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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0243-13T3

STEVONNE WILSON,

Plaintiff-Appellant,

v.

WOODFIELDS AT PRINCETON HIGHLANDS, GARDEN HOMES, WOODFIELD HOMEOWNERS ASSOCIATION, RCP MANAGEMENT COMPANY, TOWNSHIP OF FRANKLIN BUILDING INSPECTORS AND PLANNING BOARD, WENTWORTH PROPERTY MANAGEMENT COMPANY, JONATHAN FRIEDER, ROY LOMASSARO and CLIVE USISKIN,

Defendants,

and

WOODFIELD DEVELOPERS, LLC,[1]

Defendant-Respondent.

Submitted September 28, 2015 - Decided October 27, 2015

Before Judges Lihotz, Fasciale and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-6262-07.

Stevonne Wilson, appellant pro se.

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[1] In the complaint, defendant's name was improperly pled as Woodfield Developers.

Lasser Hochman, LLC, attorneys for respondent (John R. Wenzke, of counsel and on the brief).

PER CURIAM

Plaintiff, Stevonne Wilson, appeals from an order dismissing, with prejudice, her complaint against defendant Woodfield Developers, LLC, which constructed her residence. Plaintiff's complaint alleged breach of contract, common law fraud, violation of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -195, and negligence arising from water penetration in the home's basement and other defects.[2] Prior to trial, plaintiff's claims against Garden Homes, a related entity; Jonathan Frieder, a sales consultant; and Roy Lomassaro, defendant's construction manager; were dismissed by stipulation.[3] Following an eight-day bench trial, the trial judge entered a written opinion concluding the claims against defendant were unsupported and dismissed the complaint.

Raising fourteen points on appeal, plaintiff argues the trial judge erred in evaluating the evidence, and maintains

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[2] Plaintiff's complaint also alleged violations of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, which were dismissed prior to trial. The order of dismissal is not challenged on appeal.

[3] Plaintiff also resolved her disputes with the remaining defendants prior to trial and they do not participate in this appeal.

prior to trial, a different judge improperly considered and granted defendant's motion to vacate an earlier order granting plaintiff summary judgment on liability. Finally, plaintiff seeks to reinstate the claims against the dismissed defendant. We have considered these arguments in light of the record and applicable law. We affirm.

These facts are taken from the trial record. On July 18, 2001, plaintiff purchased a newly constructed home in a development known as "Woodfields at Princeton Highlands," located in Franklin Township.[4] Plaintiff testified she noticed water seepage in the basement during the final pre-closing inspection. However, a Presettlement Inspection Checklist (PIC), which plaintiff executed on the day of the final inspection does not mention water issues. Further, the document states:

> This settlement inspection punchlist will document any and all open punch list items which were not completed at the time of the 2nd settlement inspection with the Buyer(s) and Builder representative. Any defects noted during the 1st pre-settlement inspection are deemed completed and accepted by the Buyer unless specifically noted below. This is the only list which the Builder will agree to complete after settlement, excepting any warranty service repairs which may be covered by the

[4] Woodfield is a distinct, but adjacent, development from Princeton Highlands.

> Homeowners Warranty. . . . No other written or verbal representations or promises will be acknowledged by the Builder unless noted herein or contained in any of the Warranty or Contract documents.

The PIC only included the need to repair a scratch in the master bath tub.

In June 2002, plaintiff installed an in-ground swimming pool. Later, the backyard was landscaped and a retaining wall, deck, and walkway by the pool were constructed. Plaintiff testified the excavated soil was not removed from the property and additional soil and gravel were placed on the site by the landscaper when building the pool. Plaintiff mentioned seeing water in the basement a few months after closing, but later admitted she could not remember exactly when this occurred. She acknowledged there was no continuous water seepage from the closing through the end of 2001.

Plaintiff also asserted "clay-colored, muddy residue in the basement permeated throughout the house from ducts connected to the air conditioner and heating system." However, she did not recall whether she contacted defendant to complain of water seepage problems between July 18, 2001 and October 28, 2005.

Plaintiff gave more detailed testimony regarding flooding problems beginning in 2003, when she stated water would "seep through the foundation and around the perimeter of the basement"

and that you "would sink into the grass" in the ground outside the home, "like a swamp."

Beginning in October 2005, plaintiff maintained water penetrated the home and the "basement smelled of mold and was extremely damp with mold deposits on the walls." She identified three occasions of significant flooding: first, on October 27, 2005, when her sump pump failed and the fire department was called to pump out approximately twelve inches of water; second, in July 2008, when four to six inches of water accumulated in the basement; and third, in August 2011 during Hurricane Irene, resulting in approximately twenty-four inches of water in the basement after the sump pump stopped working because of an electricity outage. Plaintiff contacted Lomassaro in 2005, but did not contact defendant's representatives between the 2005 and 2008 incidents.

Plaintiff's Law Division complaint alleged "[d]efendant[] failed to apprise plaintiff of the grading problems, draining issues, basement leaking, steep slopes, . . . that her property was built on underground streams, and built too close to buffers and drains." She also stated her home was built on a site with a lower elevation than surrounding homes, causing runoff waters to flow toward plaintiff's property, resulting in basement, rear, and side-yard flooding. Further, she characterized the

home's construction as shoddy, alleging defective ductwork, uneven floors, and the absence of a point load in the basement, which caused the living and dining room to sag. Plaintiff further alleged the premises was represented as 2618 square feet, but only built as 2400 square feet, and defendant collected homeowner's dues related to an advertised recreation park, which was not completed until 2009 or 2010.

At trial, the parties presented expert testimony regarding the water seepage. Plaintiff's experts included Steven R. Kelly, a licensed professional land surveyor; Jason Mondrosch, a master plumber; and Richard B. Lukoff, a licensed civil engineer. In July 2012, Kelly prepared a topographic survey of plaintiff's property. Mondrosch testified his inspection of the interior perimeter drain revealed a blocked drainage pipe. He opined the improper installation caused water to seep into the basement when it rained. However, on cross-examination he admitted the inspected pipe was actually a radon pipe, which also could aid drainage.

Lukoff relied on Kelly's survey, Mondrosch's report of a blocked drainage pipe, his own examination of the basement, the lot's grading and location in relation to adjacent properties, and an inspection of improvements (e.g., the pool, the retention wall, shed, walkway and deck). Lukoff also reviewed various

reports prepared by consultants in connection with the development of Princeton Highlands, including a Soils and Foundation Investigation by Melick-Tully and Associates, P.C., a geotechnical consultant. From his review, Lukoff concluded reddish brown stains on the home's basement floor evinced damage from chronic water seepage. He opined this was attributed to design and construction defects when the home was built, as shown by: (1) construction of the residence over shallow groundwater; (2) the right side-yard swale failed to conform to the submitted designed; (3) the house was set below the grade of surrounding homes; (4) the sub-slab perimeter drain was blocked; (5) there was no water stop, which was described as a hard rubber or fiberglass piece between the footing and the wall to seal the joint; and (6) the exterior footing foundation drain outlet was blocked. Lukoff also concluded although the pool required localized grading changes, these alterations did not affect the grading or drainage of plaintiff's property or contribute to the water seepage.

Defendant's witnesses included Lomassaro, the construction manager for Princeton Highlands, and William Buzby, a civil engineer and land surveyor expert. Lomassaro discussed the Plot and Grading Plan prepared by Fletcher Engineering, Inc., to obtain construction permits, which depicted grading and the

drainage system. He asserted water was never found: when the foundation was dug; during phases of initial construction; upon the many inspections by the Township; or during any of the three pre-closing inspections with plaintiff. Lomassaro acknowledged, on the first inspection, a leak in the condensate line from the air conditioner, located next to the sump pump, was repaired. Otherwise, no water seepage occurred.

Lomassaro discussed his inspection upon responding to plaintiff's October 28, 2005 complaint of a wet basement. He maintained this was the first recorded claim of water in plaintiff's basement. He observed a water mark visible at approximately three to four inches above the floor and noticed the sump pump unplugged and found it inoperable. He inspected the yard and described moisture coming through the retaining wall by the pool and, in the same vicinity, saw patio pavers surrounding the pool had caved-in. Lomassaro believed the pool was leaking and recommended plaintiff contact the installer. No follow-up or other complaints were received from plaintiff.

Buzby visually inspected plaintiff's property and concluded the property's rear and side-yard grading were altered from that shown on the initially prepared survey. He asserted grading following the installation of the pool and related improvements redirected storm water run-off toward the dwelling. On cross-

examination, Buzby admitted he did not make measurements or calculations, but his opinion was based on his observations.

In his opinion, the judge evaluated the evidence and found it insufficient to prove plaintiff's allegations. He noted the Township's approval and issuance of a certificate of occupancy demonstrated construction was in conformance with the originally filed and approved plans. Lukoff's testimony, although voluminous, was found to be inconclusive regarding the grading of plaintiff's property when the home was delivered at closing. Further, Mondrosch was incorrect about the pipe he inspected and Lukoff relied, in part, on this error. The judge dismissed plaintiff's complaint. This appeal ensued.

A final determination made by a trial judge conducting a non-jury case "[is] subject to a limited and well-established scope of review[.]" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). "[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]" Ibid. (alteration in original) (quoting In re Trust Created By Agreement Dated December 20, 1961, ex. rel. Johnson, 194 N.J. 276, 284 (2008) (internal quotation marks omitted)). "[T]he scope of appellate

review is expanded when the alleged error on appeal focuses on the trial judge's evaluations of fact, rather than his or her findings of credibility." Walid v. Yolanda for Irene Couture, Inc., 425 N.J. Super. 171, 179 (App. Div. 2012). However, the judge's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). As a result, we review the judge's legal conclusions de novo. Little v. KIA Motors America, Inc., 425 N.J. Super. 82, 90 (App. Div. 2012).

The first point presented on appeal raises a procedural challenge to the interlocutory order setting aside a November 16, 2012 order for partial summary judgment, fixing defendant's liability. Plaintiff argues the earlier determination by the judge, who entered partial summary judgment, may not be disturbed by a different reviewing judge. We disagree.

Interlocutory orders are "subject to revision at any time before the entry of final judgment[,] in the sound discretion of the court in the interest of justice." R. 4:42-2. Understanding, that "[i]nterlocutory orders are always subject to revision in the interest of justice[,] . . . the power to reconsider an interlocutory order should be exercised 'only for good cause shown and in the service of the ultimate goal of

substantial justice.'" Lombardi v. Masso, 207 N.J. 517, 536 (2011) (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 263-64 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988)).

Discussing this concept, the Court instructs:

> where a judge is inclined to revisit a prior interlocutory order, what is critical is that he [or she] provide the parties a fair opportunity to be heard on the subject. It is at such a proceeding that the parties may argue against reconsideration and advance claims of prejudice, e.g., missing witnesses, destroyed evidence. Moreover, once the judge has determined to revisit a prior order, he [or she] needs to do more than simply state a new conclusion. Rather, he [or she] must apply the proper legal standard to the facts and explain his [or her] reasons. In the case of reconsideration of summary judgment, for example, the judge should apply Rule 4:46-2 and explain what genuine issues of material fact require trial.
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> [Id. at 537-38.]

Here, the order granting partial summary judgment was entered following review of defendant's motion for reconsideration. The reviewing judge considered oral argument and thoroughly read earlier arguments and submissions presented during the prior cross-motions for summary judgment. Plaintiff's counsel believed his argument was cut short and he filed a supplemental brief, which also was considered by the reviewing judge.

Defendant's request to vacate stated the order granting partial summary judgment on liability was improvidently granted. Defendant had initially moved for summary judgment premised on the legal assertion that all issues raised in plaintiff's complaint were addressed in arbitration. The cross-motion did not respond to this matter, but sought partial summary judgment alleging defendant had not provided evidence to refute liability. Replying to the cross-motion, defendant asserted the application was untimely and should be dismissed; defendant did not file a statement of facts refuting plaintiff's overarching claim that liability was not contested. The lack of competing expert evidence swayed the judge who granted partial summary judgment to plaintiff.

In considering defendant's motion to vacate the partial summary judgment order, the reviewing judge identified documents included in plaintiff's cross-motion, which reflected a dispute of material facts. Specifically, Lukoff's certification, submitted in support of partial summary judgment, stated he received, reviewed, and disagreed with Buzby's report opining the grading of the property following the pool's installation caused the water seepage. The reviewing judge found this evidence was overlooked when partial summary judgment was granted. The judge also commented on defendant's failure to

fully present Buzby's assertions, suggesting this occurred because plaintiff's cross-motion did not relate to the substance of the initial motion. See R. 1:6-3(b) (requiring a cross-motion to relate to the same subject matter as the initial motion). Consequently, he determined defendant did not have the opportunity to present an accurate picture of the status of the litigation. The reviewing judge concluded because plaintiff's submissions included references to defendant's expert's opinion on the cause of water damage, a dispute of facts was shown making entry of summary judgment inappropriate.

We find no flaw with the procedure used or the conclusions reached by the reviewing judge. We agree partial summary judgment was initially granted in error. The parties' expert reports related conflicting conclusions. The judge entering summary judgment mistakenly believed defendant failed to present an expert's position, which meant defendant had not obtained an expert and could not defeat facts supporting its liability. This error was properly considered and corrected by the reviewing judge. Lombardi, supra, 207 N.J. at 536.

We also reject plaintiff's claim stating her counsel was not provided sufficient time to present oral argument opposing the motion to vacate. In his February 11, 2013 oral findings, the reviewing judge commented on this assertion, which he

rejected as unfounded, noting all arguments were fully aired. Further, he stated he reviewed counsel's subsequently submitted supplemental brief articulating arguments in opposition to defendant's motion. We conclude the procedure employed fully complied with the Court's direction in Lombardi.[5]

Plaintiff's remaining challenges relate to the weight of the trial evidence, which she argues was "overwhelming and conclusive" and proved defendant's liability. Also, she states "[t]he trial judge failed to consider the relevant factors supporting [her] claims . . . ." We are not persuaded.

Plaintiff also suggests defendant, in its marketing and sales brochures, misrepresented that a recreation park would be available to Princeton Highlands' residents. Plaintiff states she paid homeowner's dues ascribed for the park for eight or nine years before the park was actually available. Plaintiff waived this claim at the commencement of trial and the record contains no evidence supporting her assertion or demonstrating

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[5] Plaintiff further contends earlier orders dismissing claims, which she consented to, should be vacated and her claims against these defendants reinstated. This assertion was not raised before the reviewing or trial judge. We decline its consideration. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (stating "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest") (citation and internal quotation marks omitted).

damages based on the park's delayed opening. Thus, the claim was properly dismissed. See Weinberg v. Sprint Corp., 173 N.J. 233, 240 (2002) (noting plaintiff's claims for common-law fraud and negligent misrepresentation were dismissed by trial court because plaintiff could not prove damages); Cox v. Sears Roebuck & Co., 138 N.J. 2, 10-11 (1994) (recognizing plaintiff must prove damages to recover for breach of contract or Consumer Fraud Act claim).

Attacking the judge's findings and conclusions regarding her main damage claim, related to water seepage, plaintiff contends Buzby was unqualified to opine on the issue because he only performed visual inspections without actual calculations. She also asserts Lomassaro's testimony was inconsistent and far less convincing that Lukoff's. Plaintiff additionally identifies as error what she characterizes as a failure to consider evidence comparing her property's grading to her neighbor's, which did not have a pool, but experienced similar flooding problems.

Assessing the trial evidence, the judge stated:

> While Mr. Lukoff's testimony was voluminous, it is clear that [plaintiff's] home was built according to the plans submitted and approved by the Township's authorities. According to Mr. Lukoff, the swales, if built as planned, would have been sufficient to handle the runoff of water away from [plaintiff's] home.

The failure of the sump pump after five (5) years was not the fault of the builders. If anything, Mr. Lukoff answered it would be the responsibility of the manufacturer of the sump pump.

The installation of the water stops was not required by the building code. Importantly, other than Mr. Lukoff's own opinion there was no evidence that the absence of the water stops was a cause of the floods.

At no time did Mr. Lukoff, or anyone else, produce any evidence that the high groundwater table was the cause of the flooding. Rather, the evidence and or opinions dealt with the ground water runoff.

The evidence shows that at the time of Mr. Kelly's topographical survey in 2012 the swales did not conform to the original building plans. There is no evidence presented by the plaintiff that the defendant failed to properly construct the swales in 2000-01. All [she] can prove is that the swales did not conform to the original building plans in 2012. In the face of approvals by the Township of Franklin after construction in 2001, this [c]ourt cannot conclude that the builders failed to properly construct the swales. On the contrary, there is some evidence from which inferences could be drawn that the building of the pool and the distribution of the soil dug up (118 cubic yards) may have contributed to the changes in grading which caused some of the water problems.

With respect to the sub-slab drain, it is clear that Mr. M[o]nd[r]osch was wrong in his assumption that the pipe under the slab was a drain pipe. It is a radon pipe. Mr. Lukoff relied on Mr. M[o]nd[r]osch's opinion, and likewise, was wrong. The

> drainage system consisting of gravel is acceptable under the code and apparently is working properly, according to Mr. Lukoff.
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> No evidence was presented that the exterior drain pipe was not working properly or that it was installed improperly. Mr. Lukoff stated that they would have to dig up the area in order to make that determination. He opined that it was working properly as far as he could determine.

As to the CFA assertions, the judge noted the record is devoid of evidence showing defendant misrepresented or withheld information regarding water conditions on plaintiff's property prior to the sale of the home. Nor did she prove defendant negligently constructed the home or graded the property, causing the basement and yard flooding.

Following our review, we determine each factual finding by the trial judge is supported by credible evidence in the record. Therefore, the legal conclusions based on these facts cannot be found to be "'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)).

Without proof demonstrating defendant improperly graded or defectively constructed her home prior to sale, all of plaintiff's claims fail. Lukoff's opinion assumed as true

plaintiff's assertion that no grading changes occurred when the pool and related amenities were installed; but this underlying assertion was not supported. On the other hand, defendant produced evidence the municipality inspected the construction, which it approved, presumably as conforming to the originally submitted plans. Accordingly, we conclude the judge's supported factual findings and legal conclusions based on these facts should not be disturbed. Ibid.

We also reject as unfounded any suggestion relevant evidence regarding the neighbor's water seepage and plaintiff's mold conditions were overlooked. Plaintiff never showed the neighbor's home experienced flooding and plaintiff's mold report was admitted over defendant's objection, but the evidence documenting damages was not reached when liability was not proven.

Finally, we have considered plaintiff's remaining assertions. Any issue not otherwise addressed in our opinion was found to lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.