DAVID KUTHER TRACI KUTHER v. JOHN ZAKLAMA COFFEE PLACE LLC

Superior Court of New Jersey, Appellate Division.

DAVID KUTHER and TRACI KUTHER, Plaintiffs-Respondents, v. JOHN ZAKLAMA and COFFEE PLACE, LLC, Defendants-Appellants.

DOCKET NO. A-6292-07T3

Decided: January 04, 2011

Before Judges Stern, Sabatino and J.N. Harris. Marc J. Friedman, attorney for appellants. Bathgate, Wegener & Wolf, attorneys for respondents (Brian W. McAlindin, of counsel and on the brief; Christopher B. Healy, on the brief).

Defendants, John Zaklama and Coffee Place, LLC, appeal a final judgment in the sum of $165,721.79, plus interest and costs, in the Law Division following a bench trial to adjudicate a complaint brought by David and Traci Kuther ("plaintiffs") for negligence. We affirm.

I.

In their original complaint, plaintiffs alleged that Zaklama [1] negligently maintained his brownstone house on Garden Street in Hoboken. Plaintiffs asserted that, as a result of Zaklama's negligence, their own brownstone house which was next door was damaged by water seeping through a shared wall.

Each house on the block apparently was built with a single cast-iron drainage pipe for all effluvia generated from the house. Additionally, the roof on both houses contained a "Yankee drain," which was described in the record as "simply a gutter with a trough" that leads to the same pipe. The pipes that serviced each house ran along each building's south side. Thus, the pipe that serviced plaintiffs' house ran along the side opposite Zaklama's building, while the pipe that serviced Zaklama's house ran along the wall adjoining plaintiffs' house.

Plaintiffs purchased their four-bedroom, nineteenth-century brownstone in 2002 for $915,000. Prior to their purchase, the home had been almost completely renovated to its original condition by the previous owners. Shortly after purchasing the home, plaintiffs hired a contractor who specialized in restoring historic homes to complete the renovations.

In October 2005, plaintiffs began to observe water damage spreading on the north wall of their property, the wall adjoining defendants' property. Plaintiffs hired a number of "plumbers and

experts to come in and try to decipher what was wrong." The plumbing contractors whom plaintiffs hired told them that the damage was coming from defendants' drainage pipes. Plaintiffs paid these contractors $1,011.15 to conduct tests on both their plumbing line and defendants' plumbing line. Plaintiffs also obtained two expert opinions about the condition of their roof, both of whom determined that the roof was not the source of the water damage.

After they "saw the potential mold" on their property, plaintiffs called in the Hoboken Board of Health. The Board inspected plaintiffs' house and the next-door premises at the Zaklama property as well. The Board subsequently cited Zaklama for the unsanitary conditions there, a determination that he challenged in the municipal court. Plaintiffs approached Zaklama to request that he remediate the water seepage, but he refused to do so, claiming that his appeal of the Board of Health's citations in municipal court would determine who was truly at fault for the water damage.

In March 2006, Dr. Zaklama, who is described in the record as the property manager for Zaklama's premises, represented to plaintiffs that he had made the necessary repairs to stop any water seepage through the common wall into their premises at the Kuther property. As a result, plaintiffs hired a contractor to scrape the damaged plaster from the wall, replaster and repaint. Plaintiffs were charged a net sum of $1,125 for that particular work.[2]

Almost immediately, the water damage substantially worsened on that same wall. The paint began to bubble, then it flaked and peeled off the wall. According to plaintiffs, some paint chips fell onto the staircase, where plaintiffs' infant son and their two dogs allegedly attempted to ingest them.

In September 2006, after plaintiffs became unable to tolerate the smell of mold and the perceived health hazard to their pets and children, they left the house. They temporarily moved all four family members and their two dogs into a 500 square foot, one-bedroom apartment in Queens, New York, which they then shared with Mr. Kuther's parents. Plaintiffs stayed in the Queens apartment through May 2007, when they temporarily moved into a two-bedroom apartment in Manhattan.

In September 2006, plaintiffs were served with a criminal summons by Zaklama to appear in municipal court on charges of harassment in violation of N.J.S.A. 2C:33-4b. Mrs. Kuther alleges that this charge stemmed from an incident on September 19, 2006, when she was outside of the house and speaking to a Hoboken police officer and city councilman about the unlicensed contractors that Zaklama allegedly had hired to repair the roof at the Zaklama property.

The municipal harassment case was adjourned multiple times because Zaklama failed to appear as the complaining witnessuntil October 25, 2006, when it was finally dismissed by the municipal prosecutor. Plaintiffs' counsel invoiced Mrs. Kuther $6,278.39 for appearing in connection with that matter.[3]

Plaintiffs commenced the instant action by filing a verified complaint against Zaklama in the Law Division on January 19, 2007. At the same time, they brought an order to show cause seeking immediate injunctive relief to remediate the water seepage. After hearing oral

argument on the application, the trial judge issued orders on March 13, 2007 and April 30, 2007, requiring Zaklama to abate the nuisance and make repairs to his building.

Two months later, after Zaklama had failed to comply adequately with either of the court's orders, the trial judge issued a bench warrant for his arrest. The judge stayed execution of this warrant multiple times through June, July, August, and September 2007 upon receiving periodic updates by Zaklama on his progress toward full compliance with the court's March and April 2007 orders. At some point in October 2007, the repairs were made to Zaklama's building and were inspected by Hoboken officials. Apparently, the arrest warrant for Zaklama was then vacated.[4]

In his answer to the complaint, Zaklama denied liability. After the court-ordered repairs were completed, plaintiffs moved for reimbursement of the $36,560 in counsel fees that they had been charged in securing Zaklama's remediation and compliance. Zaklama opposed the fee application. After hearing oral argument and reviewing in detail the itemized affidavit of services presented by plaintiffs' counsel, the trial court awarded plaintiffs counsel fees in the reduced sum of $11,640. The court subtracted from that amount the $1,000 in counsel fees that it had previously awarded and which had already been paid to plaintiffs, yielding a net balance due of $10,640.

After the leaks from Zaklama's house were remediated in October 2007, plaintiffs awaited an estimate for repairs from a contractor of Zaklama's choosing. In February 2008, after no such estimate from Zaklama was forthcoming, plaintiffs solicited their own estimates for the work. Plaintiffs obtained two such estimates: one for $31,000 from Artistic Renovations, Inc. (“Artistic Renovations”) and another for $32,500 from Birch Tree Builders, LLC. Plaintiffs accepted the bid from Artistic Renovations, because it was $1,500 lower, and also because they were familiar with the quality of that firm's work from when it performed renovations on their home in 2003.

Artistic Renovations completed the repair workremediating the water damage and repairing plaintiffs' stairwayin May 2008 to plaintiffs' satisfaction. It charged plaintiffs the bid price of $31,000 for the job, which they subsequently paid.

Plaintiffs moved for summary judgment against Zaklama on all counts. Zaklama opposed the motion and cross-moved for summary judgment on the basis of a settlement that he alleged he had entered into with plaintiffs. After considering the parties' contentions, the trial judge granted plaintiffs' motion in part and denied Zaklama's cross-motion in full on May 23, 2008. Specifically, the judge stated in his bench ruling:

I've already determined, after several days of testimony, that [Zaklama] maintained the nuisance, which I ordered [him] to abate the water damage to [plaintiffs'] property, resulting from the tension drain, I think it was called, on the roof, and various plumbing problems, as to which I heard testimony from at least two of the tenants in the building.

There [were] days of testimony. I heard from numerous witnesses, including [Zaklama]. I saw videotape, et cetera. So there is no material issue of fact, with respect to the infiltration of water from the Zaklama property, onto the wall that was-that they virtually shared in common.

They were separate walls, but the south wall was right next to the north wall. There's no question that the water seeped from the Zaklama property onto the wall of the Kuther property, and that's, in fact, what caused the wetness, the peeling, the mold, and et cetera.

[(Emphasis added).]

The court reserved judgment on the quantum of damages, as at the time there was still an open demand in the pleadings for a jury trial. The judge noted that "[d]amages [are] something that will have to be for a jury to hear and decide."

The ensuing damages trial commenced on June 24, 2008. The case was heard as a bench trial, as both parties ultimately waived the right to a jury. During the course of the trial, plaintiffs called three witnesses: Jacek Werocsy from Artistic Renovations; plaintiff Traci Kuther; and Zaklama. The defense called two witnesses: Samer Awad, a contractor who had worked for Zaklama before and who had previously done work on the Zaklama property and Dr. Zaklama.

At the outset of Zaklama's trial testimony, he alerted the court to the fact that he had sold the Zaklama property to a corporate entity, Coffee Place, LLC. Coffee Place, LLC ("the LLC"), is a corporation with a listed address at another of Zaklama's properties in Jersey City. Zaklama indicated that he had transferred ownership of all of his properties to the LLC within the month prior to trial. He testified that he was the president and sole shareholder of the LLC.

With respect to the subject premises, Zaklama testified that he transferred the property to the LLC for the sum of $10,000. He admitted in his testimony, however, that the likely market value of the property was about $1 million. At the time of the transfer, there were liens on the property imposed by the State for unsatisfied judgments, as well as the prior $10,640 award of counsel fees in this case. As a result of this transfer, as of the time of the damages trial, Zaklama apparently held no significant personal assets.

After Zaklama's testimony revealed these transfers, plaintiffs' counsel orally moved under Rule 4:9-2 to amend the pleadings to include Coffee Place, LLC as a co-defendant. Noting that both trial attorneys had apparently been taken off guard by the transfer, and that the LLC was "entirely owned by Mr. John Zaklama, and he's the president of it," the judge granted the motion to amend.

In his testimony, plaintiffs' contractor, Werocsy, testified that a team from his company had worked on the repairs of plaintiffs' property for thirty-five days in April and May 2008. Werocsy stated that his crew worked six days each week, and that he was present on site for at least part of every day that work was conducted. Werocsy testified that he "used two plasterers, and two carpenters, and then two painters" to complete the project. During the course of the repairs, the plasterers tore the damaged stucco from the masonry walls along the staircase that ran up the north wall of the Kuther property. They then cleaned mold and stray plaster from the underlying brick. Finally, they reapplied new stucco to the wall.

After the plasterers had repaired the wall, the carpenters checked and replaced each stair in the staircase as needed. This required the workers, as Werocsy described it, to "basically

disassemble the stairs and put them back together." In the process, they checked the anchoring of the stairs to the wall and reseated any stairs that had warped away from the wall. After the work on the staircase was finished, the plasterers came back in and touched up the stucco around the newly-repaired stairs. They also replaced the plaster soffits under the stairs. Finally, painters came in to stain and varnish the staircase, and to prime and paint the walls in and around the staircase.

Traci Kuther testified at length about the chronology of her family moving out of their Hoboken brownstone, and their efforts to get the water intrusion remediated. She testified that, by the time that she and her family left the premises, their home smelled of mold, and the staircase to the third floor, where the bedrooms were, had become too fragile to ascend. She testified that she unsuccessfully searched Hoboken for an apartment of appropriate size to house her family. She chose not to look in the nearby municipalities of Jersey City or Weehawken, since she did not consider those areas to be safe. Mrs. Kuther testified that she looked for a house to rent that was equivalent to the house that they had lived in. According to Mrs. Kuther, such a rental in Hoboken would have cost her $8,000 per month, and that she and her family could not afford that expense.

Mrs. Kuther testified that a two-bedroom or three-bedroom apartment in Hoboken that permitted petseven one inferior to their brownstonerequired a rental rate of "between [$4,000] and $5,000" per month. She stated that plaintiffs were on the waiting list for such a Hoboken apartment while they were looking to move out of their relatives' apartment in Queens.

Eventually, plaintiffs rented a two-bedroom apartment on 63rd Street in Manhattan for $4,350 per month. Plaintiffs paid $1,309.74 in moving costs to transfer into that apartment. Plaintiffs stayed in the Manhattan apartment from May 2007 until the time of the damages trial in late June 2008. According to Mrs. Kuther, the Manhattan unit was in a "rent-stabilized" building, and they obtained favorable lease terms from a sympathetic landlord in that building by signing a two-year lease that contained an exit clause that only required thirty-days notice.

In his testimony for defendants, Awad estimated on direct examination that the necessary repairs to plaintiffs' residence should have cost them no more than $16,000. On cross-examination, Awad acknowledged that he had not personally examined the work done by Artistic Renovations, and that he had not entered the premises of the Kuther residence to survey the damage, either before or after the renovations.

Dr. Zaklama testified that he is the owner of a contracting company, Zak's Construction Company, whose license at the time of the trial was "pending before the State of New Jersey." Dr. Zaklama estimated the fair cost of the needed repairs to plaintiffs' home at "a little bit more than $400."

After hearing summations from trial counsel, the trial judge issued an oral decision on the damages issues on June 26, 2008. The judge began his bench opinion by noting that "[t]he case was preceded by some [fifty-two] complaints against [Zaklama] by the Department of Community Affairs, including [for a] faulty roof and faulty waste piping, all of which started in January of 2005, and various municipal complaints in Hoboken beginning in June of 2006."

The judge also observed that Zaklama went about the repairs in "a very dilatory manner . with pressure from the court to do so." The judge found that plaintiffs were justified in waiting for the official inspection of defendants' property by the municipal inspectors before proceeding to repair their own home. The judge rejected defendants' claim that plaintiffs had acted improperly in waiting until after the discovery end date to have the renovations done. The judge also noted that plaintiffs appropriately chose the lower of two bids for the repair work.

Turning to the submissions of the repairs of plaintiffs' dwelling, the judge found Werocsy "eminently qualified to do the work that he did." The judge accepted Werocsy's credentials and his assessment of the work that needed to be performed. In making these determinations, the judge found the competing testimony of both Dr. Zaklama and of defendants' expert, Awad, to be not credible as to the extent of the repairs required. As a result, the judge awarded plaintiffs the full $31,000 charged by Artistic Renovations, as a component of their overall damages.

Additionally, the judge found that plaintiffs had properly paid $690.15 and $321.00 to Roto-Rooter and to Dependable Plumbing, respectively, for the purposes of discovering the source of the water seepage. The judge added those minor amounts to the damages calculation.

Addressing the rent and moving expenses claimed by plaintiffs, the judge acknowledged that "plaintiffs are entitled to live in a dwelling which is the equivalent of their [own] home." He found that neither the apartment in Queens nor the apartment in Manhattan were "even close to being on a par with their home in Hoboken." The judge further found that plaintiffs had left their home in Hoboken due to valid health concerns, which were brought about as the result of the actions and inactions of defendants.

Consequently, the judge found that the rent of $4,350 per month for the thirteen months that plaintiffs lived in Manhattan was reasonable. The judge added the sum of that rent, $56,550, to the damages total. The judge also found plaintiffs' moving expenses of $1,384.74 to be reasonable. He doubled that amount and added it to the total, noting that plaintiffs would likely incur the same charges in moving back to their newly-repaired home.

Acknowledging that the last possible month that plaintiffs could have reasonably lived in their home was January 2007, the judge then calculated damages for plaintiffs' loss of the enjoyment of their home from January 2007 through May 2008, when the repairs were completed. The judge found such loss-of-enjoyment damages were appropriate because the two places that plaintiffs were forced to live during that period were not the equivalent of their own home before it was damaged.

In calculating this amount, the judge accepted plaintiffs' testimony that an equivalent four-story home in Hoboken rented for $8,000 per month. He then subtracted the amount that they actually paid in rent per month in Manhattan and arrived at a difference of $3,650 per month. Extrapolating this through the seventeen months that plaintiffs spent away from their home, the judge added $62,050 to the damages total to compensate them for their loss of enjoyment. This resulted in a total damages award of $155,757.63 for plaintiffs, which the court included in a final judgment for $165,721.79, dated July 9, 2008, inclusive of counsel fees but not inclusive of interest and costs.

Defendants appeal on several discrete issues. In particular, they argue that the trial court erred in: (1) awarding counsel fees to plaintiffs; (2) permitting plaintiffs to amend their complaint to include Coffee Place, LLC as a defendant; (3) calculating plaintiffs' damages for the costs of renovations; (4) finding that plaintiffs adequately endeavored to mitigate their damages; and (5) awarding plaintiffs damages for "loss of enjoyment of life." Plaintiffs have not cross-appealed the reduction of their counsel fee claim, nor have they cross-appealed any other aspects of the trial court's determinations.

II.

We examine the discrete issues raised by defendants, seriatim.

A.

Defendants first argue that there is inadequate support for the trial court's award of counsel fees under Rule 1:10-3. We perceive no such inadequacy.

Under Rule 1:10-3, in an application to enforce litigants rights, "[t]he court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief[.]" R. 1:10-3. As the late Judge Pressler wrote in her last published comments to the Rule 1:10-3:

Although the so-called American rule, still followed in New Jersey, continues to require each party to bear his own counsel fees except as otherwise provided by R[ule] 4:42-9, this rule provision allowing for counsel fees recognizes that as a matter of fundamental fairness, a party who willfully fails to comply with an order or judgment entitling his adversary to litigant's rights is properly chargeable with his adversary's enforcement expenses.

[Pressler, Current N.J. Court Rules, comment 4.4.5 on R. 1:10-3 (2010) (emphasis added).]

We are satisfied that, as a matter of law, an award of counsel fees was properly authorized here under Rule 1:10-3, in light of Zaklama's failure to comply in a timely manner with successive orders of the trial court directing the remediation of the leaks that were damaging plaintiffs' home and making the premises unsuitable for continued occupancy. The trial judge's finding that defendant had been "very dilatory" in complying with the court's orders is supported by substantial, credible evidence, and we will not disturb that assessment. Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974).

Defendants argue, by analogy, that the trial court should have applied here the fee-shifting standards contained in the frivolous litigation statute, N.J.S.A. 2A:15-59.1, which require that the opposing party have engaged in frivolous conduct in order to be liable for fees. However, case law has recognized that the strict provisions of N.J.S.A. 2A:15-59.1 "are not incorporated into R[ule] 1:10-3." Gyimoty v. Gyimoty, 319 N.J.Super. 544, 552 (Ch. Div.1998). Instead, Rule 1:10-3 "vests the trial court with discretion to award, and its policy favors the award of, attorney's fees to the prevailing movant who seeks relief in aid of litigant's movant where the opposing party fails or refuses to comply with a court order." Ibid. (emphasis added). See also

R. 2:9-9 (analogously permitting the imposition of sanctions, including an award of counsel fees, on appeal).

The trial judge did not exceed his prerogatives in awarding counsel fees here to plaintiffs. The fees were reasonably incurred in efforts to secure Zaklama's compliance with court orders and to restore sanitary and habitable conditions to plaintiffs' adjacent dwelling. Fee determinations by trial courts should be disturbed "only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). See also Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 443-49 (2001) (citing the "deferential standard of review" mandated by Rendine). We detect no such clear abuse of discretion here. Indeed, the trial judge exhibited equitable restraint by containing the fee award to less than one-third of the counsel fees that plaintiffs had originally sought to recover.

With respect to the quantum of fees awarded, and the trial court's methodology of calculation, defendants complain that the judge committed reversible error by not explicitly declaring that the hourly rates charged by plaintiffs' counsel were reasonable.[5] Although we are cognizant of that particular omission, we remain satisfied that the fee award as a whole was reasonable. In his bench ruling on fees, the judge was manifestly selective in deciding which particular fee entries were justified, and which ones were not. As noted, the judge whittled down the fee claim substantially, to only a fraction of what was sought. On the whole, the fee award was fair, and we do not disturb it.

B.

The next point of claimed error concerns the trial judge's grant of plaintiffs' extemporaneous application to amend the complaint to name Coffee Place, LLC as a co-defendant, immediately after Zaklama had testified that he had recently transferred ownership of his premises to that limited liability company. Defendants argue that the amendment was improper since plaintiffs had not filed pleadings alleging that the premises were fraudulently conveyed to defeat or hinder creditors, and also because the LLC had not participated in the negligent conduct that caused the damages to plaintiffs' adjacent home. In addition, defendants point out that the LLC was not separately represented at trial, and that the LLC's interests "were contrary to those of Zaklama, the individual alleged to have caused the damages."

It is well settled that leave to amend a pleading is to be "freely given in the interest of justice," see R. 4:9-1, and that courts have the discretion to allow the amendment of pleadings "as may be necessary to cause them to conform to the evidence . at any time, even after judgment[.]" R. 4:9-2. See also Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998). Given the sudden and apparently surprising manner in which the transfer of ownership to the LLC was revealed in Zaklama's trial testimony, we cannot fault plaintiffs for not anticipating this development with a formal pleading invoking the statutory standards for a fraudulent conveyance under N.J.S.A. 25:2-3. See also Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-20 to -34.

Moreover, given the past history of the parties and the litigation, the unrefuted testimony of Zaklama itself concerning the timing and circumstances of the asset transfer, was manifestly

sufficient to support the court's addition of the LLC as a co-defendant. When Zaklama announced to the court that he had transferred all of his personal assets to Coffee Place, LLC, he was already bound by the court's previous order to pay plaintiffs $10,640 in attorney's fees. Also, at that time, the court had already granted plaintiffs summary judgment as to liability, and was on the verge of determining the quantum of damages in the case, once the short trial was concluded.

Zaklama testified that he was the president and sole shareholder of the LLC, that the LLC was engaged in the business of real estate, and that it only owned the three properties that previously had been titled in his name. As a result of this transfer, there was a reasonable basis to conclude that Zaklama had substantially divested himself of his personal property subject to attachment and had made himself either judgment-proof or judgment-resistant, while the LLC that he controlled, and of which he was the sole shareholder, held title to the properties. Given the difficulties that plaintiffs already had experienced before trial in compelling Zaklama's compliance with the court's remedial orders, and the intensity of the parties' conflicts that spilled over into other proceedings, plaintiffs would have been rightly concerned that the asset transfer to the LLC could have seriously impeded their ability to enforce a final judgment in this case.

Zaklama admitted in his testimony that the conveyance to the LLC was undertaken to avoid the consequences of a monetary judgment in this case, although he did temper that admission by stating that such avoidance was not the "only" reason for the transfer. He did not, however, specify in his testimony what such other benign reasons were.

On the whole, we discern no manifest injustice or reversible error in the trial court's grant of leave to plaintiffs to amend the complaint to name the LLC as an additional defendant. The amendment served as a prophylactic measure to deter future dissipation of assets that could be responsive to the enforcement and collection of the final judgment. The order also served the interests of judicial economy, given Zaklama's admissions on the record.

Lastly, we detect no unfairness in the trial court's approval of the amendment, despite the fact that the LLC was not separately represented at trial. If the disclosure of the LLC's acquisition had been made earlier in a forthright and timely manner, the separate representation could have been reasonably secured in advance of the trial. As it was, the court and trial counsel were all confronted with an unexpected spontaneous disclosure that justified a prompt response. Although we recognize that the judge could have adjourned the trial to arrange for the LLC to obtain separate counsel, defendants identify no proofs, questions or legal arguments that counsel for the LLC could have presented at trial that were not adequately presented at trial by Zaklama's counsel. No real prejudice is apparent. Moreover, the LLC's assertion of conflict of interest is undermined by the fact that defendants are jointly represented by the same attorney on appeal, which is indicative that their interests are essentially synonymous in opposing the substance of plaintiffs' factual and legal contentions.

C.

Defendants next challenge the $31,000 in construction damages awarded by the trial court, contending that the award is unduly speculative. We disagree.

We recognize that, as a general proposition, an award of damages must be calculated with reasonable certainty and should not be based upon "mere speculation." Caldwell v. Haynes, 136 N.J. 422, 442 (1994). However, case law also instructs that precision in such calculations is not essential, and that the trial record need only provide a sufficient " 'foundation which will enable the trier of facts to make a fair and reasonable estimate.' " Id. at 436 (quoting Lane v. Oil Delivery, Inc. 216 N.J.Super. 413, 420 (App.Div.1987)). Moreover, our courts have long recognized that "[i]t is obvious that evidence of any expense, a part of which resulted in a financial loss to plaintiff, proximately caused by defendant's negligence, may be introduced for the jury's consideration in determining the amount of damages to be assessed." Nusser v. United Parcel Serv. of N.Y., Inc., 3 N.J.Super. 64, 70 (App.Div.1949). Lay opinion may be admitted to support such claims of loss, provided that it is "rationally based on the perception of the witness" and "will assist in understanding the witness'[s] testimony or in determining a fact in issue." See N.J.R.E. 701.

Consistent with those standards, the trial court took testimony from three witnesses who each claimed experience as a contractor. Plaintiffs' witness, Werocsy, the contractor whose company actually performed the repair work, stated that he had over twenty years of experience in home construction and repairs. Werocsy testified on two trial days, detailing the work that was done, the methods that were employed and the costs that were actually incurred. The market competitiveness of his cost estimate was corroborated by a second estimate from a different company, which would have charged $1,500 more to plaintiffs for the same work.

On the other hand, Awad and Dr. Zaklama, defendants' witnesses, presented no additional material information about the repair work that was done. They did little more in their testimony than present conjecture as to what, in their personal opinions, would be the reasonable costs of the repair work.

The trial judge weighed these three witnesses and explicitly found Werocsy more credible, in light of the nature of the work performed and the time consumed. We will not disturb the judge's credibility findings. See Rova Farms, supra, 65 N.J. at 483-84.

On the whole, we are satisfied that the $31,000 awarded to plaintiffs for their out-of-pocket construction damages was fair and reasonable, and was amply supported by the proofs at trial.

D.

Defendants further argue that the court erred in not finding, as the defense had urged at trial, that plaintiffs had failed to reasonably mitigate their damages. This argument is also unpersuasive.

We are mindful of the general principles instructing that "a plaintiff who has suffered an injury as the proximate result of a tort cannot recover for any portion of the harm that[,] by the exercise of ordinary care[,] he could have avoided." Ostrowski v. Azzara, 111 N.J. 429, 437 (1988). In that same vein, "[a] claimant is not barred from full recovery by the fact that it would have been reasonable to make expenditures or subject himself to, for instance, pain or risk; damages will be curtailed only when he is unreasonable in refusing or failing to take action to prevent further

loss." Covino v. Peck, 233 N.J.Super. 612, 617 (App.Div.1989) (citing Restatement (Second) of Torts § 918 (1979)) (emphasis added).

We agree with the trial judge's determination that plaintiffs acted reasonably when they discovered the extensive damage, mold, and flaking paint that was being caused by water infiltration from defendants' premises. Plaintiffs acted prudently in trying to get their neighbor to fix the problems, and in calling the local health department only when it became apparent that no prompt remediation was forthcoming. They did not act precipitously in removing themselves, their two minor children, and their pets from the patent hazards of the premises. The temporary quarters that they found, first with their relatives in Queens, and thereafter in Manhattan, were inferior in size to their Hoboken brownstone and not manifestly unreasonable in rental price.

Given the inclusion of children and two dogs in their household, it is understandable that plaintiffs confronted difficulty in finding an affordable and comparable rental house in Hoboken that would meet their needs. Moreover, the length of plaintiffs' temporary relocation was indeterminate, and depended upon the progress of repair work at both defendants' premises and their own premises. That uncertain time factor also would complicate a search for interim accommodations. Plaintiffs were not obligated to confine their search to Hoboken or adjacent municipalities in New Jersey, particularly given the proximity of New York City and their relatives in New York.

We agree with the trial judge that plaintiffs' actions were reasonable and that they acted responsibly to limit their out-of-pocket damages while they were dispossessed. The sums awarded for the reimbursement of their Manhattan rent and their moving costs are affirmed.

E.

As their final argument, defendants claim that the trial court improperly awarded and computed damages to plaintiffs for the lost enjoyment of life. Such damages are authorized, as a matter of law, as a proximate consequence of tortious harm. See, e.g. Johnson v. Scaccetti, 192 N.J. 256, 279-80 (2007); see also Model Civil Jury Charge 8.11E.

Here, it is obvious that plaintiffs experienced a diminution of their everyday quality of life when they were abruptly forced to vacate their family home and find other quarters for an uncertain period of time. Rather than enjoy the benefits of their usual abode and its immediate environs, the family of four at first squeezed into their relatives' two-bedroom Queens apartment for five months, and then moved again into a temporary apartment in Manhattan for almost thirteen months. We have no difficulty in recognizing this seventeen-month period of disruption as a compensable part of plaintiffs' actual damages.

Defendants criticize the methodology by which the trial judge computed such loss-of-enjoyment damages. However, our Supreme Court has recognized that such damages for "loss of enjoyment of life" cannot be measured by any "schedule or formula." Johnson, supra, 192 N.J. at 279-80. Such a computation is within the sound discretion of the factfinder. Ibid. Furthermore, a damages award for subjective harm should not be disturbed by a reviewing court

unless it is determined to be " 'wide of the mark and pervaded by a sense of wrongness.' " Jastram ex rel. Jastram v. Kruse, 197 N.J. 216, 229 (2008) (quoting Johnson, supra, 192 N.J. at 281).

Having no schedule or formula to consult for computing "dislocation harm," the trial judge calculated plaintiffs' loss-of-enjoyment damages by utilizing what was, in essence, a reasonable surrogate measure of injury. The judge recognized that plaintiffs had been dislodged from a roomy, four-bedroom house in Hoboken, and found credible Mrs. Kuther's testimony that a comparable brownstone in Hoboken would generally rent at about $8,000 per month. Based on that unrefuted estimate, the court awarded plaintiffs the difference between their actual out-of-pocket rental costs in New York City and the rental value of their Hoboken brownstone.

We are cognizant that the aggregate impact of the judge's rulings was to award plaintiffs the full $8,000 for the thirteen months in which they were paying rent in Manhattan, plus $3,650 per month as lost-enjoyment-of-life damages for the shorter period in which they resided with their relatives rent-free in Queens. That calculus is not overly generous, as plaintiffs presumably were still paying the carrying costs of maintaining their own residence in Hoboken (e.g., real estate taxes, insurance, utilities and any mortgage loan installments) while it was being repaired.

Although other measures of subjective damage conceivably could have been applied, defendants have not demonstrated that the damages awarded by the trial court for lost enjoyment of life are so "wide of the mark" to warrant our appellate intervention. See Jastram, supra, 197 N.J. at 229. The damages are hereby affirmed.

III.

For all of these reasons, the points raised on appeal by defendants are rejected. Consequently, the final judgment of the Law Division is affirmed in all respects.

FOOTNOTES

FN1. Because John Zaklama's father, Dr. Esmat Zaklama, was a trial witness, we shall refer to defendant John Zaklama in this opinion as "Zaklama" and to his father as "Dr. Zaklama.". FN1. Because John Zaklama's father, Dr. Esmat Zaklama, was a trial witness, we shall refer to defendant John Zaklama in this opinion as "Zaklama" and to his father as "Dr. Zaklama."

FN2. The actual cost of these repairs was $2,125, but plaintiffs' homeowners' insurance covered $1,000 of the cost. FN2. The actual cost of these repairs was $2,125, but plaintiffs' homeowners' insurance covered $1,000 of the cost.

FN3. None of the counsel fees awarded in this case included those attorney services in the municipal court. FN3. None of the counsel fees awarded in this case included those attorney services in the municipal court.

FN4. It appears that the parties and the trial court were ultimately satisfied that the repairs to Zaklama's premises had adequately abated the nuisance and satisfied the outstanding municipal

violations. FN4. It appears that the parties and the trial court were ultimately satisfied that the repairs to Zaklama's premises had adequately abated the nuisance and satisfied the outstanding municipal violations.

FN5. According to the record, two attorneys from the same firm worked on the matter for plaintiffs at various times, one charging $275 per hour, the other $200 per hour. FN5. According to the record, two attorneys from the same firm worked on the matter for plaintiffs at various times, one charging $275 per hour, the other $200 per hour.

PER CURIAM