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Consumer Fraud Act Is Effective in Construction Cases

Condo association gets big win against unscrupulous developer

By Gene Markin

In late 1998, Monroe Station Associates started construction on the Belmont, a seven-story, 34-unit condominium building in Hoboken. Monroe Station served as the sponsor, developer and general contractor of the Belmont. Prior to completing construction, Monroe Station filed a public offering statement (POS), which stated that there were no known defects in the common elements of the Belmont building that a prospective purchaser could not determine by a reasonable inspection. Attached to the POS were certain marketing materials, which provided that the potential buyers would be getting a "Proven Developer and Construction Management Team which has overseen the building and renovation of over 400 Single Family & Condominium Homes, and over 1,000,000 Sq. Ft. of Office/Commercial/

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Retail Development."

In reality, the Belmont was the first building the owner of Monroe Station, Dean Geibel, had ever developed. Having hired several experienced project/construction managers, Geibel relied on their collective experience as support for the representation in the marketing materials that the buyers would be getting a "proven" developer. Unfortunately, the Belmont suffered from water intrusion problems from the very beginning. Unit owners experienced water leaks into their units from molding around windows, light fixtures, balconies and air-conditioning ducts. In response, the condominium association hired various contractors, home inspectors and professional engineers to investigate, test and repair the source of the water leaks.

Over the course of several years, the association attempted to fix a variety of construction deficiencies that had been identified and were suspected of causing the water intrusion issues. The water leaks continued however, and in January 2007 the association stopped

making repairs and filed suit against Monroe Station, alleging negligence, fraud and violations of the Planned Real Estate Development Full Disclosure Act and the Consumer Fraud Act (CFA). The matter went to trial, where the testimony focused on the origin and cause of the water infiltration, with the association's experts attributing the problem to construction defects and defendant's experts blaming poor or inadequate maintenance.

According to the association's expert, the total estimated cost to remediate the exterior and interior of the Belmont was approximately \$1.825 million. Conversely, the defendant's expert estimated the cost of the necessary repairs to be \$741,000. The jury returned a verdict in favor of the association, awarding it \$2,186,675 in damages, with Monroe Station being responsible for 80 percent of the damages (\$1,749,340). The trial court then awarded treble damages, prejudgment interest and attorney fees, giving the association a total judgment against Monroe Station in the amount of \$7,236,677.

Monroe Station appealed, challenging among other things the association's standing to recover for ascertainable losses of members who were not original purchasers, the association's standing to recover for damages to windows that it argued were not part of the common

elements, the applicability of the CFA to the representations made by the developer, and the trial court's award of prejudgment interest on the punitive portion of the CFA damages award. In its written opinion, captioned *Belmont Condo. Ass'n v. Geibel*, 2013 N.J. Super. LEXIS 105 (App. Div. July 9, 2013), the Appellate Division affirmed in part, and reversed in part.

The Appellate Division had no trouble finding that the association was an appropriate party in interest with standing to pursue CFA claims on behalf of individual unit owners. Because the ascertainable loss being alleged was damage to the common elements, the association, which was charged with the sole responsibility of maintaining and repairing the common elements, had standing to recover for the misrepresentations made by the developer to the original unit purchasers. It made no difference that the association itself could not demonstrate reliance on the alleged misrepresentations.

In order to state a claim under the CFA, a plaintiff must allege three elements: (1) unlawful conduct; (2) an ascertainable loss; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss. N.J.S.A. 56:8-19. The CFA delineates the conduct that will amount to an unlawful practice as:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, *whether or not any person has in fact been misled, deceived or damaged thereby*, is declared to be an unlawful practice.

N.J.S.A. 56:8-2 (emphasis added).

A plaintiff, therefore, need not show reliance on the unlawful conduct of the

defendant as long as an ascertainable loss resulting from defendant's conduct is demonstrated. Accordingly, in order to prevail, a plaintiff need only demonstrate a causal connection between the unlawful practice and an ascertainable loss. The Belmont condo association did just that — it presented evidence that the POS and accompanying marketing materials were distributed to all the original purchasers in order to induce them to purchase their units. Reliance was not a required element, and therefore the Appellate Division rejected Monroe Station's arguments to the contrary.

Next, Monroe Station contended that the association's CFA claim must fail as a matter of law because the POS representations were true at the time they were made and because they were not accompanied by "aggravating circumstances." The Appellate Division disagreed.

A false statement of fact is not an essential ingredient of a plaintiff's cause of action based on affirmative wrongdoing. Instead, the capacity to mislead is the prime ingredient of an unlawful practice under the CFA. Intent is irrelevant. Therefore, a claim of literal truth will not constitute a defense to a plaintiff's CFA claim where the overall impression created by an advertisement is misleading and deceptive to an ordinary reader.

According to the Appellate Division, Monroe Station's statement that there were no known defects in the common elements that could not be determined through reasonable inspection, while literally true at the time made, because they were made before construction, clearly had the capacity to mislead an average reader. As such, the developer's claim of literal truth was not a valid defense to the association's CFA claims.

The Appellate Division likewise rejected Monroe Station's "aggravating factors" argument, because a plaintiff need not demonstrate "aggravating factors" when the alleged "unlawful practice" is an affirmative misrepresentation. Only when an unconscionable commercial practice, such as a breach of contract or breach of warranty is alleged, does a showing of "substantial aggravating circumstances" become necessary in order to justify treble damages and an award of attorney fees. Since the Belmont condo

association's CFA claims were based on the unlawful practice of affirmative misrepresentations rather than on an unconscionable commercial practice, the association was not required to demonstrate "aggravating factors."

The Appellate Division, however, agreed with Monroe Station that the association lacked standing to seek damages for the windows because the windows are personal to the unit owners and are not part of the "common elements." Since the master deed did not classify the windows as part of the common elements nor make any specific reference to the unit windows, the Appellate Division reasoned that the unit windows, located within the individual units, are intended for the use of the individual owner. As such, the association could not recover for defects in the windows, as those would be individual grievances necessarily left to litigation brought by individual unit owners.

Finally, the Appellate Division reversed the trial court's award of prejudgment interest on the punitive portion of the plaintiff's CFA damages award. It is well settled that prejudgment interest is not intended to apply to awards of punitive damages. In *Belinski v. Goodman*, 139 N.J. Super. 351, 360 (App. Div. 1976), the Appellate Division explained:

While R. 4:42-11(b) does not expressly except punitive damage awards from its scope, the policy considerations which gave rise to its adoption suggest that result. Prejudgment interest is assessed on tort judgments because the defendant has had the use, and the plaintiff has not, of moneys which the judgment finds was the damage plaintiff suffered. It is thus clearly implied that interest on the loss suffered by a plaintiff as a result of defendant's tortious conduct is what was contemplated by the rule.

An award of prejudgment interest is therefore limited to the compensatory portion of a CFA damages verdict. Accordingly, the trial court erred in awarding prejudgment interest on the trebled damages amount instead of only on the compensatory damages amount

awarded by the jury.

All things considered, this was a big win for condominium associations and unit owners. It is clear that the CFA has teeth and can yield big awards against unscrupulous developers. A multimillion-dollar judgment sounds great and is very impressive on paper; however, there still remains

the issue of collection. A multimillion-dollar award is not worth the paper it is printed on if the developer is insolvent, bankrupt or judgment-proof. Therein lies the rub. Most of the time, developers will create a project-specific entity to act as the “developer” of a condominium complex, and that entity will have no assets as

soon as the last unit in the development is sold. Once all the money is gone, there is nothing left for creditors or plaintiffs to seize. That is why many condominium-association plaintiffs forgo pursuing CFA claims and instead go after insurance proceeds for property damage resulting from negligent construction. ■