OPINION OF THE COURT

Frigueletto v. CRA Construction and Home Elevations, LLC, et al.

L-2477-16

Return Date:	March 23, 2018
Nature of Proceeding:	Motion and Cross-Motions for Summary Judgment
Moving Party:	Defendants CRA Construction and Home Elevations, LLC; CDA Elevations, LLC; Christopher Aldarelli
Moving Party Counsel:	Gary Fox, of Fox & Melofchik, LLC
Cross-Moving Party:	Defendants CRA Construction and Home Elevations, LLC; Christopher Aldarelli; Paul Logan as to Count IV, V, and VI of Complaint
Cross-Moving Party Counsel:	John Robertelli, of Rivkin Radler, LLP
Cross-Moving Party:	Plaintiffs Albert and Eileen Frigueletto
Cross-Moving Party Counsel:	Michael Deem, of R.C. Shea & Associates, P.C.
Oral Argument:	Yes
Next Proceeding:	Trial: April 30, 2018

Co-counsel for Moving Defendants bring a Motion and Cross-Motion for Summary Judgment to dismiss the claims asserted against them and for judgment on the counterclaim. Plaintiffs oppose these motions and bring their own Cross-Motion for Summary Judgment as to all claims asserted against Defendants. For the reasons set forth herein, the Court grants Defendants' motions in part and denies Plaintiffs' motion.

STATEMENT OF FACTS/PROCEDURAL HISTORY

This matter arises from a home improvement contract entered into between Plaintiffs Albert and Eileen Friguelttо (hereinafter "Plaintiffs") and Defendant CRA Construction and Home Elevations, LLC (hereinafter "Defendant CRA") on March 11, 2015 for an original price of $134,985. Plaintiffs allege Defendant CRA and its agents and employees failed to complete the agreed upon work in a workmanlike manner. Defendant CRA and the other named Defendants (collectively "Defendants") argue Plaintiffs failed to make final payments pursuant to the contract.

Throughout the course of the project, there were several modifications or additions to the project, which required change orders to be created. The project was also held back at times due to delayed RREM funds for Plaintiffs. Defendants allege the project was down to a punch list of items, when Plaintiffs refused to make final payment under the contract and prevented Defendants from completing the project.

On or about August 29, 2016, Plaintiffs filed the Complaint in this matter against Defendants, pleading several causes of action. Count One of the Complaint alleges violations of the New Jersey Consumer Fraud Act. Count Two is for Breach of Contract. Count Three asserts a Breach of Warranty. Count Four is for Negligence, and Count Five asserts Res Ipsa Loquitur. Count Six is for Corporate Officer Participating in Tort liability. Finally, Count Seven is for "Conspiracy to

Commit Tort." Defendants ceased all work on Plaintiffs' home after the Complaint was filed. On or about October 21, 2016, Defendants filed an Answer and Counterclaim, with Count One for Breach of Contract and Count Two for Unjust Enrichment, seeking $12,249 owed under the contract and $8,300 owed for additional work performed.

Co-counsel for Defendants now move to dismiss all counts of Plaintiffs' Complaint and seek summary judgment on the Counterclaim. Plaintiffs oppose these motions and cross-move for summary judgment. Part of Defendants' motions was to bar the late expert report and amendments served by Plaintiffs, which this Court granted by way of Order and Opinion, dated March 20, 2018.

STANDARD FOR SUMMARY JUDGMENT

R. 4:46-2(c) mandates that summary judgment 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 the moving party is entitled to a judgment or order as a matter of law." Thus, summary judgment is not appropriate where there are genuine issues of material fact and a rational fact finder could resolve the material facts in dispute in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 520 (1995). It is well established that

> [t]he determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether competent evidential materials present, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Brill, supra, 142 N.J. at 523.]

The moving party bears the burden of establishing that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. R. 4:46-2; Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). Where the moving party makes the requisite showing, it is incumbent upon the opposing party to come forward with competent proofs indicating the facts are not as the moving

party asserts. Spiotta v. Wm. H. Wilson, Inc. 72 N.J. Super. 572, 581 (App. Div.), certif. den., 37 N.J. 229 (1962).

Therefore, in the present matter, this court will view all the evidence in the light most favorable to the non-moving party.

ISSUE I

Count Six of Plaintiffs' Complaint for Participation Theory is Dismissed.

Plaintiffs' counsel indicated at oral argument on February 16, 2018, Plaintiffs were voluntarily dismissing Count Six of their Complaint. As such, Count Six is hereby dismissed.

ISSUE II

Count Three of Plaintiffs' Complaint for Breach of Warranty is Dismissed.

Defendants argue the breach of warranty claim is without merit. First, there is no express warranty in any of the relevant documents. Defendants argue there is no factual or legal basis for this claim, such as an expert report to demonstrate Defendants failed to perform in a workmanlike manner. Therefore, Defendants contend Count Three should be dismissed.

Plaintiffs argue the warranty claim arises from the implied warranty of habitability. Plaintiffs argue because the house was left without a certificate of occupancy, it is uninhabitable, and therefore Defendants breached the implied warranty of habitability.

The Court finds Plaintiffs have failed to demonstrate a cause of action for breach of warranty in this matter. Plaintiffs fail to point to any express warranty Defendants might have breached. While the implied warranty of habitability may apply in some construction cases, Plaintiffs claims are really centered around the breach of contract, negligence, and consumer fraud claims. As such, Count Three of Plaintiffs' Complaint is dismissed.

ISSUE III

Plaintiffs have failed to set forth sufficient evidence to maintain a claim for negligence against Defendants, and therefore Defendants' Motion for Summary Judgment is GRANTED as to Counts Four, Five, and Seven of Plaintiffs' Complaint.

In cases of negligence, such as here, negligence "must be proved and will never be presumed . . . there is a presumption against it, and [the] burden of proving negligence is on the plaintiff." Buckelew v. Grossbard, 87 N.J. 512, 525 (1981), citing Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 139 (1951). Plaintiff must prove that defendant owed plaintiff a duty of care; defendant breached that duty of care; and plaintiff's injury was proximately caused by defendant's breach. Siddons v. Cook, 382 N.J. Super. 1, 13 (App. Div. 2006). Before recovery may be had, a duty must exist in law and a failure in that duty must be proved as a fact. Mergel v. Colgate-Palmolive Co., 41 N.J. Super. 372, 379 (App. Div. 1956).

The net opinion rule forbids the admission into evidence of an expert's conclusions not supported by factual evidence or data. Polzo v. County of Essex, 196 N.J. 569, 583 (2008). The rule requires an expert "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013) (quoting Pemerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 372 (2011).

Defendants contend Counts Four, Five, and Seven of the Complaint, which relate to negligence, should be dismissed, because the expert report from engineer Brian Murphy, dated September 12, 2016, is a net opinion, and therefore Plaintiffs cannot support a claim for negligence based on their home improvement work. Defendants argue Mr. Murphy's report is a net opinion because he does not provide an opinion that Defendants' work was performed in a negligent manner. Mr. Murphy's report includes photographs and observations of conditions on the property, but Defendants assert there is no analysis as to how each identified condition failed to meet a specific industry code or standard. Mr. Murphy does list construction and building codes, but Defendants urge there is no analysis applying those codes to the facts of this case. Defendants also note R. 4:17-4 requires a detailed report, including "a complete statement of that persons opinions" and "the facts and data considered in forming opinions." Due to these stated failures, Defendants argue Plaintiffs have failed to provide competent evidence to demonstrate Defendants breached the standard of care for construction work performed on the property.

Plaintiffs argue the photographs of the subject property provide sufficient evidence for a claim of negligence. Plaintiffs contend expert testimony is not required for some of these items because a jury can determine, based on the photographs, the work performed by Defendants was clearly unreasonable or

negligent. Plaintiffs essentially argue the alleged negligence of Defendants can be decided based on the common knowledge of a jury.

The Court previously excluded late amended reports produced by Plaintiffs by way of Order, dated March 20, 2018. Thus, Plaintiffs' expert testimony is limited to the September 12, 2016 expert report from Mr. Murphy. The Court finds this report is a net opinion. As Defendants have noted, the report contains observations of the property and lists objective standards, but there is no why or wherefore or analysis explaining how the observed conditions failed to comply with the referenced codes. This report does not provide any assistance to a jury in determining whether Defendants breached the appropriate standard of care for home improvement contractors, and it is the type of report the net opinion rule is intended to preclude. The Court further holds the standard of care for home construction and renovation is not within the purview or a juror's general knowledge. Thus, without competent expert testimony, Plaintiffs cannot sustain a claim for negligence. Because the Court finds Mr. Murphy's expert report is deficient, Count Four for negligence must be dismissed.

As to Count Five for res ipsa loquitur, the Court finds the doctrine is inapplicable here and cannot be used to allow Plaintiffs to overcome the general principle that negligence will not be presumed. Furthermore, there is no basis for Count Seven for conspiracy to commit tort where, as here, Plaintiffs have failed to

establish a tort claim. As such, Defendants' motion for summary judgment as to Counts Four, Five, and Seven is **GRANTED.**

ISSUE IV

There are genuine disputes as to the breach of contract claims by both parties. As such Defendants' Motion for Summary Judgment as to Count Two of Plaintiffs' Complaint is DENIED, and Plaintiffs' Cross-Motion on Breach of Contract is DENIED.

A party alleging a breach of contract claim has the burden of establishing the following elements: (1) the parties entered into a valid contract; (2) the plaintiff did what the contract required; (3) the defendant breached the contract; and (4) the defendant's "breach or failure to do what the contract required caused a loss to the plaintiff." Globe Motor Co. v. Igdaley, 225 N.J. 469, 482 (2016) (citing Model Jury Charge (Civil), 4.10A "The Contract Claim—Generally" (May 1998)).

Defendants argue they are entitled to summary judgment on Count One of the counterclaim for breach of contract in the amount of $12,249. Defendants contend Plaintiffs undisputedly breached the contract by failing to make payments owed for Defendants' work. Defendants explain they sat down with Plaintiffs in July of 2016 to go over all the remaining work. Defendants maintain they were ready to perform the work but were not able to complete it because Plaintiffs were threatening the current litigation. Thus, Defendants argue the record shows Plaintiffs breached the contract and prevented Defendants from completing their contractual obligations.

Defendants further seek damages for unjust enrichment. Defendants argue Plaintiffs verbally instructed Defendants to construct additional decks and steps not

included in the contract. Defendants contend this work was completed, and Plaintiffs received the benefit of this work without additional payment to Defendants.

Plaintiffs counter Defendants breached the contract by failing to complete the work and contractual obligations. Plaintiffs cite to various issues, including the water utility hook up and curb cutting, among other issues. Plaintiffs also address work performed pursuant to an unsigned change order, which they dispute owing payment on, but even if Plaintiffs do owe Defendants the approximately $2,000, that is not a material breach of the underlying contract.

The Court finds there are genuine disputes as to the breach of contract claims in this matter. There were multiple change orders and modifications throughout the course of this project. Thus, this not a straightforward case of one party failing to make payment or complete work. There are disputes as to what projects were paid for and which ones were not. The parties also dispute who made the first material breach of the contract. A finder of fact must review what payments were made, what work was performed, and what amounts remain due and owing by the parties. Ultimately, the amounts requested by Plaintiffs and Defendants are both in dispute at this time. As such, Plaintiffs' and Defendants' motions for summary judgment on the breach of contract claims are **DENIED.**

ISSUE V

There are genuine disputes as to Consumer Fraud Act liability. As such Defendants' Motion for Summary Judgment as to Count One of Plaintiffs' Complaint is DENIED, and Plaintiffs' Cross-Motion is DENIED.

Pursuant to N.J.S.A. 56:8-2 ("CFA"), consumer fraud is "any unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation" in connection with the sale of goods, services, or real estate. The requisite "unlawful practice" for a CFA claim may be established through affirmative acts, knowing omissions, and/or regulatory violations. Id. The capacity to mislead is the key factor for consumer fraud claims. Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 378 (1977). Once a plaintiff established a violation under the CFA, he or she must then establish an ascertainable loss related to the violation, meaning one that is quantifiable or measurable. Thiedemann v. Merceds-Benz, USA, LLC, 183 N.J. 2 (1995).

Defendants argue Plaintiffs' claim for CFA liability fails because Plaintiffs are unable to establish an ascertainable loss connected to any violation. Defendants again argue Mr. Murphy's expert report fails to show any connection between alleged defective workmanship and ascertainable damages. Defendants also note the report is absent of any calculated damages. Defendants further argue, even if there is an ascertainable loss, Plaintiffs have failed to provide any evidence, expert or otherwise, to establish a connection to any unlawful conduct by Defendants.

Plaintiffs assert there is an ascertainable loss connected to unlawful conduct in this matter. Specifically, Plaintiffs contend N.J.A.C. 13:45A-16.2(a)(6)(v) prohibits a contractor from "request[ing] the buyer to . . . make final payment on the contract before the home improvement is completed." Moreover, the Supreme Court has held an "improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the Act, because the consumer is not obligated to pay an indebtedness arising out of conduct that violates the Act." Cox v. Sears Roebuck & Co., 138 N.J. 2, 23 (1994). Here, Plaintiffs point to the fact Defendants demanded final payment on the contract before completing the project. Thus, Plaintiffs argue Defendants committed a regulatory violation under the CFA, and the improper counterclaim by Defendants for the balance of the contract price of $12,249 is an ascertainable loss. Plaintiffs also point to per se violations in the contract, such as the failure to provide the name of the insurance carrier and a defective cancellation policy. Plaintiffs further contend Defendants also performed additional work without a signed change order, the change orders were from "CRA Elevations LLC" which is not a registered home improvement company, and that Defendants misrepresented they would perform all services, but later informed Plaintiffs they would not be responsible for water hook ups. For all these reasons, Plaintiffs argue there is sufficient evidence to assert a CFA claim against Defendants.

The Court finds Plaintiffs have provided sufficient evidence to maintain a claim for CFA violations against Defendants. Plaintiffs' strongest claim is for the ascertainable loss sustained as a result of Defendants demanding final payment on the contract before completing the work. If said conduct is found to be a violation of the CFA, there would be a clear connection between that conduct and the ascertainable loss of the counterclaim. The other allegations and further ascertainable losses suffered by Plaintiffs may be in dispute, but there is sufficient evidence to keep the CFA claim in this matter. As such, Defendants' motion for summary judgment as to Count One of the Complaint is **DENIED**, and Plaintiffs' cross-motion for summary judgment on the CFA claim is **DENIED.**

CONCLUSION

For the aforementioned reasons, Defendants' Motion for Summary Judgment is **GRANTED in part.** Counts One and Two of Plaintiffs' Complaint remain, and Defendants' Motion for Summary Judgment on the Counterclaim is **DENIED.**

Plaintiffs' Cross-Motion for Summary Judgment is **DENIED.**