

To the members of The New Jersey Chimney Sweep Guild:
From Felice T. Londa, Esq.
Re: Consumer Fraud Act

By way of further follow up to my seminar on the Consumer Fraud Act, I thought you would like to see a case in which the Act was used to defeat a claim for unpaid invoices from a landscaper based upon technical violations. This was decided August 13, 2008, which makes it the most recent case on the Consumer Fraud Act (CFA). I believe you will find it self-explanatory, but the gist of it is that the plaintiff, a landscaper, sued for unpaid invoices, and the defendant homeowner defended on the basis of technical violations of the CFA. The landscaper lost its bid for its fees, but the homeowner was not awarded damages as she was unable to prove any ascertainable loss.

Had the homeowner demanded attorneys fees and costs in her initial trial, I believe she would have received an award of fees. However, since she did not do so until the appeal, no issues can be raised on appeal that were not presented to the trial court, and therefore, she was not entitled to an award of attorney's fees in addition to not having to pay for the services rendered by the landscaper which were the basis of his suit.

Note that not all of the homeowner's CFA claims were found correct, but the landscaper nevertheless lost its right to be paid for work he performed.

This shows you how damaging the CFA can be as a weapon against home contractors.

I suggest you print this out, and read it at your leisure.

Felice T. Londa, Esq.
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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
UNIQUE CUSTOM LANDSCAPING, Plaintiff-Respondent,
v.
Dalit STERMAN, Defendant-Appellant.
Argued Feb. 25, 2009.
Decided Aug. 13, 2009.

On appeal from the Superior Court of New Jersey, Law Division, Special Civil Part, Bergen County, Docket No. DC-13368-06.

[Joseph H. Neiman](#) argued the cause for appellant.

[Charles A. Gruen](#) argued the cause for respondent (Law Offices of Charles A. Gruen, attorneys; [Matthew E. McGoey](#), on the brief).

Before Judges LIHTOZ and [MESSANO](#).

PER CURIAM.

*1 We consider this matter for the second time. In *Unique Custom Landscaping v. Stermán*, A-3450-06 (App.Div. February 6, 2008), we reversed judgment in favor of plaintiff **Unique Custom Landscaping** and vacated dismissal of defendant Dalit Stermán's counterclaim. We remanded the matter for a new trial on all issues. Following a second non-jury trial, the judge dismissed both the complaint and the counterclaim. Defendant now appeals from the dismissal of her counterclaim. We affirm.

Plaintiff provided landscape supplies and services to defendant's residence over a two-year period. When a number of its outstanding invoices remained unpaid, it commenced suit in the Special Civil Part seeking \$2,999.70 in damages. Defendant filed an answer that denied liability, asserted a number of statutory affirmative defenses, and counterclaimed, seeking damages under the Consumer Fraud Act, [N.J.S.A. 56:8-1](#) to -167 (the CFA).

At the trial on remand, plaintiff's owner, Visilio "Billy" Vamvakidis, testified that in June 2003, he was referred to defendant by one of her friends, his client, and asked to come to defendant's home in Teaneck and submit a proposal for landscaping the property. Defendant was just moving into the house with her family, and "needed to get [the work] done right away." The first proposal for \$68,855 was rejected by defendant as too expensive. Vamvakidis submitted several other written proposals, ultimately leading to a written contract for various work to be performed at a price of \$20,000. An additional \$2800 was added to the price for the planting of various "side trees." The agreement was signed by Vamvakidis and defendant in September 2003 (the contract).

Plaintiff was to fully landscape defendant's front yard, install "a retaining wall" and blocks around the window wells, install a sprinkler system, and repair areas with necessary soil, mulch, and sod. It also agreed to "prep []" and "ready" other bed areas for "the following year." The contract contained a one-year "warranty" on "[a]ll plant material" as to any "defects" or "any improper installation." The warranty specifically did not cover "dehydration." Defendant hand-wrote on the contract that she wanted "peat moss & gypsum," as well as "arbs," which Vamvakidis testified meant arborvitae, of a certain size, and "Douglas fir[s]" of a certain size as the additional "side trees" to be installed. The parties handwrote "\$2800" as an additional cost for the planting of the side trees. No other specific types of plants or trees were listed in the contract. It is undisputed that the total contract amount, therefore, was \$22,800.

Vamvakidis testified plaintiff performed all the services specified in the contract, including the planting of arborvitae along the rear of defendant's property for privacy, and two hydrangeas. These hydrangeas were not listed in the contract, but Vamvakidis claimed to have provided them as a gift. Defendant paid the full price of the contract.

*2 Plaintiff subcontracted the installation of the sprinkler system to Quench Irrigation (QI).^{FNI} Vamvakidis told defendant this work was going to be done by a subcontractor before she signed the contract, and she met with QI's employees before they performed the work.

^{FNI}. Joseph Maucieri, the owner of QI, testified that his company was licensed by the New Jersey Department of Community Affairs and was so licensed in 2003.

During cross-examination, Vamvakidis acknowledged that the contract provided for "a complete and full landscape design with all focal points and small plantings and some Dakota [b]oulders[.]" at the front of the property. He admitted the boulders were never delivered, and he agreed the contract did not specify the type of small plants to be used, or the quantity or type of focal point trees to be planted.

In October, plaintiff delivered and planted six additional arborvitae because defendant wanted more privacy from her neighbors. There was no signed proposal for this additional work, though plaintiff introduced in evidence a bill for \$1023.28 for the work and supplies (the change order). In April 2004, plaintiff and defendant entered into an agreement for the ongoing monthly maintenance of the property. Since a number of Douglas fir trees plaintiff planted died within one year of installation, they were replaced at no cost to defendant. Vamvakidis could not remember the exact number of trees he dug out, and how many he re-planted with new ones. In April 2005, another monthly maintenance agreement was executed by the parties. Defendant inserted a handwritten notation requiring plaintiff to "get [her] O.K. for any optional [and] additional work" as reflected in the agreement.

During 2005, problems arose. Plaintiff replanted three Norway spruce trees intended to replace three initially planted as part of the 2003 contract. After specific discussions with defendant, plaintiff also planted some additional flowers and spread mulch on the property, resulting in an invoice for \$2120 (the invoice). Defendant called Vamvakidis to express her dissatisfaction, telling him the flowers were not the colors she wanted and that she had not ordered any mulch. The

parties continued to dispute payment for these items, but plaintiff, nevertheless, continued to perform services under its monthly maintenance agreement. More Douglas fir trees installed in 2003 died, and plaintiff, attempting to assuage defendant's ire, replaced them even though Vamvakidis claimed it was now well beyond the warranty period. Altogether, plaintiff replaced a total of nine, but not all of the trees, and Vamvakidis opined that they died because they had not been properly cared for by defendant.

Defendant's payment of plaintiff's monthly bills became sporadic. In November 2005, plaintiff sent defendant a letter terminating their relationship because the outstanding balance of \$2,999.70 had not been paid. In June 2006, it filed its complaint.

Defendant also testified at trial. She claimed that in spite of regular watering, the Douglas fir trees installed as part of the contract began to die by spring 2004. She contacted Bartlett Tree Service in an attempt to rectify the situation, but by the fall, most of the trees were dead. When she brought this to Vamvakidis' attention, he replaced three of the firs in early 2005. According to defendant, Vamvakidis promised to replace the other dead trees as well, but instead just stopped taking her phone calls in September 2005. Defendant claimed she never saw the irrigation contract that allegedly existed between plaintiff and QI and was unaware that the work was being performed by a subcontractor. Defendant claimed that the change order for additional arborvitae was a mistake because they should have been included in the 2003 contract.

***3** Defendant further acknowledged that during 2005, she requested that plaintiff plant ten annual flower beds in specific colors and also ordered topsoil to even out a slope in her yard. However, she arrived home one day and discovered that plaintiff had mulched and planted flowers in colors she did not want. She spoke to Vamvakidis for the last time in September 2005. He admitted he made a mistake regarding the mulch, though defendant agreed to pay for it anyway. She also told Vamvakidis that one of the hydrangeas had died, but he refused to replace it even though he previously agreed he would. Defendant claimed her repeated calls to plaintiff went unanswered.

Dean Dykeman, a certified arborist, testified as defendant's expert. He examined the fir trees in October 2006 and found that eight of fourteen had died. Dykeman opined that certain trees had died because 1) they were planted too deep and could not obtain proper water or oxygen, and 2) they lacked a proper root system. He opined further that it was unlikely they had survived a year after planting, but he could not render an opinion as to when the trees actually died.

Plaintiff moved to dismiss defendant's counterclaim at the conclusion of trial, claiming she had failed to establish an "ascertainable loss" for purposes of the CFA. The judge agreed, and dismissed the counterclaim. The judge then considered plaintiff's claim. He found that the installation of the Douglas fir trees, pursuant to the September 2003 contract was not done in a "workmanlike manner," accepting Dykeman's testimony that the trees died because they were not properly planted. The judge concluded that the value of the dead trees exceeded plaintiff's claim and dismissed the complaint.

I.

Defendant argues that the judge erred in determining she had not suffered an ascertainable loss for

purposes of the CFA. She alternatively argues that even if the judge correctly determined there was no ascertainable loss, he erred in determining that her proof regarding plaintiff's violations of the CFA failed to provide an affirmative defense to plaintiff's claim for damages, thus, entitling her to recover, at the least, counsel fees.

Plaintiff counters by arguing that the judge correctly determined that any of its "technical" violations of the CFA caused no ascertainable loss to defendant and therefore he properly dismissed her counterclaim. As a result, defendant was not entitled to recover counsel fees, citing our decision in [Pron v. Carlton Pools, 373 N.J.Super. 103 \(App.Div.2004\)](#).

Our review of the factual findings made by the trial judge in a non-jury trial is quite limited. [Estate of Ostlund v. Ostlund, 391 N.J.Super. 390, 400 \(App.Div.2007\)](#). "[W]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." [Mountain Hill, L.L.C. v. Twp. of Middletown, 399 N.J.Super. 486, 498 \(App.Div.2008\)](#) (quoting [State v. Barone, 147 N.J. 599, 615 \(1997\)](#)). In general, the judge's factual "findings ... should not be disturbed unless they are so wholly insupportable as to result in a denial of justice[.]" [Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84 \(1974\)](#) (quotation omitted). However, "[a] trial court'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., 140 N.J. 366, 378 \(1995\)](#). And, of particular relevance to this case, we have previously held that "[t]he question whether the regulatory violations [under the CFA] subject defendants to treble damages and attorneys' fees is one of law, in respect of which no special deference is to be accorded to the trial court's determinations." [Roberts v. Cowgill, 316 N.J.Super. 33, 37 \(App.Div.1998\)](#) (citing [Manalapan Realty, supra, 140 N.J. at 378](#)).

*4 A violation of the CFA can arise in three different settings. [Gennari v. Weichart Co. Realtors, 148 N.J. 582, 605 \(1997\)](#). An affirmative misrepresentation, even if unaccompanied by knowledge of its falsity or an intention to deceive, is sufficient. *Ibid.* (citing [Strawn v. Canuso, 140 N.J. 43, 60 \(1995\)](#)). An omission or failure to disclose a material fact, if accompanied by knowledge and intent, is sufficient to violate the CFA. *Ibid.* (citing [Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 \(1994\)](#)). Lastly, "[t]he third category of unlawful acts consists of violations of specific regulations promulgated under the [CFA]. In those instances, intent is not an element of the unlawful practice, and the regulations impose strict liability for such violations." [Cox, supra, 138 N.J. at 18](#).

The CFA "makes no distinction between 'technical' violations and more 'substantive' ones." [BMJ Insulation and Const. Inc. v. Evans, 287 N.J.Super. 513, 518 \(App.Div.1996\)](#). However, to succeed on a claim for treble damages under the CFA, "a private litigant must allege specific facts that ... establish the following: (1) unlawful conduct by the defendant[]; (2) an ascertainable loss ...; and (3) a causal relationship between the defendant's unlawful conduct and the [] ascertainable loss." [Hoffman v. Hampshire Labs, Inc., 405 N.J.Super. 105, 113-14 \(App.Div.2009\)](#) (citations and quotations omitted).

II.

Specifically, defendant argues that she proved the following violations of the regulatory provisions governing home improvement contracts: 1) the warranty provision of the 2003 contract lacked

specificity, [N.J.A.C. 13:45A-16.2\(a\)\(11\)](#); 2) the contract lacked specificity in describing the work to be performed and failed to include a start or completion date, [N.J.A.C. 13:45A-16.2\(a\)\(12\)](#); 3) the yearly maintenance contracts lacked specificity and were not signed by both parties, [N.J.A.C. 13:45A-16.2\(a\)\(12\)](#); 4) the invoice reflecting the delivery of the flowers and mulch exceeded \$500 and was never signed by both parties, [N.J.A.C. 13:45A-16.2\(a\)\(12\)](#); 5) plaintiff failed to deliver the boulders specified in the 2003 contract, [N.J.A.C. 13:45A-16.2\(a\)\(7\)\(ii\)](#); and 6) plaintiff failed to disclose the use of a subcontractor for installation of the sprinkler system, and failed to provide its name, [N.J.A.C. 13:45A-16.2\(a\)\(4\), \(7\), \(9\), and \(12\)](#). The applicable regulations provide:

[§ 13:45A-16.2](#). Unlawful practices

(a) Without limiting any other practices which may be unlawful under the [CFA], utilization by a seller of the following acts and practices involving the sale, attempted sale, [] or performance of home improvements shall be unlawful [].

11. Guarantees or warranties:

i. The seller shall furnish the buyer a written copy of all guarantees or warranties made with respect to labor services, products or materials furnished in connection with home improvements. *Such guarantees or warranties shall be specific, clear and definite and shall include any exclusions or limitations as to their scope or duration*

12. Home improvement contract requirements-writing requirement:

All home improvement contracts for a purchase price in excess of \$500.00, and all changes in the terms and conditions thereof shall be in writing. Home improvement contracts which are required by this subsection to be in writing, and all changes in the terms and conditions thereof, shall be signed by all parties thereto, and shall clearly and accurately set forth in legible form and in understandable language all terms and conditions of the contract, including, but not limited to, the following:

ii. *A description of the work to be done and the principal products and materials to be used or installed in performance of the contract.* The description shall include, where applicable, the name, make, size, capacity, model, and model year of principal products or fixtures to be installed, and the type, grade, quality, size or quantity of principal building or construction materials to be used. Where specific representations are made that certain types of products or materials will be used, or the buyer has specified that certain types of products are to be used, a description of such products or materials shall be clearly set forth in the contract;

iv. *The dates or time period on or within which the work is to begin and be completed by the seller;*

vi. *A statement of any guarantee or warranty with respect to any products,*

materials, labor or services made by the seller.

[[N.J.A.C. 13:45A-16.2\(11\) and \(12\)](#) (emphasis added).] ^{FN2}

[FN2](#). We find defendant's reliance upon [N.J.A.C. 13:45A-16.2\(a\)\(4\), \(7\), and \(9\)](#) to be unpersuasive. Subparagraph (4) prohibits a seller from misrepresenting its identity. There was no evidence that plaintiff or QI misrepresented themselves. Indeed, the only testimony on the subject from defendant was that she never knew the QI representatives were not employees of plaintiff. We have said, “there is no requirement the ‘seller’ set forth its contracts with subcontractors.” [Branigan v. Level on the Level, Inc., 326 N.J.Super. 24, 29 \(App.Div.1999\)](#). Subparagraph (7)(ii) prohibits the seller from “[f]ail[ing] to begin or complete work on the date or within the time period specified in the home improvement contract, or as otherwise represented[.]” However, the gravamen of defendant's claim was that the 2003 contract had no start or completion date. There was no testimony that plaintiff failed to complete the work in a timely fashion. See [Branigan, supra, 326 N.J.Super. at 29-30](#) (requiring causal link between lack of starting and completion dates in contract and actual damage to consumer). Subsection (9) prohibits the seller from making material misrepresentations. It is unclear what material misrepresentations defendant contends were made, except claims that Vamvakidis allegedly agreed to replace the hydrangea and the trees. While these post-contract statements, if true, might be evidence of the intended scope of the 2003 contract, they do not give rise to an independent basis for finding a regulatory violation.

Because the judge concluded defendant failed to demonstrate any ascertainable loss, he considered with specific reference only some, but not all, of the regulatory violations. Nonetheless, we conclude that the judge's implicit factual findings, taken together with relevant case law, supports the dismissal of defendant's counterclaim under the CFA.

Although citing the various alleged regulatory violations in her brief, defendant's argument that she suffered an ascertainable loss is more limited. For example, she contends that “[b]ecause [the] warranty provision [in the 2003 contract] utterly fails under the [CFA],” it was not “honored by the plaintiff.” Specifically, she claims the “warranty only covers a tree once,” and this is not “clearly [] spelled out in the [2003] contract.” The 2003 contract specifically stated the following:

All plant material comes with a one year warranty. This means you're covered for any defects in the plant material, or any improper installation. Note warranty will not cover you for dehydration. Water directions will be handed to you when job has been completed and fully explained. All soils will be treated with gypsum and peat moss to break down any clay and nourish soil. All plant []s will be treated with pills and will feed plantings for two years. Also all plant material will be sprayed for any insects before planting.

*6 The judge found the warranty to be “certain and definite,” as required by the regulations. Defendant has cited to no decision precisely on point regarding the required level of specificity of a warranty contained in a home repair contract covered by the regulations promulgated under the CFA, and our research does not reveal any either.

Defendant claims that it was unreasonable for plaintiff to interpret the warranty as only being applicable for one year after a specific plant was planted, and only to the specific plant. Quite frankly, we think, as the trial judge found, it is “plain as day” that is what the warranty meant. We concur with the judge's finding that plaintiff did not violate the regulation in this regard, and that defendant suffered no ascertainable loss as a result.

In a more general sense, we also find defendant's argument that the contract itself violated the regulations because it was vague and unspecific as to all the plants defendant was to install to be unpersuasive. In this context, we view defendant's reading of [N.J.A.C. 13:45A-16.2\(a\)\(12\)\(ii\)](#) as too restrictive. The testimony revealed that prior proposals included lists of the number and types of plants, but it is equally clear that defendant knew what she was getting when she signed the contract. In fact, she added precise directions as to certain plants and trees when necessary. With certain limited exceptions, which we discuss immediately below, the case centered not around plaintiff's failure to perform the contract contrary to defendant's expectations, but rather whether it lived up to the warranty promises as they related to the trees that were planted.

Defendant next contends she suffered an ascertainable loss because she “improperly paid” \$623 on the change order that violated the regulations because it exceeded \$500 and was not signed by the parties as required by [N.J.A.C. 13:45A-16.2\(a\)\(12\)](#). The ascertainable loss results, she argues, because these six additional arborvitae were to be included in the original 2003 contract, which, because of its lack of specificity as required by [N.J.A.C. 13:45A-16.2\(a\)\(12\)\(ii\)](#), allowed plaintiff to make the agreement up “as he went along.”

The 2003 contract required plaintiff to plant “privacy trees ... between [defendant and her] neighbors along [the] side.” Vamvakidis recalled laying out the arborvitae with defendant before they were planted, and telling her she was going to need six additional ones when she expressed a desire for more privacy. Defendant's testimony never discussed the details of the invoice at all, and lacked any assertion as to why she concluded these six bushes were part of the contract. When defense counsel pressed the judge as to his specific finding regarding the change order, the judge noted the issue did not “spring from the contract[,]” which we take as an implicit finding that the additional arborvitae were just that, i.e., not part of the contract but ordered by defendant in addition to the ones originally contemplated.

*7 While defendant argues the imprecision of the 2003 contract as to specific types and numbers of plantings caused confusion and resulted in her paying for arborvitae that should have been included in the original agreement, the judge concluded otherwise. He saw the change order as a new agreement and, we find no reason to disturb that factual conclusion since it is amply supported by Vamvakidis' testimony. Undoubtedly, the change order violated the regulations since it was not signed by plaintiff or defendant. However, as we said in [Roberts v. Cowgill, supra, 316 N.J.Super. at 41](#), to successfully prove a CFA claim, the plaintiff must demonstrate “a causal relationship ... between the ascertainable loss and the unlawful practice.” Here, defendant suffered no ascertainable loss because she received the six arborvitae the judge determined were in addition to those originally ordered.^{FN3}

[FN3](#). We acknowledge two other claims defendant has made as arising from the contract itself. First, it is undisputed that she never obtained the boulders actually specified in the

agreement. However, that is solely a breach of contract claim, not a regulatory violation, for which defendant never submitted any proof as to value. Defendant claims the two hydrangeas were included in the contract, and only one was replaced, although both died. In this regard, the testimony was directly contradictory, because Vamvakidis claimed the plants were a gift. The judge, apparently, implicitly accepted this version of the events.

Defendant next argues that she sustained an ascertainable loss because the \$2120 invoice for the flower plantings and mulch was not signed by both parties in violation of the regulations. She testified that she did not order these particular flowers or the mulch and was very upset when the items were delivered. Plaintiff argues that if the invoice violated the regulations, defendant suffered no ascertainable loss because she never paid it.

We think it is clear that the invoice violated the regulations in that it exceeded \$500 and was not signed by the parties. However, what remained unresolved by the judge's findings was whether plaintiff's version of the events was accurate, or was defendant's version more credible. Only if defendant did not obtain what she bargained for did she suffer an ascertainable loss. *See e.g. Artistic Lawn and Landscape Co. v. Smith, 381 N.J.Super. 75, 88 (Law Div.2005)* (where the court, in a similar type dispute, noted that plaintiff landscaper violated the CFA because “the defendant did not obtain the full benefit of the bargain, and there was considerable dispute as to the work authorized and completed”). More importantly, if defendant's version was believed, her argument that the regulatory violation was causally linked to her ascertainable loss would be demonstrated. *See Scibek v. Longette, 339 N.J.Super. 72, 82 (App.Div.2001)* (noting “plaintiff's violation of the [CFA] created the climate for the dispute that ultimately developed”).

At trial, defense counsel sought to have the judge explicitly rule on the invoice, which went unmentioned during the judge's decision granting plaintiff's motion for involuntary dismissal. The judge responded simply, “I've given my decision.” An untranscribed “off the record” discussion ensued, but the issue was never addressed again.

Defendant does not dispute that she never paid the invoice. Instead, she argues in her reply brief that permitting “a contractor [to] violate the [CFA], sue a consumer, and if the consumer ... is successful on its defense under the [CFA] then because [she] refused to pay for such invoice ... defendant would not be entitled to [her] attorney's fees.” That contention, however, misses the point.

***8** While defendant was entitled to defend against plaintiff's action on its account by claiming violations of the CFA, she could only prevail on her counterclaim if she demonstrated an ascertainable loss that resulted from the regulatory violation. She failed to do this. We discuss below the true gravamen of defendant's argument in this regard, i.e., that she is entitled to counsel fees because she successfully defended plaintiff's claim by demonstrating violations of the CFA.

In sum, we affirm the trial judge's dismissal of defendant's counterclaim because she failed to demonstrate an ascertainable loss connected to the regulatory violations that she undeniably proved.

III.

In her second point raised on appeal, defendant correctly notes that even if she failed to establish an affirmative claim for treble damages under the CFA for lack of proof as to an ascertainable loss, she was entitled to a counsel fee award if she proved a violation of the statute that provided a defense to plaintiff's affirmative claim. [*Cox, supra*, 138 N.J. at 25](#); [*Scibek, supra*, 339 N.J.Super. at 86](#); [*Branigan, supra*, 326 N.J.Super. at 30-31 \(1999\)](#); [*Artistic Lawn, supra*, 381 N.J.Super. at 89-90](#).

In this regard, plaintiff's reliance on our decision in *Pron, supra*, is misplaced. There, we held that if a CFA claimant's affirmative cause of action is involuntarily dismissed for failure to prove an ascertainable loss, she is not entitled to recover counsel fees under the statute simply because she proved a regulatory violation. [*Pron, supra*, 373 N.J.Super. at 113](#). But *Pron* did not disapprove of any of the holdings in the cases cited above. Absent a finding of waiver or estoppel based upon a defendant's conduct or actions, "a plaintiff who has violated the act may not obtain damages even though his failure to abide by the regulations was innocent, technical and committed in good faith." [*Scibek, supra*, 339 N.J.Super. at 80](#). Even if "defendant did not suffer an ascertainable loss by reason of plaintiff's violation of the [CFA,] 'an award of ... attorneys' fees is mandatory.'" [*Id.* at 86](#) (quoting [*Cox, supra*, 138 N.J. at 24](#)).

In dismissing defendant's counterclaim, the judge specifically noted, "whether [the regulatory violations] stand as defenses to the plaintiff's cause of action for payment is a different question altogether." However, he left that issue unresolved. After hearing the summations of counsel, the judge decided plaintiff's affirmative claim for relief. He accepted defendant's expert testimony that "the trees were planted too deep and that the root ball was too small" "caus[ing] their demise." He found that the contract contained an "implied requirement" "that the work be done in a worker-like manner[.]" He concluded that "the damages that ... defendant incurred [] easily offset [] plaintiff's claim and therefore, plaintiff cannot prevail on its claim for damages ... insofar as [its] own testimony is that the value of these eight trees far exceeds [its] claim for unpaid services."

*9 The problem with this analysis is that plaintiff's claim had nothing to do with services provided under the contract or the change order. It was limited solely to the monthly maintenance services plaintiff provided largely from April 2005 forward. Imbedded in the invoice upon which plaintiff sued was the disputed \$2120 invoice for the annual plantings and mulch of which defendant disapproved. The judge's findings never addressed the outstanding bill for services at all, and never considered whether defendant's asserted regulatory defenses should prevail against that claim.

However, defendant never raised the issue of any entitlement to counsel fees. After the counterclaim was dismissed, defense counsel delivered a summation regarding plaintiff's affirmative claim. He argued that the regulatory violations provided a defense to any verdict in plaintiff's favor. However, the transcript ends with the judge dismissing the complaint. There is no discussion, if indeed any took place, as to whether defendant's proof of a regulatory violation of the CFA regarding the invoice entitled her to an award of attorney's fees. Defense counsel never made a specific request for fees.

The two orders the judge entered, one of which was submitted by defense counsel, shed no further light on the issue, because they simply provided for the dismissal with prejudice of both the complaint and the counterclaim. Neither order reflects a counsel fee request was made by defendant. Plaintiff has not cross-appealed from these orders. Whether the reasons the judge utilized for the dismissal are sustainable is simply not before us because plaintiff has not cross-appealed.

Because the issue was never raised before the trial judge, we refuse to consider it for the first time on appeal. [*Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 \(1973\)](#).

Affirmed.

N.J.Super.A.D.,2009.

Unique Custom Landscaping v. Sterman

Not Reported in A.2d, 2009 WL 2461171 (N.J.Super.A.D.)

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