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by Lawrence Hughes

In ***Cox v. Sears, Roebuck & Co.***, 647 A.2d 454 (N.J 1994), the New Jersey supreme court held that Sears, Roebuck & Company ("Sears"), by failing to comply with regulatory provisions governing home improvement work, had engaged in a unlawful practice violating the state's Consumer Fraud Act ("Act"). Additionally, the court found that the merchant's violation of the Act resulted in an ascertainable loss for the plaintiff, thus entitling him to treble damages, attorney's fees, and court costs.

Plaintiff sues for breach of contract and Act violations

In August 1988, William Cox signed a home repair proposal contract with Sears for kitchen renovations. Under the contract, Sears agreed to make numerous kitchen improvements, including installation of new cabinets, vinyl flooring, a microwave hood and vent, a garbage disposal, and an extra electrical outlet. Cox financed the entire cost of $7,295.69 on his Sears credit card and received the merchant's promise of "satisfaction guaranteed or your money back." Additionally, when Sears began the home repairs on December 5, 1988, Cox signed an "Authorization for Change of Specifications" that provided for rewiring and updating of electrical work at an additional cost of $1,500.

On December 23, 1988, Cox signed a statement indicating that the improvements made to date had been completed to his satisfaction. Subsequently however, he became dissatisfied with Sears' work. During 1989, he complained to the merchant about defects in the cabinets, the flooring, and the microwave hood. In response to these complaints, Sears sent a repairman to Cox's home on at least four occasions. However, after Cox retained legal counsel in October 1989, Sears made no further repairs. Cox then sued for breach of contract and consumer fraud violations under the Act. Sears counterclaimed for the full contract price of the kitchen repairs.

Upon conclusion of the trial, the jury returned a verdict for Cox on both the breach of contract and consumer fraud claims. On the contract claim, the jury found that Sears had not substantially performed its contractual obligations. It concluded that Cox was entitled to damages amounting to the full contract price of $8,795.69 less $238 for the value of the merchant's performance. Moreover, the jury found that Sears had failed to correct the deficiencies in its work and awarded Cox $6,830 to complete or repair his kitchen. On the consumer fraud claim, the jury found that Sears had violated the Act by failing to have competent workmen install the cabinets, plumbing, and electrical wiring in a safe manner consistent with existing regulations.

Sears then moved for judgment notwithstanding the verdict ("JNOV"). It contended that the conduct characterized by the jury as consumer fraud did not, in actuality, violate the Act. Initially, the trial court denied Sears' JNOV motion, awarded treble damages to Cox according to the provisions of the Act, and dismissed Sears' counterclaim. However, Sears renewed its motion. In turn, Cox filed a cross-motion seeking damages, costs, and attorney's fees totaling $56,840.57.

At this time, the trial court granted Sears' renewed motion and entered a "no cause of action" in its favor on both the breach of contract and consumer fraud claims. However, the court did not disturb an order dismissing Sears' counterclaim and directed the merchant to remove charges from Cox's account and the lien on his house.

On appeal, the appellate division affirmed the trial court's decision. First, it held that Sears' conduct constituted a breach of contract. It concluded that the jury's award of compensatory damages of $6,830 put Cox in a position equal to the one he would have enjoyed if the merchant had performed according to the contract. Second, the court found that Sears had not engaged in consumer fraud. It stated that a violation of the Act required an unconscionable practice on the part of the merchant. The court reasoned that a breach of contract, such as the one in the present situation, did not rise to that level.

Cox appealed this decision to the supreme court of New Jersey. In the supreme court, Cox confined his arguments specifically to the consumer fraud claims in the case and raised no issue as to the contract claim. Specifically, Cox alleged that Sears' conduct constituted an unlawful practice under the Act that resulted in an ascertainable loss. He asserted he was entitled to treble damages, attorney's fees and costs.

Sears failed to comply with Home Improvement Practices regulations

In addressing the issue of whether Sears had violated the Act by engaging in unlawful practices, the supreme court turned to both the direct language of the Act as well as its legislative history. It first suggested that the Act, like other remedial legislation, was designed to be construed liberally in favor of consumers. The court noted that the Act specifically authorizes any consumer who suffers an ascertainable loss from the use or employment of any "unlawful practice" to bring a private cause of action. Similarly, it observed that the Act held a practice unlawful whether or not the merchant had acted in good faith or the consumer had, in fact, been deceived. Both acts and omissions qualified as violations of the statute. Additionally, according to the court, unconscionable commercial practices, characterized by a lack of good faith and honesty, also violated the Act.

The court then specifically examined the nature of the three general categories of unlawful commercial practices recognized by the Act: affirmative acts; knowing omissions; and regulatory violations. First, the supreme court noted that an affirmative act did not require intent as an essential element of an alleged consumer fraud violation. In such a case, the plaintiff did not need to prove that the defendant intended to commit the act. Second, the court observed that an omission required "intent;" an essential element of the fraud. Here, unlike an affirmative act, the plaintiff must show that the defendant acted "knowingly" to perpetuate the fraud. Third, the court recognized that the Act imposed strict liability on regulatory violations. Accordingly, any failure to comply with the statutory provision resulted in liability. The court stated that parties subject to the regulations are assumed to be familiar with them, and therefore, any failure to comply, regardless of intent or moral culpability, violates the Act.

In analyzing the issue of whether Sears had violated the Act, the court concluded that the appellate division had failed to adequately address Cox's consumer fraud claim. Specifically, it found that the lower court had focused solely on whether the merchant had engaged in an unconscionable commercial practice. Because the appellate court found that Sears had not committed an unconscionable practice, it held that there was no violation of the Act. It did not further examine whether Sears had committed any of the three categories of unlawful commercial practices detailed in the Act.

The supreme court, however, stated that such an interpretation of the Act was too narrow. It suggested that the Act was not designed to be read in the conjunctive as it had been by the lower court. Rather, the Act should be read in the disjunctive. In so doing, the Act may be violated by an unconscionable commercial practice or by one of the three categories of violative behavior. Proof of any affirmative act, omission, or regulatory violation was sufficient to establish that unlawful conduct occurred.

Reading the Act in the disjunctive, the supreme court held that Sears had violated the statutory provision. It suggested that Sears' unlawful conduct involved both regulatory violations and affirmative acts. For example, although several permits were required for the home improvement work to be done in Cox's home, none had been obtained. Acknowledging that neither statute nor regulation specifically required Sears to obtain permits for an owner, the court nevertheless concluded that Sears began work without checking for permits required by state law. The court also found that Sears had violated state law requiring that a home owner receive a copy of the inspection certificate before final payment is due and the completion slip is signed. Since no permit existed for the work on Cox's home, no inspection took place and no certificate was issued. Finally, the court found that the evidence supported an inference that Sears had asked Cox to sign a certificate of completion before the work had actually been completed.

In finding that Sears' conduct constituted an unlawful practice in violation of the Act, the court observed that such regulations governing home improvement work had been developed to prevent precisely the poor quality of work that characterized Sears' performance in this instance. Furthermore, the supreme court noted that the Act was intended to protect consumers, such as Cox, even when substandard workmanship did not approach the level of unconscionable commercial practice.

Sears' unlawful conduct caused Cox an ascertainable loss

The New Jersey supreme court then considered whether Cox was entitled to damages under the Act. Acknowledging that the Act's remedial purpose is to compensate a victim for loss, the court stated that the Act also serves as a deterrent. It provides for punishing the wrongdoer by awarding treble damages, attorney's fees and costs. To be entitled to treble damages, however, a plaintiff must show an "ascertainable loss."

The supreme court held that Sears' failure to comply with the regulations caused an ascertainable loss for Cox. It stated that the purpose of the Home Improvement Practices regulations is to protect the consumer from hazardous or shoddy work. If Sears had obtained all the required permits before it began work, its performance would have been subject to periodic inspections. As such, an inspector would have detected any substandard performance and required Sears to correct the deficiencies. Because the inspections did not occur, deficiencies, such as the unsafe wiring, occurred. The court found that these deficiencies created an ascertainable loss for Cox and thus, were compensable under the Act.

Furthermore, the court dismissed the appellate division's suggestion that Cox had incurred no loss because he did not spend money to repair or finish the work. According to the court, such a construction would have been contrary to the Act's remedial purpose. It also rejected the appellate division's suggestion that Cox failed to incur any loss because he "kept" the kitchen since it had been installed. It reasoned that Cox had no other choice because he still owned the house. Similarly, it found that Cox did not "gain" a kitchen since Cox had a normal and safe kitchen prior to the renovations. The supreme court stated that a victim need only estimate damages within a reasonable degree of certainty to demonstrate loss; he did not have to actually spend the money for repairs to be entitled to bring a consumer fraud claim. According to the supreme court, the trial court had properly found that Cox adequately demonstrated the cost of repairs.

State supreme court finds both treble damages and attorney's fees are appropriate

The court also held that the Act mandates an award of treble damages and attorney's fees when a consumer fraud plaintiff proves both an unlawful practice and an ascertainable loss. According to the court, the proper measure of Cox's damages was the cost of repairs trebled, or $20,490.

Moreover, although the contract breach claim was not before the court, it considered the jury's determination that the value of Sears' performance was $238 and credited that amount against the award. A plaintiff is required, under the "causation" provision of the Act, to prove that the unlawful consumer fraud caused his loss. Accordingly, the court entered judgment for Cox in the amount of $20,252. It held that the contract price was an incorrect measure of the damages as the fraud occurred in the course of performance, and not in the actual contracting of the work.

Additionally, the court acknowledged that the credit card debt and the lien on the house were losses to Cox and were properly canceled by the trial court for the breach of contract. The court, however, held that these losses had not resulted from Sears' violation of the Act. Rather, Cox incurred the losses before any fraud occurred. Because the improper debt and lien were not caused by Sears' consumer fraud, the court held that Cox was not entitled to having those damages trebled.

Finally, Cox's award of attorney's fees and costs was remanded to the trial court for recalculation. The court indicated that the fee request originally submitted to the trial court was plainly disproportionate to the resulting damages. As a result, the trial court would need to determine fees appropriate to the result.

The judgment of the appellate division was reversed and remanded to the trial court for reconsideration on the issues related to the consumer fraud violation.