Contractors Beware: Small Missteps Can Give Rise to Large Liability

By Gene Markin

One of the biggest challenges facing homeowners is the search for reputable, reliable and competent home improvement contractors. For those owners without any construction knowledge or background, hiring contractors to perform substantial construction work on their homes, such as installing home additions, pavers and pools, patios, decks, roofs, siding or home remodeling, is a risky venture. Fortunately for them, the protections afforded by New Jersey's consumer fraud laws and regulations are all-encompassing and easily triggered.

From the stringent requirements of the Contractors' Registration Act (CRA), N.J.S.A. 56:8-136 et seq., and the New Jersey Home Improvement Practice Regulations (HIPR), N.J.A.C. 13:45A-16.1 et seq., to the sweeping provisions and applicability of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 et seq., consumers have more leverage and remedies than they may think in dealing with contractors. From the initial pitch to the contract to the performance of the actual work, contractors must walk a fine line to not violate the litany of consumer protection laws applicable to home improvement transactions.

First, the CRA requires that every home improvement contractor performing work in New Jersey be registered with the Department of Consumer Affairs, N.J.S.A. 56:8-138, maintain at least $500,000 per occurrence commercial general liability insurance, N.J.S.A. 56:8-142, and display in all advertisements, documents and contracts his registration number, N.J.S.A. 56:8-144. Moreover, contractors must include a copy of their certificate of insurance with the contract, N.J.S.A. 56:8-151. Violations of the CRA give rise to private causes of action by aggrieved consumers who may, upon proving a violation has occurred, recover the greater of actual damages suffered or $500 per violation, along with reasonable attorney fees and costs of suit, N.J.S.A. 56:8-159.

Second, the HIPR imposes specific, and sometimes onerous, requirements on contractors with respect to representations, promises, performance of the work and the contract itself. For instance, it is a violation of the regulations to misrepresent to consumers the maintenance requirements for materials to be installed or to fail to provide written notice of unexpected delays in the execution of the work, N.J.A.C. 13:45A-16.2. Moreover, home improvement contracts in excess of $200 must be in writing, signed by both parties and clearly convey the terms and conditions of the agreement, including: start and end date of the work to be performed, total price to be paid inclusive of finance charges, description of the products and materials to be used or installed and a statement of any guarantee or warranty being provided by the contractor. Furthermore, the contractors are responsible for obtaining all necessary state and local construction permits, and are not allowed to request final payment before providing the customer with copies of applicable municipal inspection certificates.

Proof of even a single violation of the numerous regulations, whether big or small, is an automatic violation of the CFA, entitling the consumer to recover triple damages and attorney fees and costs. See *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18 (1994); see also N.J.S.A. 56:8-29. Notably, intent to comply with HIPR is irrelevant, as contractors are strictly liable for even the most minimal of violations, such as not including a start/finish date on the contract, or asking for final payment prior to completing the work, or furnishing copies of the inspection certificates.

To make out a prima facie case under the CFA, a plaintiff consumer must present evidence of: (1) unlawful conduct by defendant contractor; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss. N.J.S.A. 56:8-19. A misrepresentation is actionable under the CFA only if it is material to the transaction, false in fact and induces the buyer to purchase. The CFA, however, covers both written and oral misrepresentations.

Intent to mislead, on the other hand, is not an essential element to make out a claim for an affirmative misrepresentation, N.J.S.A. 56:8-2. A practice can be unlawful even if no person was, in fact, misled or deceived by it. The prime ingredient is the mere "capacity to mislead" and, therefore, the plaintiff need not prove that defendant acted with the intent to mislead. *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255, 263 (1997). Thus, a contractor who misrepresents his ability to perform the work, his familiarity with materials or products to be installed, or his knowledge of proper installation techniques, is liable for consumer fraud.

Such was the case in *Hudson Harbour Condo. Ass'n v. Oval Tennis*, 2015 N.J. Super. Unpub. LEXIS 1811 (App. Div. July 29, 2015), where the Hudson Harbour Condominium Association hired Oval Tennis, an "experienced" tennis court installer, to install an open-celled Premier Court on an existing concrete slab. Oval represented to the association that it was a certified Premier Court installer, was familiar with the requirements of the job, possessed sufficient experience to properly install the court and employed trained technicians to perform the work. Despite the contract calling for an open-cell court, Oval installed a closed-cell, non-breathable court unsuitable for the concrete surface it was installed upon. The closed-cell surface did not allow vapor to pass through, trapping the vapor and moisture underneath the court, which caused noticeably premature deterioration of the court, including blisters near the net, holes, ripples, bubbling and delaminating of the court surface.

The court had no trouble finding that sufficient, credible evidence supported a prima facie case and that Oval engaged in "unlawful conduct" in violation of the CFA. Oval represented to the association that it was an experienced tennis court installer with sufficient skill and knowledge to install an open-cell court. At trial, however, Oval's owner admitted that he did not know the difference between an open-cell and closed-cell tennis court. That was enough for the issue of whether Oval engaged in deceptive conduct under the CFA to reach the jury.

Contractors may also be liable for CFA violations for negligent workmanship resulting in a breach of contract, but only if certain "aggravating factors" are present. Take the case of *Akhtar v. JDN Props. at Florham Park*, 2015 N.J. Super. Unpub. LEXIS 355 (App. Div. Feb. 24, 2015). The plaintiff, a homeowner, hired an architect to prepare plans for the construction of a new home, as well as a developer to construct the home per the plans. The plans called for testing of the underlying soil to confirm that the bearing capacity of the soil was adequate to support the weight of the house.

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The builder, despite being contractually obligated to build the home in accordance with the plans and specifications, neglected to test the soil. As a result, after the home was erected, the plaintiff noticed substantial cracking and differential settlement throughout the house, which the builder assured him was just "a normal part of the settling process." The plaintiff later found out that a substantial portion of the house was constructed on soil with a bearing capacity considerably less than what was required, causing the house to slowly slide down a hill and rendering it uninhabitable. The plaintiff brought suit against the builder for breach of contract as well as violations of the CFA.

Conduct constituting a breach of contract *may* certainly present grounds for a consumer fraud claim, but not invariably so. *Josantos Constr. v. Bohrer*, 326 N.J. Super. 42, 47 (App. Div. 1999). In that regard, our Supreme Court explained that:

> [U]nconscionability is an amorphous concept obviously designed to establish a broad business ethic. The standard of conduct that the term "unconscionable" implies is lack of good faith, honesty in fact and observance of fair dealing. However, *a breach of warranty, or any breach of contract, is not per se unfair or unconscionable [] and a breach of warranty alone does not violate a consumer protection statute*. Because any breach of warranty or contract is unfair to the non-breaching party, the law permits that party to recoup remedial damages in an action on the contract; however, by providing that a court should treble those damages and should award attorneys' fees and costs, the Legislature must have intended that *substantial aggravating circumstances* be present in addition to the breach.

Cox, 138 N.J. at 18 (citations and internal quotation marks omitted) (emphasis added).

A simple breach of warranty or breach of contract is, therefore, not per se unconscionable, and standing alone will not result in a violation of the CFA. There must be some aggravating circumstance that qualifies the breach as a prohibited act.

In *Akhtar v. JDN*, the builder breached a requirement in the architect's plan attached to the contract; however, without the existence of an aggravating factor bringing the breach within the purview of the CFA, the plaintiff's claims and recovery were limited to those sustainable under breach of contract and negligence theories only. Even though the breach had devastating consequences, specifically to the tune of $1.57 million spent on an uninhabitable home, the extent of the damages alone does not a CFA violation make. The Appellate Division recognized that a fact-finder could find circumstances surrounding the breach were so egregious as to constitute a violation of the CFA and, therefore, remanded the case back to the trial court for a determination of whether any CFA-triggering factors existed.

For consumers, the take away is simple: ask prospective contractors plenty of probing questions about their experience, expertise, training and specialized knowledge. Request and retain copies of any marketing and sales materials, and attempt to memorialize important conversations in writing, i.e., through emails, text messages, letters, etc. Scrutinize contracts for pertinent information, such as license numbers, start and end dates, clear descriptions of the work and materials to be used, and evidence of insurance coverage. Never make final payment until the work is completed, inspected and applicable inspection certificates are furnished. Use the threat of triple damages and attorney fees as a bargaining chip to diffuse disputes and resolve workmanship-related issues.

For contractors, the motto is "knowledge is power." The more familiar contractors become with the requirements of the CRA, HIPR and CFA, the better they can protect themselves from inadvertent and innocent violations, which could still expose them to significant liability. Making sure the contracts and sales material being distributed to customers is up to par will go a long way in preventing potential issues down the road. ■

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