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REAL ESTATE

Expanding the Scope of the Consumer Fraud Act in Real Estate Transactions

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Since 1976, the New Jersey Consumer Fraud Act (the "CFA") has applied to transactions occurring in connection with the sale of real estate. N.J.S.A. § 56:8-2. The CFA's goal is to protect consumers by "eliminating sharp practices and dealings in the marketing of merchandise and real estate." *Lemelledo v. Beneficial Mgmt.*, 150 N.J. 225, 263 (1997). It imposes enhanced liability, including treble damages and attorneys' fees. N.J.S.A. § 56:8-19.

In *Matera v. M.G.C.C. Group, Inc.*, 952 A.2d 525 (2007), the Law Division has recently held that a cause of action can be alleged under the CFA absent any contact between the parties, as long as there is a causal nexus between the alleged violation of the CFA and the alleged ascertainable loss. This holding marks a dramatic expansion of the CFA, threatening a new unforeseen and unwarranted breed of liability for real estate developers, lending institu-

tions, and any entity which falls under the ambit of the CFA.

In *Matera*, Bank of America's predecessor, Fleet Bank ("Fleet"), obtained title to an undeveloped section (Section III) of Crystal Creek Estates in Howell Township by deed in lieu of foreclosure. Section III is located above Section II, where the plaintiffs reside. Fleet never owned, and did not sell, the lots in Section II to any of the plaintiffs. All of the plaintiffs "purchased their properties from individual owners (not from Fleet), between August 1995 and September 2002." In 1996, Fleet made a presentation to the Howell Township Planning Board (the "Planning Board"), in order to gain approval for construction on Section III and sell it to a developer, M.G.C.C. Group, Inc. Per the plaintiffs' allegation in their Complaint, Fleet knew and concealed the fact that construction on Section III would cause flooding of Section II. The Planning Board granted Fleet a letter of compliance as to Section III. Fleet sold Section III and two lots in Section II to M.G.C.C. M.G.C.C. began construction shortly thereafter, and water from Section III flooded the plaintiffs' property on Section II. The plaintiffs sued, claiming, among other things, that Fleet's misrepresentations to the Planning Board and M.G.C.C. were unlawful violations of the CFA and that the violations caused

their ascertainable loss.

Fleet brought a motion to dismiss the complaint contending misrepresentations were not in "connection with the sale . . . of . . . real estate" as required by N.J.S.A. § 56:8-2. Thus, there could not be causal nexus between Fleet's conduct and plaintiffs' ascertainable loss. The court initially granted Fleet's motion to dismiss the CFA claim.

In granting a reconsideration motion, however, the court reversed course and held that plaintiffs pled a viable CFA claim even though the alleged misrepresentations were made to the Planning Board. The misrepresentations did occur in connection with the sale of real estate. The Planning Board's approval for construction on the property was a prerequisite for the sale to M.G.C.C. The misrepresentations, however, were not made in connection with the sale of real estate to the plaintiffs, nor were they intended to induce the plaintiffs to buy their property. None of the plaintiffs' homes are even on property that Fleet owned. There is no support in the existing case law for a cause of action under the CFA under these circumstances. Specifically, until now, no court has held, or even implied, that the causal nexus test of the CFA need only connect the unlawful conduct and the ascertainable loss, with no regard for the parties to the transaction.

Causal Nexus Analysis

In rendering its decision, the court first relied on *Neveroski v. Blair*, 141 N.J. Super. 365 (App. Div. 1976),

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for the broad proposition that “privity is not a condition precedent under [the CFA].” While true, *Neveroski* involved two parties that had direct contact with each other. There, the seller’s real estate broker failed to disclose extensive termite damage to the buyer, when the broker knew of the damage and was under a duty to disclose. The broker and the buyer had extensive interaction, and the misrepresentation was made directly to the buyer. The case only stands for the proposition that misrepresentations from one party to another, in a transaction covered under the CFA, can constitute a violation of the CFA absent a direct contractual relationship between the two.

The *Matera* court used the *Neveroski* court’s finding to create liability where no relationship exists between the defendant and the consumer, as long as there is some arguable violation of the act and some ascertainable loss related to it.

Case Law Does Not Support an Extension of the CFA

The Court next cites the Appellate Division in *Varacallo v. Mass Mutual Life Insurance Co.* for the proposition that “consumer fraud requires only proof of a causal connection between the concealment of the material fact and the loss.” 332 N.J. Super. 31, 43 (App. Div. 2000). Interpreting that statement, the court adds “did not say that consumer fraud requires a connection between the material act and the parties.” The court then cites the Supreme Court in *Gennari v. Weichert Co. Realtors*, 148 N.J. 582 (1997), for the proposition that a violator of the CFA is liable for “any misrepresentations whether ‘any person has in fact been misled, deceived, or damaged thereby.’” Interpreting that statement, the court adds “did not say any party.” These two “holdings,” collectively, support the court’s decision that the parties need not have any type of relationship,

but only a causal nexus between some violation and a loss. Because the court focused on what these two decisions did not say, it did not take into account the facts of each case or the intent of the propositions cited.

Varacallo and *Gennari* stand for the proposition that a cause of action under the CFA does not require proof of reliance. The *Gennari* court cites the section of the CFA commonly cited for this issue, but only in part. The full clause in the CFA reads “whether or not any person has in fact been misled, deceived or damaged thereby.” N.J.S.A. § 56:8-2. The purpose of this clause is to distinguish actions under the CFA from common-law fraud, where proof of the consumer’s reliance on the misrepresentation is a necessary element. Indeed, *Gennari* specifically cites this section to distinguish the facts of its case from common-law fraud, because there was a question as to whether the consumer actually relied on the misrepresentation made. 148 N.J. at 607-08.

Similarly, the proposition cited by the court from *Varacallo* is itself a citation to the “proof of reliance” section in *Gennari*. Again, this section of the CFA is discussed to distinguish the elements of a cause of action under the CFA as opposed to traditional common-law fraud. *Varacallo* involved the certification of a class action, where direct misrepresentations to insurance policy holders by the insurance company were at issue. Both common-law fraud and consumer fraud were alleged, and the *Varacallo* court cited *Gennari* only to show that proof of reliance is not an element under the CFA.

Neither *Gennari* nor *Varacallo* deal with factual situations similar to the present case. Both cases deal with misrepresentations made directly to consumers with the intent to induce those consumers to enter into a transaction. In that context, both cases were only illustrating

the well-established principle that consumers need not prove that they relied on those misrepresentations to succeed on a consumer fraud claim. The *Matera* decision reads more into the statements in these two cases in an attempt to prove a legislative intent to extend the protection of the CFA to any potentially aggrieved person.

The CFA Protects Only Victims of Fraudulent Transactions

The Court also cites the Appellate Division again in *Chattin v. Cap e May Greene*, 216 N.J. Super. 618 (App. Div. 1987), for the proposition that the causal nexus must only exist between the violation and the loss. In *Chattin*, subsequent purchasers of homes were denied a cause of action under the CFA because the original sellers “made no representation to [the subsequent purchasers].” The *Matera* decision distinguishes this case because the plaintiffs allege an ascertainable loss as a result of Fleet’s misrepresentations to the Planning Board. The case is distinguishable, but not for the mere fact that the subsequent purchasers in *Chattin* failed to make similar allegations. Surely, those subsequent purchasers suffered the same ascertainable losses as other purchasers who had direct contact with the sellers and were found to have a valid cause of action under the CFA. They, however, did not have a CFA claim. Likewise, Fleet’s alleged misrepresentations did not induce plaintiffs to purchase their homes.

The CFA is designed to protect consumers from many different kinds of fraudulent activity. To extend the CFA to cover individuals outside of a direct or indirect buyer-seller business relationship as *Matera* does creates avenues of liability simply not anticipated by the Act. Those claims are better addressed by existing common-law tort system or the legislature. ■