SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3272-21

NII DODOO,

Plaintiff-Respondent,

v.

PCS USA LLC and
LOUIS VANLEEUWEN,

Defendants-Appellants.

Argued June 15, 2023 - Decided July 28, 2023

Before Judges Currier and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. DC-000852-22.

Evan L. Goldman argued the cause for appellant (Goldman Davis Krumholz & Dillon, PC, attorneys; Evan L. Goldman and Asma Alqudah, on the briefs).

Colin Schmitt argued the cause for respondents (Schmitt Law LLC, attorneys; Colin Schmitt, on the brief).

PER CURIAM

Defendants appeal from the May 19, 2022 Special Civil Part order granting plaintiff judgment in the amount of $4,077.20. Plaintiff's complaint set forth two causes of action: alleged breach of contract and violations of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -227. After a bench trial, the court found plaintiff had not proven either of those causes of action. However, the court found defendants were negligent and awarded plaintiff damages. Because the court erred in sua sponte creating a cause of action, not pleaded by plaintiff and not litigated either prior to or at trial, we reverse.

Through email, plaintiff purchased a four-burner professional cooking system from defendants. Plaintiff authorized payment for the burners in the amount of $4,077.20 on April 30, 2021, and defendants emailed plaintiff the paid invoice. Plaintiff advised he did not need the burners immediately. At the time, he was living in a forty-five-floor apartment building and plaintiff provided defendants the street address and apartment number as the shipping address.

Defendants contacted plaintiff on May 18, 2021, informing him the product was being shipped to his address that day. Plaintiff responded, asking defendants to hold the shipment "a little longer" and offering to make alternative arrangements if that was not possible. Defendants replied they could continue

holding the burners but the next shipment would not be "until mid to end of June." Defendants asked whether that was acceptable. Plaintiff replied: "That is totally fine. I will be sure to give you at least [one] month heads up ahead of shipping."

On May 25, 2021, defendants informed plaintiff there was a supply chain issue with the cardboard used to ship their products, causing a shipping delay of "hopefully no more than [two] weeks." The email concluded, "With that said we are hopeful that our shipment [will] arrive in early July, once we receive our shipment [defendants would] notify [plaintiff] ASAP." Plaintiff replied: "Understood, no problem for me as I'm not in a rush."

On December 12, 2021, plaintiff emailed defendants stating he was ready for the shipment of the burners. After not getting a response, he sent two more emails regarding the status of the shipment.

Defendants responded to plaintiff on January 13, 2022, forwarding an email from UPS advising the package was delivered and signed for by "Trey," who was an employee of the apartment building, on July 27, 2021. According to UPS, any claims related to the package delivery had to be filed within sixty days. Two days later, plaintiff advised defendants he was unaware the package

was being shipped and he received no notification from the apartment that his package was delivered.

Defendants produced the delivery notifications from UPS, confirming the delivery date and time and advising the shipment was received inside the building by "Trey." There was a wavy line in the signature block.

On January 15, defendants' CEO emailed plaintiff, expressing his sympathy that the package was missing. The CEO stated:

> When we send a package to a customer there is automatically an email generated in the UPS system which alerts the customer that a package is on the way. This email also includes the tracking number. Since we know this was sent, and we have the name of a person who signed for the package and nearly [seven] months have passed since we sent this unit there is really not much we can do.[1]

Plaintiff responded he would look for the UPS email.

As stated, plaintiff filed a complaint in the Special Civil Part alleging breach of contract and violations of the CFA. During a virtual bench trial in May 2022, plaintiff testified as set forth above and advised he never received a notification from his building that he had a package in the mailroom. Defendants' CEO testified he called the apartment building and spoke with Trey

[1] Ultimately, the CEO offered plaintiff a new unit at a fifty percent discount and a waiver of the shipping charges.

who confirmed he signed for the package. There was no objection to this testimony.

In an oral decision issued at the close of the trial on May 19, 2022, the court stated plaintiff was "seeking a judg[]ment against . . . defendant[s] for a failure to comply to get the product delivered to him and for consumer fraud." The court continued:

> [I]t appears . . . that . . . defendant[s] did fulfill [their] shipping obligation—[their] commercial obligation to ship a package to [plaintiff] and the [c]ourt is satisfied that the package was shipped and that there is a Trey at the building. That's confirmed by [the CEO's] conversation and I believe that's truthful. . . . So I'm satisfied the product was delivered.

Without elaboration, the court rejected plaintiff's consumer fraud claim.

The court then stated: "Now the issue becomes, in the [c]ourt's mind, . . . why didn't . . . defendant[s] live up to [their] duty assumed by [them] to give . . . plaintiff one month's notice of the shipment." The court found defendants were negligent, stating "the breach of duty by [defendants] proximately caused a situation where . . . plaintiff suffered a loss and could have been in a position to avoid that loss had he been notified." The court entered judgment for plaintiff of $4,077.20 in a May 19, 2022 order.

On appeal, defendants contend the court erred in finding negligence because plaintiff did not plead it as a cause of action in the complaint; and plaintiff could not establish proximate cause because there was an intervening factor—the mishandling, loss or theft of the package after delivery at the apartment building.

In reviewing an order following an appeal from a non-jury trial, "we give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015). We will not disturb such findings unless we are "convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Ibid. (quoting Rova Farms Resort v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). We also "defer[] to the trial [judge]'s credibility determinations." C.R. v. M.T., 248 N.J. 428, 440 (2021).

However, we owe no special deference to "[a] trial court's interpretation of the law and the legal consequences that flow from established facts." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Plaintiff's complaint only set forth causes of action for breach of contract and violations of the CFA. The court found plaintiff did not prove either of those claims. That conclusion should have resulted in an entry of judgment for defendants.

At no time did plaintiff proffer a theory of negligence. To the contrary, at the close of plaintiff's case, defendant moved for a dismissal under Rule 4:37-2(b). In response, plaintiff's counsel referred to the consumer fraud claim, arguing defendants' actions violated the CFA. Plaintiff's counsel did not raise a negligence cause of action.

Nevertheless, the judge stated:

> I don't know about the [CFA] claim, but what about—I'm [going to] explain this again.
>
> My tendency now is to think that you have made a claim, but I want to hear about—it's based on a single negligence theory that [defendants] promised notice one month in advance for any shipment and [they] didn't comply with that.
>
> So tell me then, what's the proximate cause between—she assumed a duty here. What's the proximate cause between a breach of that duty and your client's loss?
>
> Does that—if there's no proximate cause, you know, I'm thinking I may have to grant the motion, but tell me what the relationship is.

Plaintiff's counsel only responded regarding his understanding of a CFA claim. The court denied the motion.

In his summation, plaintiff's counsel stated:

> The reason why it's—a consumer fraud action is . . . because it's an affirmative misrepresentation that's critical to the sale of the merchandise.
>
> There doesn't need to be intent. It doesn't need to be deceitful . . . . It doesn't need to be a situation that's nefarious intent by the seller. All it needs to do—you said negligence perhaps. In this situation it's the same difference. The burden is on the . . . merchant in this case.

In reviewing the trial testimony, plaintiff was not pursuing a negligence theory. Rather, he continued to argue a CFA violation and even referred to the burden of proof being on defendants. If the case was proceeding as a negligence action, plaintiff would bear the burden of proving the claim.

In concluding defendants were negligent, the judge inserted a new theory of liability that was not presented or pursued by plaintiff. Plaintiff did not amend the pleadings to assert a negligence claim. Nor did the court conform the pleadings to the evidence to provide defendants notice of a negligence cause of action. See R. 4:9-2.

On appeal, plaintiff does not address defendants' arguments regarding the court's error in determining defendants were negligent. Instead, plaintiff

continues to argue a CFA violation. Plaintiff did not file a cross-appeal from the court's order and therefore is foreclosed from contesting the court's finding regarding the CFA claim. See R. 2:4-2(a).

As we have stated, a litigant must "be apprised of the nature of the claim against [them] and to be accorded the opportunity to address it fully." R. Wilson Plumbing & Heating, Inc. v. Wademan, 246 N.J. Super. 615, 618 (App. Div. 1991). As occurred in Wademan, the court here sua sponte injected a negligence theory into the case without according defendants an opportunity to address the claim. Therefore, it was error to enter judgment for plaintiff based solely on a negligence cause of action. See ibid.

Reversed.