DONALD NICKERSON v. THE QUAKER GROUP

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-6253-06T56253-06T5

DONALD NICKERSON and LISA

NICKERSON, husband and wife,

Plaintiffs-Appellants,

v.

THE QUAKER GROUP, THE QUAKER

GROUP GLOUCO II, L.P., K.

HOVNANIAN COMPANIES, and

HOVNANIAN ENTERPRISES, INC.,

Defendants-Respondents,

and

RYNO MARKETING, JOSEPH FUSCELLOW,

SANG LEE, and PAULA MILLER,

Defendants.

_____

Argued May 21, 2008 - Decided

Before Judges Cuff, Lihotz, and King.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, L-2141-04.

John W. Trimble, Jr., argued the cause for appellants (Trimble & Associates, attorneys; Mr. Trimble, on the brief).

Nicholas J. Sansone argued the cause for respondent Quaker Group and Quaker Group Glouc III (Naulty, Scaricamazza & McDevitt, attorneys; Mr. Sansone, on the brief).

Brian D. Barr argued the cause for respondent K. Hovnanian Companies and Hovnanian Enterprises (Cooper Levenson April Niedelman & Wagenheim, attorneys; Mr. Barr, of counsel and on the brief).

PER CURIAM

I

Plaintiffs purchased a new home from Quaker Group Glouco II, a limited partnership of the Quaker Group. Ryno Marketing was the sales agent. Not long after the start of actual construction, the assets of Quaker's various limited partnerships including Quaker Group Glouco II were sold to the Hovnanian group. Hovnanian thus assumed responsibility for completing construction. There were several construction defects which plaintiffs tried to have the builder repair before they brought this action. Plaintiffs claimed fraud, negligent misrepresentation, consumer fraud, negligence that resulted in construction deficiencies, and other torts, no longer in dispute. The Quaker defendants and the Hovnanian defendants cross-claimed for contribution.

Plaintiffs settled with the Hovnanian defendants for an amount equal to their estimate for the cost of repairing the construction defects, and they did so shortly before the court granted the Hovnanian defendants' motion for summary judgment. The court granted summary judgment to the Quaker defendants as well, but it also granted plaintiffs' motion for leave to amend the complaint to add a claim of breach of contract against the Quaker defendants for the construction deficiencies.

The Quaker defendants moved to dismiss the contract claim, which the court granted in part by dismissing the portion that had been the subject of plaintiffs' settlement with the Hovnanian defendants. Plaintiffs then settled the remainder of the contract claim with the Quaker defendants and settled with Ryno Marketing, which later declared bankruptcy. Plaintiffs now appeal the dismissal of their fraud and consumer fraud claims, but only as against the Quaker defendants.

II

This is the procedural background. On December 23, 2004 plaintiffs filed a complaint against the Quaker Group, Quaker Group Glouco II, L.P. (Glouco II), K. Hovnanian Companies, Hovnanian Enterprises, Inc., Ryno Marketing (Ryno), Joseph Fuscellow, Sang Lee, and Paula Miller. The parties and the trial judge generally referred to the Quaker and Hovnanian defendants as "Quaker" or "Hovnanian," with the specification of a particular entity as incidental. We will do the same. Plaintiffs alleged common-law fraud (count one), negligent misrepresentation (count two), consumer fraud (count three), and negligent construction of their home (count four). Plaintiffs' claims for intentional and negligent infliction of emotional distress (counts five and six), are not at issue on appeal.

Quaker filed a denial. It also raised cross-claims for contribution against Hovnanian and Ryno. Hovnanian also filed a denial and cross-claims for contribution, as did Ryno.

On March 13, 2006 Hovnanian moved for summary judgment. Quaker cross-moved for summary judgment, although not on plaintiffs' negligence claim (count four).

On June 5, 2006 plaintiffs entered into a settlement with. Hovnanian. The settlement recited that plaintiffs had received $36,586 as "full payment" for releasing them from "[a]ny and all claims arising from" this lawsuit.

On June 27, 2006 the judge issued an opinion and order in which he dismissed the complaint against Hovnanian. He also dismissed the complaint against Quaker except for count four, which he reserved upon until Quaker specifically moved to dismiss that count.

On July 13, 2006 plaintiffs moved for leave to amend their complaint by adding a claim against Quaker for breach of contract (count seven). On July 17, 2006 Quaker moved to dismiss count four on summary judgment. On July 19, 2006 plaintiffs moved for reconsideration of the grants of summary judgment to both Hovnanian and Quaker on counts one, two, and three.

On August 18, 2006 the judge denied plaintiffs' motion for reconsideration. The judge granted Quaker's motion to dismiss count four, relying on the grounds for which it had dismissed that count against Hovnanian. However, concomitant with that dismissal, the judge granted plaintiffs' motion for leave to amend the complaint to add count seven.

On September 20, 2006 plaintiffs filed a motion for discovery that would identify "all entities trading as the Quaker Group," and for leave to file a second amended complaint naming them as defendants. On October 6, 2006 the judge denied the motion. That same day, Quaker moved for summary judgment on count seven. On December 11, 2006 plaintiffs settled with Ryno. On December 15, 2006 the judge partially granted and partially denied Quaker's motion. The judge dismissed plaintiffs' claims for the construction deficiencies that were the subject of plaintiffs' first expert report and for some of the items that plaintiffs claimed as consequential damages. However, the judge denied dismissal of plaintiffs' claims for the construction deficiencies identified after the first expert valuation and for the remaining consequential damage items.

On February 28, 2007 plaintiffs moved again for reconsideration of the grant of summary judgment on counts one, two, and three. On March 16, 2007 the judge denied the motion.

On June 19, 2007 the judge entered judgment on plaintiffs' conditional settlement of the contract claim with Quaker of count seven without prejudice to this appeal for $10,000. The order stayed enforcement of that settlement pending this appeal of the grant of summary judgment to Quaker and of the denial of plaintiffs' first motion for reconsideration. Only the plaintiffs' fraud and consumer fraud claims against Quaker Group remain in this appeal.

Plaintiffs thereafter filed their notice of appeal. Plaintiffs' claims on appeal are addressed only against Quaker.

III

A. The factual background about Quaker.

Quaker's predecessor was established in 1952. The trade name "Quaker Group" was first used in the 1970s. Quaker formed limited partnerships, such as Glouco II, each time it acquired property for development. According to Sara Gowing, who had been Quaker's chief executive officer since 2003, it was industry practice to use limited partnerships in that manner while using the trade name for advertising and brochures. She was not sure that any particular Quaker entity "had been in existence for 45 years" as of 1999.

Gowing further explained that the limited partnerships did not construct houses; instead, Quaker paid the subcontractors from the common accounts, with ledger entries indicating that the payments were being made on behalf of the corresponding partnership. All of the partnerships formed for New Jersey residential projects were based in Quaker's offices in Montgomeryville, Pennsylvania. They did not have their own employees or even separate phone lines to distinguish them from other Quaker entities.

B. Plaintiffs' purchase decision.

Plaintiffs wanted a house built by a "quality builder" with a "good reputation." They had heard "horror stories" about certain builders who failed to repair defects that the buyers did not discover until they occupied the house. They also wanted a location near Washington Township in order to remain near Lisa Nickerson's mother. One development had no lots available; another had lots that were too small.

Plaintiffs had not heard of Quaker before they drove past the Equestrian Estates development in Washington Township. They met Sang Lee, an employee of Ryno, the sales agent. Lee gave them brochures for other developments by Quaker, which asserted "the quality of the homes" and "the quality of the builder," but Donald Nickerson did not recall if the brochures elaborated on the "quality" assertion in any way.

Plaintiffs asked Lee about Quaker's quality, and whether it ever failed to fix problems promptly before turning its attention to its next development. Lee responded that such problems did not occur because Quaker was a builder of good quality and had been in business for about fifty years with a reputation for service. Plaintiffs went to look at houses in a Quaker development in Hainesport; the record does not indicate that any representations were made to them there.

An undated promotional flyer for Equestrian Estates, which named only the Quaker Group, stated that "Quaker combines old-time craftsmanship with contemporary quality standards, then guarantees it." Gowing said that Quaker's sales materials used the word "quality" to indicate a new home with contemporary features and materials that some other builders were not providing.

C. The agreement of sale for plaintiffs' house.

On August 31, 2001, plaintiffs entered into an agreement of sale which named Glouco II as the seller of a two-story, single-family house to be constructed in Equestrian Estates. The contract price was $279,490, with a 5% cash deposit due in two equal installments, one upon execution and the other forty-five days later.

A contemporaneous addendum to the agreement similarly named Glouco II as the seller, but the section on title insurance also referred to Equestrian Estates as "this Quaker Group Development." Lisa acknowledged the designation of Glouco II as the seller, but she understood the naming of any Quaker entity to mean the Quaker Group; they were all the same to her.

The agreement of sale contained disclaimers about the scope of the seller's representations. One was that the buyers had decided to purchase by relying on "the attached brochure and standard features list[,] and not by any representation made by Seller or any selling agent or any other agent of Seller." The seller would "not be responsible, or liable for any agreement, condition or stipulation not specifically set forth in this Agreement relating to or affecting the said property."

The agreement did not refer to the deposit as refundable or nonrefundable, other than to state that the seller's inability to complete the house within 365 days following the buyers' selection of custom features would compel the seller to refund the deposit "promptly." The agreement required the buyers to obtain the seller's approval before assigning their rights and obligations, but it did not impose any such constraint on the seller, and it declared that all its terms would "bind the . . . successors and assigns of the respective parties."

The agreement incorporated a limited ten-year warranty, which entitled plaintiffs to present lists of "items requiring attention in accordance with the standards of the warranty," at thirty days after closing and again at twelve months after closing. The seller would then "promptly correct the deficiencies noted, in accordance with the standards of the warranty."

The agreement concluded with an integration clause, which declared as follows:

Entire Agreement. This writing contains the entire Agreement between the parties and no agent[,] representative, salesman or officer of the parties hereto has the authority to make or has made any statement, agreement, representation or contemporaneous agreement, oral or written, in connection herewith modifying, adding to or changing the terms and conditions herein. This written agreement shall supercede [sic] any prior dealings, discussions, or communication between the parties. No modification of this Agreement shall be binding unless such modification shall be in writing and signed by the parties hereto.

On December 8, 2001 plaintiffs executed a modification to the sales agreement that changed the model of their house. It increased the contract price by $20,000.

Plaintiffs asserted in their interrogatory responses that they had been rushed into putting a deposit on their home. Lee told them that a lot had unexpectedly become available but that they needed to reserve it because others were also interested. She allegedly said that the deposit would be refundable. However, at some later time, when plaintiffs felt misled by Lee's contradictory statements about whether they could change certain minor construction details, they asked for a refund of their deposit and Lee said it was not refundable.

D. The transfer of assets from Quaker to Hovnanian.

On March 13, 2002 Quaker entered into an asset purchase agreement under which Hovnanian would purchase the assets of Quaker's limited partnerships. Under the agreement, Hovnanian could use the name "Quaker," but not the term "Quaker Group," as a trade name in connection with home developments and home sales in the regions encompassing the transferred assets.

Without dispute, this agreement committed Hovnanian Enterprises to complete unfinished construction work on the houses already sold by the limited partnerships, but the redacted version of the agreement in the record provides no indication of any requirements or standards for Hovnanian Enterprises to satisfy. This version does recite Hovnanian Enterprises' commitment to perform "all required warranty work" on the sellers' behalf for any house on which title had been closed during the preceding year, and its right to reimbursement from the sellers. If Hovnanian Enterprises did not complete the warranty work by a certain date following the date of this agreement, the sellers would be obligated within the next thirty days to "obtain from reputable contractors a firm contract to complete" whatever work remained.

Gowing testified on deposition that when Hovnanian entered into this agreement, it hired "all of the Quaker Group's employees who were associated with the residential business." It also leased Quaker's Montgomeryville office, which provided the supervision for "all of the residential activity" in New Jersey.

Plaintiffs learned from friends that Equestrian Estates had been purchased and plaintiffs believed that the buyer was Hovnanian. Donald knew that Hovnanian was a big company, and "they seemed like a quality builder to me through their ads." Lisa knew only that Hovnanian was a big builder with a good reputation. She did not learn much about it from its web site, but she was

unconcerned about the change in builder because she assumed that a bigger one would be "better at what they do."

Plaintiffs asked the people they had dealt with at Equestrian Estates about the change, and Joe Fuscellow, an employee of one of the Quaker entities, told them that it was actually a favorable development. Fuscellow thought that Hovnanian was organized in a more efficient manner than Quaker and provided better post-closing service. He added that "Quaker would continue to build" while Hovnanian "would be responsible for the service end of it." Plaintiffs said that the change in builder did not prompt them to seek cancellation of the agreement of sale.

The parties do not dispute the judge's finding that "Quaker apparently prepared the foundation and framed the home; Hovnanian performed the balance of the construction."

E. Closing, and the initial warranty work.

On June 26, 2002 Washington Township issued a certificate of occupancy for the house. It named "Quaker Group Radcliff" as the fee owner and "Quaker Group 96" as the "agent/contractor"; the same address and phone number in Montgomeryville, Pennsylvania, was listed for both entities. The certificate declared the house to have "been constructed in accordance with the New Jersey Uniform Construction Code."

The closing occurred on July 11, 2002. A warranty "coverage validation form" dated July 24, 2002 named Hovnanian as the insured builder. The record does not indicate whether plaintiffs ever received a copy of that form.

On August 15, 2002 plaintiffs submitted a "service sheet" form with a header that named only "the Quaker Group" and "Quaker Construction Co." It listed sixteen required repairs, including flooding in the basement. Notations, apparently added by the builder, indicated that all sixteen repairs were to be completed by September 12, 2002. On that date, a new repair item was added, about half the others were noted as having been resolved, and the completion date for the remainder was changed to "year end."

F. Plaintiffs' home inspection.

Plaintiffs commissioned a home inspection report from "A Piece of Mind," which issued it on August 5, 2003. In addition to other matters, this report recommended sealing the basement window frames with silicon to end the moderate leaks and "prevent water from entering the foundation," and further recommended "applying a coating of waterproofing to the basement walls to prevent water penetration." It called the grading and drainage "serviceable," but also noted that revising the grading on the right side of the house would enhance the effectiveness of the basement window-sealing and waterproofing.

There were "minor horizontal cracks" on some basement joists, but the basement's wood framing was nonetheless "serviceable." The recommendation to twin each "damaged" framing joist with an additional joist was listed as being of "low priority/aesthetic value only."

On August 7, 2003 plaintiffs called Hovnanian to request the grading work and window sealing. That same day, Hovnanian sent a service authorization to a subcontractor to perform the grading work, and also to perform a "dig out" to "install stone," in order to resolve the leakage of water through the basement windows. The request was for the work to be done "asap, next week if possible."

On August 11, 2003 this time using a Hovnanian warranty request form, plaintiffs submitted a request naming approximately twenty items, including a leaking basement window and "dirty" basement conditions from "continuous floods." This was apparently the list that the warranty entitled plaintiffs to submit twelve months after the closing.

On October 30, 2003 Hovnanian sent two more service authorizations to contractors. One was to have a leaking basement window sealed, while the other stated that basement flooding required work on the grading and the window-well drains. A handwritten note indicated that additional work on the window wells was scheduled for December 3, 2003. A notation dated March 25, 2004 on plaintiffs' August 11, 2003 list implied that several of the items were still outstanding as of that date.

G. Plaintiffs' first engineering evaluation.

Plaintiffs commissioned an engineering evaluation of their home from Preferred Property Inspections & Engineering, Inc., which issued it on September 24, 2004. It stated that certain areas of the brick veneer on the front of the house had been installed incorrectly, which encouraged rainwater to pool and seep into the frame. It further noted "serious water seepage inside the basement" through the two left windows, apparently due to incomplete drainage of the window wells, and it attributed the presence of mold to the seepage.

The evaluation also noted empty joisting bays in the basement, which indicated the absence of some wood bridges and cross-bridges. Their absence would decrease the lateral stability of the joisting and allow the floors to shake, which the evaluation called a "major structural deficiency."

Another major deficiency was the reliance on soffit vents in the attic and the absence of ridge vents. In the "hip type roof" on plaintiffs' home, ridge vents were "very critical for proper exhaustion of hot air from the attic space and adequate circulation of air," and their absence "will cause an excess condensation build-up inside the attic and damage to roof sheathing and roof shingles." The report asserted that the inadequate venting violated the building code.

Re-Design Contractors gave plaintiffs an undated estimate of $36,586 (the amount of the June 2006 settlement with Hovnanian) for correcting those deficiencies and making the other repairs that Preferred Properties Inspections recommended. The estimate included the costs of cleaning, moving furniture, and restoring the landscaping.

H. Mold and other repair matters.

On October 13, 2004 EMSL Analytical, Inc., tested plaintiffs' home for many kinds of fungal spores, at locations it described as "outside," "1st floor/front," and "basement." For the outside and the basement, there was no reportable increase in spore concentration beyond the background level. The same was mostly true for the first floor, except for aspergillus, which was 69% above the background level, and discernible counts for two other species for which no background amount was detected. Nothing in the record characterizes the seriousness of such spore levels. EMSL noted that the presence of more than one species of spores "may indicate the presence of a more widespread mold problem in the walls and under [the] crawl area."

On October 25, 2004 Donald sent Hovnanian his "final request to have on-going punch list items as well as structural defaults completed/work started within thirty days of receipt." He asserted that "[i]t rained in my house all summer," causing mold in the walls.

In the summer of 2005 the mold worsened, to the point that plaintiffs decided to stop inviting guests to the house. On August 18, 2005 ESML tested the front room again and found aspergillus at a high level.

I. Plaintiffs' second engineering evaluation.

On April 15, 2006 Preferred Property Inspections issued an updated evaluation on "deficiencies that may have developed in the house since" its first evaluation. However, this report did not state that any deficiency it named was new, or imply that any deficiency had been hidden or obscured. The only new information was "new evidence" of water seepage into the basement due to inadequate sealing of a waste pipe through the front foundation wall.

In November 2006, plaintiffs asserted that the prior estimate of $36,586 covered only the cost of repairing the construction defects. As consequential damages, they asserted mold remediation costs of $7000, water infiltration damage to furniture and other possessions of $5650, "total loss of use" of 30% of the house for forty-five months from their closing date, and $3000 for a rehearsal dinner and a baby shower that they could not hold in the house due to the mold.

IV

The plaintiffs raise these issues on this appeal:

I. DID THE COURT ERR BY GRANTING SUMMARY JUDGMENT TO THE QUAKER DEFENDANTS ON COMMON LAW FRAUD?

II. DID THE COURT ERR BY GRANTING SUMMARY JUDGMENT TO THE QUAKER DEFENDANTS ON CONSUMER FRAUD?

III. DID THE COURT ERR BY DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION ON COMMON LAW AND CONSUMER FRAUD?

IV. DID THE COURT ERR BY DENYING PLAINTIFFS LEAVE TO AMEND THE COMPLAINT TO NAME ADDITIONAL QUAKER ENTITIES AS DEFENDANTS?

V. DID THE COURT ERR BY GIVING THE QUAKER DEFENDANTS CREDIT FOR PLAINTIFFS' SETTLEMENT WITH THE HOVNANIAN DEFENDANTS?

V

Plaintiffs claim that the court erred by granting summary judgment to the Quaker defendants on their claim of common law fraud. They contend that they relied on the material representations about Quaker's as a "quality" builder and about having been in business for more than fifty years, which were false because their home was poorly constructed and because Glouco II, the actual seller, did not even exist before the mid-1990s. Other material misrepresentations on which plaintiffs relied were the refundability of their deposit upon termination, the omission about Hovnanian's assumption of responsibility for construction, and the builder's willingness to repair all construction defects.

Plaintiffs further claim that the judge erred by finding on summary judgment, rather than after a trial, that the misrepresentations about Quaker's experience and quality of work were not fraudulent. They argue that the judge correctly thought that the misrepresentations here were of a kind that could be material, that they were reminiscent of other misrepresentations that have been held actionable, and that any difference would be "one of degree" and therefore fairly debatable. This ruling made the determination of "degree" by the court rather than sending the issue to a jury erroneous. We disagree.

The court did not address "the first four elements of common law fraud," which concern the materiality of the alleged misrepresentation and the knowledge or intent to induce reliance. Jewish Ctr. of Sussex County v. Whale, 86 N.J. 619, 624 (1981). Instead, the judge found that plaintiffs could not have been damaged by any misrepresentation about Quaker's quality because the construction defects, and therefore "plaintiffs' asserted damage, if any[, was] caused by the work of Hovnanian." Tort law does not impose predecessor liability for a successor's misconduct as contract law does. The absence of a "proximate relationship" between any representation made by or on behalf of the Quaker defendants and "the damages claimed for the construction defects" precluded liability.

An appellate court reviews a grant or denial of summary judgment de novo, using the same standard applied in the trial court. Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003). That standard requires summary judgment be denied if the evidence, "when viewed in the light most favorable to the non-moving party," would "permit a rational factfinder to resolve the dispute in" that party's favor. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

Fraud is "the obtaining of an undue advantage by means of some act or omission that is unconscientious or a violation of good faith." Jewish Ctr., supra, 86 N.J. at 624. It requires a material factual misrepresentation, knowledge of the falsity, an intent to induce reliance on it, and actual reliance that results in monetary damages. Ibid. Accord Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997) (involved both common-law and consumer fraud). All of those elements must be proved by clear and convincing evidence. Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989), certif. denied, 121 N.J. 607 (1990).

A seller's unelaborated statements on value provided to the buyer are usually regarded as opinions rather than as actionable misrepresentations. Daibo v. Kirsch, 316 N.J. Super. 580, 589-91 (App. Div. 1998). Unless the seller is in a confidential relationship with the buyer or has a fiduciary responsibility, its representation of value is merely an opinion, and not a statement of an objectively verifiable fact. Id. at 589-90.

In Daibo, the seller, who was "'much more sophisticated than'" the buyer, sold an interest in a corporation that owned a commercial building. Id. at 582-83 (quoting the trial court opinion). The price was based on the seller's estimate of the building's value, which the buyer alleged was excessive and therefore fraudulent. Id. at 582. The trial judge found that the estimate was indeed excessive because even the seller's appraiser could not justify it, and that the fraud was equitable rather than legal due to the lack of intent to defraud. Id. at 585-87. We reversed, on the ground that the statements of a seller who "honestly [held] his opinion as to value," and who did not possess any material information that he withheld, as a matter of law did not amount to a "misrepresentation of fact." Id. at 590.

Similarly, in Rodio v. Smith, 123 N.J. 345, 348 (1991), the Supreme Court held that the advertising slogan, "You're in good hands with Allstate," was not a fraudulent misrepresentation, even in conjunction with an Allstate agent's negligent failure to advise the insureds that they could have purchased more underinsured motorist coverage than the statutory minimum. The Court agreed with our assessment that the slogan "cannot rise to the level of common law fraud" because it "is not a representation of fact," and therefore, could not be a material misrepresentation of a fact. Id. at 351-52. Indeed, the slogan was also not actionable under the Consumer Fraud Act, "[h]owever persuasive" it might be, because it "is nothing more than puffery." Id. at 352. Accord N.J. Citizen Action v. Shering-Plough Corp., 367 N.J. Super. 8, 13-14 (App. Div.), certif. denied, 178 N.J. 249 (2003) (statement in allergy medication advertisement that "you . . . can lead a normal nearly symptom-free life again" was puffery rather than a statement of

fact or a warranty of effectiveness).

By contrast, in Gennari, supra, the buyer of a new home had been induced by the builder and its agents to rely on "'focused and highly specific misrepresentations'" that the builder "'was an exacting and demanding builder of real substance.'" 148 N.J. at 592. The first misrepresentation was that the builder "'had built hundreds of homes and was a person of detail and craftsmanship,'" when in fact he "had always worked under the supervision of others, primarily his brother-in-law," and his workmanship was "disastrous." Ibid. (quoting Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 516 (App. Div. 1996), aff'd as modified, 148 N.J. 582 (1997)). In addition, a sales agent, who was also the builder's wife, told the buyer "'that her husband had built hundreds of homes, demanded excellent quality," and that "he has five engineering degrees.'" Id. at 593 (quoting Gennari, supra, 288 N.J. Super. at 517).

The builder himself told the buyer that "'he had a father and son team who would be working on this project and who had been working with him for years, and that he was so particular only one man in the whole State could do [his] stucco work.'" Ibid. (quoting Genari, supra, 288 N.J. Super. at 517). Finally, when the buyer was told that the builder had just finished a development in Mendham, the buyer asked her sales agent to look at the homes, and the agent "'reported back that the homes were more beautiful than the photographs; the development was gorgeous, the detail exquisite, and the craftsmanship excellent.'" Ibid. (quoting Genari, supra, 288 N.J. Super. at 517).

The builder later admitted that he knew he was not providing the kind of quality that he intended, "'because of personal problems'" and because of his reliance on contractors and a superintendent "'who did not do their jobs correctly.'" Id. at 602 (quoting Gennari, supra, 288 N.J. Super. at 532). He further admitted that his superintendent had no experience other than masonry, and that he eventually fired the superintendent for incompetence. Ibid.

Those misrepresentations buttressed the buyer's interest in purchasing a home from Weichert due to its reputation as "'a large and reputable firm.'" Id. at 593 (quoting Gennari, supra, 288 N.J. Super. at 516). Other buyers, in the companion cases about houses in the same development, had received substantially similar misrepresentations, and had relied on them as well as on Weichert's reputation. Id. at 594-97, 599-600.

The Supreme Court agreed with the trial court and with this court that the statements by the builder and its agents were not simply inaccurate opinions about the builder's quality. Id. at 603-04. They were specific representations "that [the builder] had many years of experience, finished construction on schedule, and was a craftsman[,] [n]one of [which] was true." Id. at 610. They were specific enough to be material and to have induced reliance, and accordingly "were not idle comments or mere puffery." Id. at 607-08.

In the case before us, the representations about the Quaker Group's "quality" used that word without elaboration, as even plaintiffs' deposition testimony indicated. The representation that the Quaker Group had been doing business for fifty years was neither inaccurate nor misleading, because plaintiffs admitted that they regarded all the Quaker entities as one and the same, and Glouco II indeed operated as part of the Quaker Group enterprise, with shared employees and facilities, rather than as an independent company, capable of performing or supervising construction by itself.

Those general assertions of "quality" amounted to unactionable opinion and were nothing like the detailed misstatements in Gennari about the builder's personal experience and qualifications, his standards, and the abilities of his employees, all as supposedly exemplified by the houses in another development that were falsely represented as having been constructed by him without supervision. In addition, the specificity of the Gennari misrepresentations demonstrated an intent to induce reliance that the generalized comments about quality in this case could not "clearly and convincingly" establish. This record before us, as a matter of law, was insufficient to support a claim that the representations about Quaker's quality were fraudulent.

As for the deposit, the agreement of sale did not indicate that it would be refundable in the event plaintiffs wanted to terminate. Instead, it implied to the contrary by naming only one circumstance in which the deposit would be refundable, namely, the seller's inability to complete construction. Plaintiffs executed the agreement after Lee's alleged oral representation of refundability, which was superseded by the agreement's integration clause. In addition, plaintiffs wanted a new home rather than an existing one, they wanted to stay near Lisa's mother, there was no evidence that homes in other nearby developments they liked were available, and plaintiffs did not have prior problems concerning a deposit or mention knowing others who had. On that basis, this record could not be construed as "clearly and convincingly" showing that plaintiffs had entered into this contract in reliance on the refundability of their deposit.

Plaintiffs' remaining allegations of misrepresentation were similarly incapable, as a matter of law, of establishing common-law

fraud. Fuscellow's assertions of Hovanian's quality were just as general as those about Quaker's, and he made them after plaintiffs executed the agreement of sale. Finally, the poor performance of the post-closing repairs may have reflected incompetence, but it did not clearly and convincingly establish the unwillingness even to attempt adequate repairs that plaintiffs alleged. The record here was legally insufficient to support plaintiffs' allegations of common law fraud.

VI

Plaintiffs claim that the court erred by granting summary judgment to Quaker on their claim under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 (the Act). The Act protects consumers against any material misrepresentation or unconscionable commercial practice, and reliance is not required, only a causal nexus between the unlawful conduct and an ascertainable loss.. The misrepresentations of Quaker's quality and lack of complaints, the failure to disclose that Hovnanian would complete construction, misrepresentation of the deposit as being refundable, and misrepresentations about the builder's willingness to make all necessary post-closing repairs were not harmless puffery, but rather material misstatements made in the hope of inducing reliance. Plaintiffs also argue that violations of the construction code can establish a violation under the Act, and that the determination of whether the construction deficiencies in any particular case were serious enough to serve as the required "substantial aggravating circumstance" must be made on a case-by-case basis.

In addition, plaintiffs claim that the court erred by finding, as a matter of law, that the misrepresentations at issue lacked a causal nexus to their damages. They argue that the court improperly relied on the delegation of Quaker's construction responsibilities to Hovnanian in order to dismiss the import of misstatements that the court implied would have been actionable in the absence of such delegation. The court's ruling was also wrong on policy grounds, because it would allow all businesses to insulate themselves from liability for consumer fraud simply by using one entity to induce purchase of an item or a service and another entity to provide it. We disagree with plaintiffs' assertions.

The judge found that the representations of Quaker's being "a quality builder" with "a reputation built on service" were not statements of any fact "material to the transaction," and were thus akin to the kind of "puffery" or "sales talk" that our case law does not recognize as consumer fraud. The judge observed that such language could be actionable "combined with other circumstances," but he did not find the record legally sufficient on the required "other circumstances." He relied on "the inability to prove causation between the asserted misrepresentation" by Quaker and the damages actually caused by Hovnanian's deficient performance.

The judge held that construction defects by themselves are not an unlawful practice under the Act. They must be accompanied by "substantial aggravating circumstances," which did not exist here because the seller did not use "substandard materials," fail to obtain construction permits, or "abandon the project." He further held that violations of the building code were not an unlawful practice, because the case law has recognized only violations of regulations promulgated under the Act itself as per se unlawful.

The standard of proof under the Act is preponderance of the evidence. In Gennari, supra, 288 N.J. Super. at 541, we found "no indication that the Legislature intended to impose any greater burden of proof than that usually required in a civil action," which it identified as being preponderance of the evidence. Accord Hyland v. Aquarian Age 2000, 148 N.J. Super. 186, 191 (Ch. Div. 1977) ("It is the Court's opinion that since this is a civil action, preponderance of evidence, the usual civil standard of proof, should be the applicable standard."). In Liberty Mutual Insurance Co. v. Land, 186 N.J. 163, 176 (2006), which concerned a false claim under the Insurance Fraud Prevention Act, the Court called the Act the "closest statutory analogue" in remedial and prophylactic purposes, and favorably cited Gennari and Hyland for the standard of proof under it.

The Act covers sales of real estate, and it outlaws fraud, misrepresentations, knowing omissions, or any other "unconscionable commercial practice," even if no person "has in fact been misled, deceived or damaged thereby." N.J.S.A. 56:8-2. It does not require reliance, because its purpose is to proscribe practices that have the "capacity to mislead." Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994).

When "the alleged consumer fraud consists of an omission, the plaintiff must show that the defendant acted with knowledge, and intent is an essential element of the fraud." Cox, supra, 148 N.J. at 18. However, if "the alleged consumer-fraud violation consists of an affirmative act, intent is not an essential element and the plaintiff need not prove that the defendant intended to commit an unlawful act." Ibid.

In this case, the unembellished assertions about Quaker's quality were statements of opinion or puffery rather than misstatements of a fact, as discussed above, so they were not misrepresentations or any other form of deceit unlawful under the Act. There was no misstatement concerning the refundability of the deposit or the builder's willingness to attempt suitable post-closing repairs.

Finally, Quaker's failure to tell plaintiffs that Hovnanian would finish the construction work was not an omission or misrepresentation, because the agreement of sale did not prevent assignment by the seller, and plaintiffs present and we find no authority suggesting that the seller's assignment of a contract is unlawful under the Act. There is no suggestion that the assignment itself was a fraud to evade performance.

In the absence of an actionable misrepresentation or omission it is unnecessary to rely on the court's questionable supposition that plaintiffs had separate dealings with Quaker and Hovnanian for purposes of the Act, notwithstanding that plaintiffs contracted only with Quaker and had no ability to influence Hovnanian's involvement. Thus, we have no need to address the question of whether plaintiffs' dealings with Quaker and Hovnanian were truly separate. We also may treat as moot plaintiffs' argument that the court's premise would establish an unsound successor liability policy of allowing the business community to generally avoid responsibility for consumer fraud simply by having separate entities perform the functions of marketing and service.

Plaintiffs' assertion of the construction defects as violations of the Act implicates the statutory requirement of an "ascertainable loss of moneys or property, real or personal, as a result of" unlawful conduct. N.J.S.A. 56:8-19. Thus, while the Act does not require the "traditional" element of reliance, there still must be a "causal nexus" between the allegedly unlawful conduct and the ascertainable loss. Int'l Union of Operating Eng'rs v. Merck & Co., 192 N.J. 372, 389, 392 (2007). Accord Zorba Contractors, Inc. v. Housing Auth. of Newark, 362 N.J. Super. 124, 139 (App. Div. 2003); Varacallo v. Mass. Mut. Life Ins. Co., 332 N.J. Super. 31, 43 (App. Div. 2000).

Conduct that "consists of violations of specific regulations promulgated under the Act" is actionable per se. Cox, supra, 138 N.J. at 18-19. While there are regulations promulgated under the Act that cover home improvement contracts, N.J.A.C. 13:45A-16.1 to -16.2, there are none addressing new home sales. This is an omission which may merit legislative attention. The Uniform Construction Code, N.J.A.C. 5:23-1.1 to -12 A. 6, was promulgated under the State Uniform Construction Code Act, N.J.S.A. 52:27D-119 to -141, and it does not name the Consumer Fraud Act, or, for that matter, other consumer-protection schemes such as the New Home Warranty and Builders' Registration Act, N.J.S.A. 46:3B-1 to -20, among its other statutory sources of authority. Plaintiffs are inaccurate to imply that our case law makes construction code violations by themselves unlawful.

More generally, the breach of a contract by inadequate performance, including the breach of a warranty, is not necessarily "unconscionable" or "unfair" under the Act, because a lawsuit to enforce the contact will afford "remedial damages." Cox, supra, 138 N.J. at 18. Accord D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 25 (App. Div. 1985). For a plaintiff to obtain the Act's extraordinary remedies of treble damages and counsel fees, "the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach." Cox, supra, 138 N.J. at 18. Accord DiNicola v. Watchung Furniture's Country Manor, 232 N.J. Super. 60, 72-73 (App. Div.) (breach of warranty "where substantial aggravating factors are absent" is not an unconscionable commercial practice and does not violate the Act), certif. denied, 117 N.J. 126 (1989).

In Cox, supra, 138 N.J. at 7, the plaintiff's decedent entered into a home improvement contract with Sears for a kitchen renovation. The record supported the plaintiff's complaints about deficiencies, including "incomplete and substandard" rewiring that "failed to comply with building and electrical codes and home-repair regulations." Id. at 8. The plaintiff's experts testified that the rewiring was incomplete, and "that what wiring had been completed had been installed haphazardly and unprofessionally, resulting in dangerous, concealed defects," including the failure to ground new safety outlets and the improper reversal of other wiring connections that created the risk of electrical shock. Id. at 9. In addition, almost all the renovation work required municipal permits that had never been requested or issued. Id. at 10.

The jury found that Sears had not substantially satisfied its contractual obligations, and that the failure was the proximate cause of the plaintiff's damages. Id. at 9-10. The jury found that the damages were also proximately caused by a violation of the Act, namely, Sears' "failure to have competent contractors install cabinet[s], plumbing and electrical wiring in a safe, professional manner and in accordance with appropriate regulations." Id. at 10.

The Court agreed that Sears failed to comply with the Act's regulations on home improvement practices, which required contractors to obtain the necessary permits and inspection certificates. Id. at 19. The regulations existed "precisely" to protect consumers from the kind of "sloppy workmanship" that "characterized" the case. Ibid. The cost of repairing the wiring and cabinet deficiencies was an ascertainable loss that resulted from Sears' failure to obtain the permits and certificates, because obtaining them "would have triggered periodic inspections," which in turn "would have detected any substandard electrical wiring or cabinet work and would not have permitted the work to progress" until the deficiencies were corrected. Id. at 22. Cf. Josantos Constr. v. Bohrer, 326 N.J. Super. 42 (App. Div. 1999) (no causal nexus when contractor's insistence that buyer execute premature certification of completion did not delay or impede later discovery of deficiencies in the already-completed work).

However, "sloppy workmanship" by itself "falls short of an unconscionable commercial practice" in the absence of other kinds of evidence of "bad faith or lack of fair dealing." Cox, supra, 138 N.J. at 19-20. Such additional evidence could be the substitution of materials inferior to those specified in the contract in addition to the poor workmanship. Id. at 20. See also New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 501 (App. Div. 1985) (builder violated the Act by combination of construction defects and its "many" unspecified "omissions and deviations" from the contract that were "occasioned by bad faith"). Sears' failure to rewire the kitchen properly, whatever incompetence it reflected, was therefore, only a breach of contract and not a violation of the Act. Cox, supra, 138 N.J. at 19-20. The Court, therefore, limited the plaintiff's claim under the Act to Sears' misconduct "relating to permits, inspections, and certificates." Id. at 21-22.

In some instances, this court has found that the violation of regulations not promulgated under the Act could have reflected an actionable, unconscionable commercial practice. However, in those cases the conduct was not the failure to satisfy quality standards like those of a building code, but rather the direct and unfair compulsion of consumer acquiescence in a manner that a regulation specifically prohibited. Sprenger v. Trout, 375 N.J. Super. 120, 131 (App. Div. 2005) (violation of auto-repair regulations that were designed "to prevent a situation where the consumer is presented with a final bill that far exceeds the anticipated cost of repairs); Lemelledo v. Beneficial Mgmt. Corp., 289 N.J. Super. 489, 493, 502 (App. Div. 1996) (violation of Consumer Loan Act by using "deceptive or coercive marketing practices" to sell credit insurance that primarily protected lender rather than the borrower), aff'd, 150 N.J. 255 (1997); Cybul v. Atrium Palace Syndicate, 272 N.J. Super. 330, 336 (App. Div.) (condominium required buyers to close before issuance of certificate of occupancy, "despite the regulatory consequence" of Uniform Commercial Code regulations preventing occupancy without a certificate), certif. denied, 137 N.J. 311 (1994); Skeer v. EMK Motors, Inc., 187 N.J. Super. 465, 467, 470 (App. Div. 1982) (same as Sprenger).

In this case, the construction deficiencies lacked a causal nexus with plaintiffs' losses because they were not coupled with an aggravating factor as our case law requires. There was no allegation of a failure to obtain permits or inspections that would have hastened discovery of the deficiencies, no allegation of the substitution of materials inferior to those specified in the contract, and no allegation of other conduct that reflected bad faith. The same observations apply to the partly deficient post-closing repair work. We agree with the judge that this record was legally insufficient to establish the construction deficiencies as unlawful practices under the Act, even if they were violations of the construction code. The record was legally insufficient to prove a misrepresentation or other substantial conduct unlawful under the Act which could impose predecessor liability on Quaker Group.

VII

Plaintiffs next claim that the court erred by denying their motion to reconsider the dismissal of their claims for common law fraud and consumer fraud and rely on an unpublished Appellate Division case discussed below. We find this claim is unfounded.

At the hearing on this motion, the judge denied reconsideration on the basis that the record showed "just construction defects that I can't equate with the aggravating factors necessary to push it into a consumer fraud case." The defects also failed to establish common law fraud because they were not accompanied by "wild representations that were clearly untrue" like those in Gennari.

Reconsideration is to be granted "for good cause shown and in the service of the ultimate goal of substantial justice." Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 264 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988). Accord Casino Reinv. Dev. Auth. v. Teller, 384 N.J. Super. 408, 413 (App. Div. 2006). It is appropriate for "'that narrow corridor'" of cases in which the court "'has expressed its decision based upon a palpably incorrect or irrational basis'" or has obviously disregarded "'or failed to appreciate the significance of probative, competent evidence.'" Fusco v. Bd. of Educ. of Newark, 349 N.J. Super. 455, 462 (App. Div.) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)), certif. denied, 174 N.J. 544 (2002). The standard of review for the denial of reconsideration is whether the trial court abused its discretion. Triffin v. Johnston, 359 N.J. Super. 543, 550 (App. Div. 2003); Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 77 (App. Div. 1997).

Assuming that an unpublished case may compel reconsideration, there is nothing in the case that plaintiffs cite, Carboni v. Massimo, No. A-2068-05 (App. Div. January 31, 2007), which represented a change in the law or in the application of the existing legal principles to facts like these before us. In that case, we held that the regulations on home improvement contracts applied even though the contract had nominally designated the homeowner as the "contractor" for the home improvement project. Carboni, supra, (slip op. at 3). We also upheld the jury's verdict that the defendant had committed common law fraud because, in addition to violating the building code by using improper materials and "impermissible" construction techniques, he also "attempted to deceive [the] plaintiffs by covering up the improper work with sheetrock." Id. (slip op. at 4).

The deliberate concealment in Carboni satisfied the requirement of a knowing misrepresentation for common law fraud, in

accordance with the case law discussed above. For consumer fraud, it represented a "substantial aggravating factor" of mere incompetence, and it provided the causal nexus for the homeowner's "ascertainable loss" by tending to retard discovery of the construction deficiencies. However, plaintiffs' experts did not identify any such deliberate concealment here, and plaintiffs do not suggest that they possessed any other evidence of it.

VIII

Plaintiffs claim that the court erred by denying their motion for discovery that would disclose all Quaker Group entities and for leave to file a second amended complaint naming those entities. Plaintiffs argue that leave to amend must be liberally granted, that this second amendment would have helped elucidate the misrepresentations about experience and quality of work, and that it would not have expanded the nature of their claims for relief to any defendant's prejudice. We find that this claim has no merit.

The judge denied plaintiffs' motion on the ground that the claim for breach of contract (count seven) was properly limited to the parties named in the agreement of sale. Even when a pleading may no longer be amended as of right, Rule 4:9-1 requires that leave to amend be "freely given in the interest of justice." This means that leave is to be granted liberally, although only upon an assessment of whether the amendment might prejudice the non-moving parties. Notte v. Merch. Mut. Ins. Co., 185 N.J. 490, 500-01 (2006). "[T]he granting of a motion to file an amended complaint always rests in the court's sound discretion." Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998).

A party opposing summary judgment on the basis of incomplete discovery must "demonstrate with some specificity the discovery sought, and its materiality." In re Applic. of Ocean Cty. Comm'r, 379 N.J. Super. 461, 479 (App. Div. 2005). Materiality means "'the likelihood that further discovery will supply the missing elements of the cause of action.'" Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.) (quoting Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977)), certif. denied, 177 N.J. 493 (2003).

In this case, the alleged misrepresentations about experience and quality were not actionable as common law fraud or as consumer fraud against any Quaker entity, for the reasons discussed above. Plaintiffs do not indicate what facts about the existence or function of any additional Quaker entity might change those results. Further discovery about Quaker entities, and leave to file a second amended complaint naming them, were pointless and within the court's sound discretion to refuse.

IX

Finally, plaintiffs claim that the judge erred by giving the Quaker defendants credit for the settlement that Hovnanian made with them. They argue that doing so amounted to an assignment of full liability to Hovnanian and zero liability to Quaker on all seven counts, even though the Comparative Negligence Act, N.J.S.A. 2A:15-5.2, requires the allocation of liability among tortfeasors by a jury, and gives the nonsettling tortfeasor the burden of earning a reduced allocation by proving the settling tortfeasor's percentage of liability. We conclude that this claim lacks merit.

When Quaker moved to dismiss count seven, Hovnanian joined in the motion and observed that the settlement amount it had paid was equal to the economic damages that plaintiffs' expert had asserted. Plaintiffs countered that the settlement amount happened to equal the costs of repairing the house's previously identified structural deficiencies, but that it would not cover the deficiencies that their experts had subsequently identified, or the consequential damages that plaintiffs suffered due to the deficiencies.

When the court dismissed the tort claims against Quaker, it did so on the merits without reference to the amount of plaintiffs' damages, so it was only count seven, the breach of contract claim, on which the court considered the quantum of plaintiffs' damages. At the hearing where it partially granted and partially denied Quaker's motion to dismiss count seven, the court found that the "contractor's estimate to complete repairs" was "the [item of] damage[s] that plaintiff[s] recovered from Hovnanian"; it apparently made that inference from the identical dollar amounts of the estimate and the settlement payment. While the court disallowed consequential damages for the rehearsal dinner and baby shower because they were outside "the foreseeability of a breach of contract," it declined to dismiss the claims for mold remediation costs and other "consequential economic damages" because "[i]t seems to me that they do flow from a breach of contract." Recall that Quaker Group settled the contract claim on count seven against it for $10,000 without prejudice to appeal the fraud claims. (See II ante).

Plaintiffs did not allege that Hovnanian committed any misrepresentation or unlawful practice before they executed the agreement of sale, and the amount that plaintiffs accepted in settlement was exactly equal to the estimate for repairing the construction defendants. While the settlement papers were prudently drafted to preserve the generality of plaintiffs' release rather than risk limiting it to certain counts, breach of contract was nonetheless the only plausible basis for Hovnanian's liability, and plaintiffs have

not presented any authority under which the court was compelled to ignore that which was plain.

The remedies for breach of contract are generally restitution, compensatory damages, or compulsion of the breaching party to perform. Totaro, Duffy, Cannova & Co. v. Lane, Middleton & Co., 191 N.J. 1, 12-13 (2007). "Most often, courts award compensatory damages," which are intended to "put the innocent party into the position he or she would have achieved had the contract been completed." Ibid. In the absence of special circumstances, damages are limited to the losses that are foreseeable as "'natural and probable consequences of the breach of that contract.'" Id. at 13 (quoting Pickett v. Lloyd's, 131 N.J. 457, 474 (1993)). The goal is to put the injured party "in the same position it would have been in if the breaching party had performed the contract in accordance with its terms, no better position and no worse." Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 292-93 (App. Div. 1998). Those principles do not imply that courts ought to afford the wronged party a multiple recovery for any component of its damages.

While plaintiffs correctly cite the Comparative Negligence Act as requiring "the trier of fact" to determine "[t]he extent of each party's negligence or fault," that requirement applies only to "negligence actions and strict liability actions in which the question of liability is in dispute." N.J.S.A. 2A:15-5.2(a). Plaintiffs are off the mark to cite the tort cases of Young v. Latta, 123 N.J. 584 (1991); Theobald v. Angelos, 44 N.J. 228 (1965); Johnson v. American Homestead Mortgage Corp., 306 N.J. Super. 429 (App. Div. 1997); and Riccio v. Prudential Property & Casualty Insurance Co., 195 N.J. Super. 167 (App. Div. 1984), aff'd, 108 N.J. 493 (1987), as suggesting that the Comparative Negligence Act also required apportionment of liability by the factfinder in order to avoid multiple recoveries in this situation, namely, when the dismissal of all the tort claims on the merits leaves only a claim for breach of contract.

We reject this claim on the ground that no such apportionment was statutorily mandated in a case where the tort claims were dismissed on the merits, and only a contractual claim remained.

Affirmed.

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