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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4059-11T4

JAMES S. BISHOP, III,

Plaintiff-Respondent,

v.

RICHARD CATENA AUTO WHOLESALERS, INC.,

Defendant-Appellant,

and

JAMES HALLIK,

Defendant.

Submitted April 22, 2013 - Decided May 28, 2013

Before Judges Sabatino and Maven.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4601-10.

Methfessel & Werbel, attorneys for appellant (Paul J. Endler, Jr., of counsel and on the brief).

Brach Eichler L.L.C., attorneys for respondent (Anthony M. Rainone, of counsel and on the brief; Jason T. Watson, on the brief).

PER CURIAM

This case arises out of the interstate sale of a used 1989 Rolls Royce Silver Spur by defendant Richard Catena Auto Wholesalers ("Catena Auto"),[1] a New Jersey company, to plaintiff James S. Bishop, III. Plaintiff alleged that defendant James Hallik, the Catena Auto sales manager who facilitated the sale, misrepresented the quality and condition of the car in order to persuade plaintiff to buy it. Numerous problems with the car were discovered when the car was delivered to plaintiff in North Carolina.

After a one-day bench trial, the court found that defendants were liable to plaintiff for violations of the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -20, because of those misrepresentations. The court awarded plaintiff $45,620.25 in treble damages under the CFA, plus counsel fees.

On appeal, defendant Catena Auto[2] argues that the trial court's finding of liability was against the weight of the evidence. Catena Auto further contends that the court improperly admitted expert testimony from a lay witness; that the court erroneously disregarded a warranty refusal document allegedly signed by plaintiff; and that the award of counsel

[1] To avoid confusion, the owner of Catena Auto, Richard Catena, will be referred to as Mr. Catena. Our references to "Catena Auto" are references solely to his company.

[2] Co-defendant Hallik has not participated in the appeal.

fees was excessive and should be reduced. For the reasons that follow, we affirm.

I.

We derive the following pertinent facts from the record and the trial judge's comprehensive written opinion on the merits dated December 6, 2011.

In early 2010, plaintiff, a car enthusiast, saw an online advertisement from Catena Auto offering the used Rolls Royce for sale. The ad stated as follows:

> Congratulations! On finding another Premium Vehicle offered by rcatena.[c]om. This 1989 Rolls-Royce Silver Spur has 84[,]653 miles and is Carfax [c]ertified. There are no warning lights on, the motor runs strong and the transmission shifts seamlessly. The exterior is clean and has been well maintained. The upholstery is firm, tear and smoke free while the carpeting and mats are clean. When driving the car, there is no vibration, shake or shimmy. Call today to get our low Wholetail Price Today! Not Retail, Not Wholesale but a Quality Car Somewhere In-between! The paint is in excellent condition and it is apparent that this car was garaged and meticulously-maintained. . . . This vehicle's interior does show very minimal signs of wear, but it is in far better condition than what is expected for a vehicle of this age. It seems that this vehicle was owned by a non-smoker. Very smooth ride! All electronic components in working condition.
>
> RICHARD CATENA AUTO WHLSRS

Plaintiff recalled that there were photographs of the car on Catena Auto's website, but the photos did not reveal anything problematic about the car.

Plaintiff first contacted Catena Auto regarding the car in early March 2010, speaking with Hallik by phone. According to plaintiff, Hallik informed him that "[i]t was a great car, it was meticulously maintained, there was nothing wrong with the car, it rode wonderfully, there [were] no lights that were on, [and that] it was very clear and obvious that this car had been garaged and maintained perfectly." Plaintiff asked Hallik how he would rate the car on a scale of one to ten. In reply, Hallik allegedly "g[a]ve it a [rating of] seven," because it was used. Plaintiff understood the seven rating to mean that the car "was significantly above average, and it confirmed [to plaintiff] in that conversation that [he] should go ahead and expect to believe what was in the print ad."

In addition, Hallik allegedly told plaintiff that the only deficiency with the car was "a piece of electrical tape on the steering wheel," but it was "perfect" otherwise. Hallik did not mention any rust on the body of the car.

Plaintiff claimed that Hallik also assured him that Catena Auto "consistently" works with out-of-state clients, and so they have a "three-day, money-back, no-questions-asked . . .

guarantee[.]" In that regard, Catena Auto's website described its "Buyback Guarantee" as follows:

> Here's how the Program Works:
>
> We know that every car can't be perfect and furthermore that every car or truck may not be perfect for every person, and that people [sometimes] don't make the right decision the first time for any number of reasons. Can you say "Buyer's Remorse?"
>
> For the above reasons and countless others we offer a 3-Day Money-Back Guarantee with every used car, truck and SUV.
>
> You can return your Car, Truck, SUV or any other Vehicle purchased from us for any reason! And we won't pressure you into buying another car, just let us know why this particular vehicle was not the one for you.
>
> The "Nitty Gritty":
>
> Our Buyback guarantee applies to vehicles shipped sight unseen by Richard Catena Auto Wholesalers . . . ONLY. This offer does not apply to units that are bought and picked up in person, or inspected by a customer's representative or service prior to purchase.
>
> The catch, (if you want to call it that) . . . is that you pay the return cost of shipping of the vehicle back to us[.] This cost would solely be your responsibility[.] You can ship it or drive it back but we must receive the vehicle within 14 days of your notice* to us that you are returning it.
>
> *Notice must be submitted in writing and sent via certified mail.

> Our guarantee eliminates the worry out of buying your car, truck or [SUV] sight unseen!
>
> [Emphasis added.]

Plaintiff, an out-of-state buyer, testified that he would not have bought the car if not for the three-day return policy, "especially when [he] was being told that there was no need to have the car inspected." Plaintiff would have otherwise considered having his mechanic examine the car before purchasing it, but he added that "because they have the three-day money-back guarantee in place, then that gave me the confidence to buy it, based on that conversation[.]"

Relying upon these written and oral representations, plaintiff signed a contract for the sale of the vehicle. The contract was also signed by a Catena Auto representative. The contract contained the following language:

> ALL USED VEHICLE SALES DEALER'S OBLIGATION
>
> The laws of New Jersey require Motor [V]ehicle Dealers to make all necessary repairs, without charge, or return the full purchase price to the customer in the event a used vehicle sold and intended to be registered in this State fails to meet State Inspection Standards for the issuance of a certificate of approval due to a defect that is not the result of the customer's own act.
>
> . . . .
>
> WAIVER OF DEALER'S OBLIGATION (USED VEHICLE SALE)

> The undersigned[] has read and understood the above Dealer's Obligation, and does hereby WAIVE AND RELEASE the DEALER'S OBLIGATION to make repairs without charge or return the full purchase price if the vehicle fails to meet State Inspection Standards for the issuance of a certificate of approval, unless the cause for the vehicle's rejection is an item which is "covered" by New Jersey's Used Car/Lemon/Warranty Law[.]
>
> [Emphasis added.]

The contract also contained an area with the heading "IF USED VEHICLE SALE—CHECK APPROPRIATE BOX." Significantly, neither of these boxes were checked. The text for the first unchecked box reads:

> This vehicle is sold "as is" and the selling dealer hereby expressly disclaims all warranties, either express or implied, including any implied warranties of merchantability and fitness for a particular purpose. Any liability of the selling dealer with respect to defects or malfunctions of this vehicle including, without limitation, those which pertain to performance or safety, (whether by way of "strict liability," based upon the selling dealer's negligence, or otherwise), is expressly excluded and customer hereby assumes any such risks.

The text for the second unchecked box reads: "The only dealer warranty on this vehicle is the limited warranty which is issued with and made a part of this order form."

Plaintiff asserted that he understood the car was not sold to him "as is," and that there was a one-month, one-thousand mile warranty on the car's drivetrain. He said that Hallik arranged for shipment of the car to North Carolina. The contract reflected that plaintiff paid the dealership $14,314 in cash, plus a $500 deposit.

Another document, titled "Warranty Refusal," and dated March 8, 2010, bears plaintiff's signature. That document reads, in part:

> I[,] James Bishop[,] have been offered a warranty of a 1989 Rolls Royce upon purchase and have declined one. Vehicle is being sold AS-IS, no warranty expressed or implied.
>
> . . . .
>
> CAR INSPECTION
>
> I have also inspected the vehicle and agree that the tires, interior and exterior of this automobile are acceptable for delivery. I understand Richard Catena Auto Wholesalers will not be responsible for any re-conditioning once the car leaves the dealership for delivery.
>
> If I am not satisfied with the automobile at delivery I do not have to accept it, however, if I accept the automobile I hereby release Richard Catena Auto Wholesalers from any work or concerns.
>
> [Emphasis added.]

Plaintiff denied that he signed this document waiving warranties on the car. When presented with the document at trial, plaintiff stated that he had never seen it before. Plaintiff conceded that the signature on the document appeared to be his own, but he had no recollection of signing it. Most importantly, the document, which is dated March 8, 2010, recites that plaintiff had already inspected the car on or before that date, even though plaintiff did not receive delivery of the car until the following day, March 9, 2010.

Plaintiff picked up the car on March 9, 2010 from a shipping drop-off location in North Carolina. Plaintiff testified that he immediately noticed "significant dents and g[o]uges, [and] rust." He also noticed that "three out of four [hubcaps] did not match each other." In addition, the front grille "had been mashed to the side," and the emblem on the side of the car had "rotted and rusted off[.]" The front grille, which plaintiff claimed was "the most important part of a Rolls Royce on the outside," also had rust and paint chips. On the passenger side roof, there was compression damage, appearing as though something had fallen on top of the car. Plaintiff also noted that it appeared as though an impact had occurred on the driver's side rear bumper, because there was a gouge on the bumper with separation in the trim molding.

When plaintiff put the key into the car's trunk lock, the key broke off inside the lock. There was also a scrape along the passenger side door. The horn did not work, the anti-lock-brake warning light was on, the rear shock absorbers were "shot," the cruise control did not work, the power locks were not functioning, and the nozzle for the driver's side windshield washer was missing. On the inside of the vehicle, plaintiff saw a "significant" rip in the driver's seat. He testified that the poor condition of the car was a surprise to him, and that the photos of the car on Catena Auto's website did not show any of the damage.

Plaintiff contacted Hallik by phone and e-mail the same day that he received the car. He told Hallik about the car's deficient condition, and Hallik replied that the damage must have taken place during shipping. According to plaintiff, Hallik told him to contact the shipping company and file an insurance claim to get the damage repaired.

At some point between March 9, 2010 and March 20, 2010, plaintiff took the car to an automotive body shop in North Carolina that a friend had recommended as a "good, reputable dealership." Plaintiff understood the body shop to have experience working on Rolls Royce cars. Plaintiff had by then "taken care of" the key stuck in the trunk lock. He had not,

however, received the title documents from Hallik, preventing him from registering the car or purchasing insurance.[3] The body shop performed a North Carolina motor vehicle inspection, which the car failed because the body shop determined that the car was not safe to drive.

The body shop also performed a "pre-purchase inspection" to determine whether plaintiff should keep the car or return it. Plaintiff did not speak with the mechanic who performed the inspection, but he did receive a three-page report from the body shop that detailed the mechanic's observations. According to plaintiff, the body shop informed plaintiff that it would cost between $12,000 and $14,000 to make the car roadworthy. In addition, the body shop estimated that it would cost $7,462.63 to repair the damage done to the paint. Based on the body shop's assessment, plaintiff decided that he did not want to keep the car.

On March 24, 2010, plaintiff informed Hallik by e-mail that he wished to return the car. Plaintiff stated in the e-mail that the dealership's written advertisement and Hallik's representations about the car were not accurate. Hallik replied that plaintiff had only three days from receipt of the car to

[3] Plaintiff did eventually receive the car's title documents, but never transferred title to himself.

advise in writing that he did not wish to keep the car, and that seven days after receipt plaintiff allegedly had said that he would keep it.[4] Plaintiff responded, in turn, that the delays in the return of the car were caused by Hallik.

On March 31, 2010, plaintiff's attorney wrote to Hallik, seeking return of the $14,814 that plaintiff paid for the vehicle. In the letter, plaintiff's attorney threatened litigation if that amount was not tendered by the dealership. After the dealership failed to accede to his refund request, plaintiff filed suit in the Law Division against Catena Auto and Hallik. His complaint alleged: breach of contract (count one), violation of the CFA (count two), common-law fraud (count three), equitable fraud (count four), negligent misrepresentation (count five), breach of express warranty (count six), and breach of the implied warranty of merchantability (count seven). He also sought in his complaint a refund under N.J.S.A. 56:8-2.11 and -2.12 (count eight). Defendants filed a joint answer denying liability.

The case was heard in a non-jury trial in September 2011. Plaintiff testified on his own behalf. He also presented the deposition testimony of Dwight Patterson, the mechanic who had inspected the delivered car in North Carolina.

[4] Plaintiff denied this contention in his own trial testimony.

Patterson testified that he had examined the car to check if it was safe to drive, and to discover which functions were not operating. He compiled what he described as a "long" list of problems with the car before apparently stopping the examination because "[i]t wasn't a car that was necessarily worth fixing." Patterson noted that the problems with the anti-lock brakes, the brake pad sensors, the emergency brake, the heater, and the air conditioning all involved electrical components. Consequently, he stated that it would be an inaccurate statement to say that all of the electrical components in the car were working. He added that he recalled warning lights being on when he examined the car, but he could not recall which ones.

In sum, Patterson concluded that the car was not in a "roadworthy" condition. He estimated that the costs of repairing the vehicle would range between $12,000 and $14,000. As of the time of trial, the car remained in plaintiff's possession and was not repaired.

The sole witness who testified for the defense at trial was Mr. Catena. He stated that he had never spoken with plaintiff prior to the initiation of the lawsuit. According to Mr. Catena, Hallik typically handled the daily operations of Catena Auto, and had the authority to enter into contracts for the sale

of cars. Mr. Catena could not recall whether Hallik had informed him of plaintiff's dissatisfaction with the car, but claimed that if he had known that plaintiff wanted to return the car, he would have allowed it. Mr. Catena agreed that the company's policy is to allow returns within three days. He denied knowing anything about plaintiff's dissatisfaction with the car until the filing of a lawsuit.

Notably, Mr. Catena indicated that Hallik was no longer employed by Catena Auto. The defense did not call Hallik to testify. Nor did it present any expert testimony.

After sifting through these proofs, the trial judge, Hon. Susan J. Steele, J.S.C., concluded that plaintiff had established the dealership's violation of the CFA. In her December 6, 2011 written opinion addressing the merits, Judge Steele specifically found that plaintiff relied on the online advertisement and his conversation with Hallik in deciding to buy the car. The judge further determined that plaintiff had also relied on the three-day money-back guarantee for out-of-state purchasers who have not inspected their car prior to purchase.

The judge expressed skepticism as to the authenticity of the March 8, 2010 warranty refusal document, noting that it was purportedly signed before plaintiff received the car. The judge

underscored that plaintiff did not recall signing that document, and defendants could not produce a witness who could authenticate the document or its signature. Consequently, the judge concluded that the document was not a part of the contract.

The judge recited in her opinion at length the many problems with the car that plaintiff himself had found, and the problems with the car that Patterson had likewise discovered during his own examination. The judge noted that the estimate to fix the car was between $12,000 and $14,000, and that defendants had refused to accept the return of the car.

Given these factual findings, Judge Steele concluded that "numerous affirmative misrepresentations and omissions" had been made in connection with the sale of the car. In this regard, the judge pointed specifically to defendants' various oral and written assertions that "all electrical components on the car were in working order, that no warning lights were on, that the paint was in excellent condition[,] and that the car was a '7' out of ten." The judge also faulted defendants for their failure to disclose the rust on the car.

Judge Steele concluded that plaintiff had suffered an ascertainable loss, in that he paid to the dealership a purchase price of $14,814 for the car, plus inspection fees in the amount

of $392.75. The judge therefore found that defendants were liable to plaintiff under the CFA. The judge ordered defendants to refund plaintiff's payment, and awarded treble damages in the amount of $45,620.25. Finally, the judge ordered defendants to pay plaintiff's reasonable attorney's fees and costs of suit. The judge did not address other counts of plaintiff's complaint, finding it unnecessary to do so in light of her finding of liability under the CFA.

Subsequently, plaintiff's counsel submitted a certification of services. Upon considering that certification, and defense counsel's opposition to the fee request, Judge Steele awarded plaintiff a counsel fee of $89,146, plus a forty-percent contingency enhancement above the "lodestar" amount. The judge also granted plaintiff $2,458.40 in pre-judgment interest and $2,340 for the fees of an expert witness who attested to the reasonableness of plaintiff's counsel's hourly billing rate and time he expended on the case. The judge detailed her counsel fee analysis in a second written opinion dated February 21, 2012.

II.

On appeal, Catena Auto argues that (1) the trial court's verdict was against the weight of the evidence; (2) the court improperly admitted Patterson's testimony without him being

qualified as an expert witness; (3) the court improperly disregarded the "as is" language in the warranty refusal form; and (4) the counsel fee award was unjustified and excessive. Having fully considered these arguments, we affirm the trial court's decision in all respects, substantially for the sound reasons articulated in Judge Steele's written opinions dated December 6, 2011 and February 21, 2012. We add only a few comments.

The record clearly supports the dealership's liability to plaintiff for making affirmative material misrepresentations in connection with the sale of this used Rolls Royce. The proofs readily establish the elements of a CFA claim, i.e., (1) unlawful conduct engaged in by defendant; (2) ascertainable loss sustained by plaintiff; and (3) causality. See Dabush v. Mercedes-Benz USA, LLC, 378 N.J. Super. 105, 114 (App. Div. 2005) (delineating these three required elements under the statute). The judge accepted plaintiff's version of the events as credible, and it is not our role to second-guess her fact-finding. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). Notably, plaintiff's account was not gainsaid by any trial testimony from Hallik. Defendants' sole trial witness, Mr. Catena, lacked personal knowledge of this

sale transaction. See N.J.R.E. 602 (requiring lay witnesses to testify for personal knowledge).

There was no reversible error in the admission of Patterson's testimony. Although he was not proffered as an expert witness, Patterson properly was allowed as a lay witness to describe what he factually observed when he inspected the car in North Carolina. See N.J.R.E. 701.

To the extent that some of Patterson's more technical observations might be construed as expert opinion, the admission of those opinions was not "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. The trial court did not rely on Patterson's testimony in concluding that defendants had violated the CFA, nor in determining the amount of plaintiff's loss. Instead the court's finding of liability under the CFA was premised on a more narrow set of facts — namely the fact that misrepresentations were made as to the functionality of the electrical components of the car, the fact that no warning lights were on, the fact that the car's paint was falsely portrayed to be in excellent condition, and the car's overall quality was rated by Hallik as a seven out of ten. Plaintiff's own testimony sufficiently supported all of these bases for the court's finding of liability. Indeed, the

court did not cite Patterson's testimony when explaining why defendants violated the CFA.

As a procedural point, Catena Auto argues that Patterson's deposition testimony was improperly admitted into evidence because the necessary procedural steps under Rule 4:14-9 were not taken to allow the deposition to be preserved for such use at trial. Patterson's deposition testimony was transcribed, but no videotape was played at trial and only the transcript was submitted.

Moreover, under Rule 4:16-1(c), the deposition of a witness who is unavailable at trial because he is outside of this state may be used at trial as long as the party against whom the deposition testimony is being offered was present at the deposition or was given reasonable notice that the deposition would occur. Such notice was provided here.[5] Finally, as noted, because Judge Steele did not rely on Patterson's deposition in finding that defendants violated the CFA, defendant's procedural

[5] On February 14, 2011, plaintiff's attorney informed defense counsel that a deposition would take place on March 8, 2011 of "the person or employee of [the body shop] with the most knowledge of the inspection and/or repairs relating to [plaintiff's Rolls Royce]." On March 1, 2011, plaintiff's attorney identified Patterson as the person who would be deposed. Defense counsel thus had reasonable notice of the deposition, and in fact, attended the deposition telephonically and cross-examined Patterson.

objection to his testimony under Rule 4:14-9 is ultimately inconsequential.

Defendant's contention that the "as is" clause on the warranty refusal form should have been enforced here is without merit. As Judge Steele recognized, the "as is" boxes of the sales contract were not checked. In addition, the warranty refusal form falsely states that plaintiff had inspected the car before the dealership shipped it to North Carolina. Given that falsity of a key component within its text, the judge rightly declined to enforce the document.

Lastly, we are satisfied that the fee award is consistent with the governing legal principles set forth in Walker v. Giuffre, 209 N.J. 124, 130 (2012), and Rendine v. Pantzer, 141 N.J. 292, 316-17 (1995). Although the amount of the counsel fee awarded exceeds plaintiff's damages, "there need not be proportionality between the damages recovered and the attorney-fee award itself." Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 23 (2004); see also Walker, supra, 209 N.J. at 132. We detect no "clear abuse of discretion" here that would compel us to set aside the fee award. Rendine, supra, 14 N.J. at 317.

Affirmed.