not provide the size of the units, a sales receipt, or any other information during her deposition, and plaintiffs certainly provided nothing before the discovery end date that would enable a jury to determine the value of these units.

Plaintiffs' argument that they were forced to retain a "specialist maintenance" service for the HVAC system is likewise not supported by the record. Instead, the only reference to maintenance for the unit occurred during Anderson's deposition where she testified that the HVAC system received "[r]egular maintenance" or a "[c]heckup" once a year. (Emphasis added). Routine maintenance of this nature obviously does not constitute a "loss" that plaintiffs would be entitled to recover, even if they had been able to prove that the HVAC system defendants designed was defective.[7] In addition, Anderson did not provide any information that would enable a jury to determine the amount

[7] Anderson testified that the most recent "checkup" for the unit occurred just "a few months" before her October 2, 2015 deposition and that the technician advised her that the unit was "operating properly."

she paid for this service either at her deposition or prior to the completion of discovery.

Anderson's claim that she was entitled to recover the rent the first tenants withheld from plaintiffs is also belied by the record. As discussed in Section I of this opinion, the tenants withheld rent for two months, but then paid it on August 18, 2008.

Finally, plaintiffs did not present any evidence concerning the market rental rate for the condominium at any time during their ownership of the unit. Without this necessary information, they cannot recover the difference between the rent the first tenants paid ($4500 per month) and the rent the current tenant paid ($4200 per month) when his lease term began. Moreover, the current tenant was not aware there was any problem with the air conditioning in the condominium when he negotiated the lease with plaintiffs' real estate agent.

Based upon the foregoing, we affirm Judge Costello's orders granting summary judgment to KHOV, RTKL, and FACE. Because defendants were entitled to summary judgment against plaintiffs on all of their claims, we also affirm Judge Costello's order denying plaintiffs' motion for summary judgment.[8]

[8] To the extent not specifically addressed here, plaintiffs' additional arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION