

The Consumer Fraud Act in Residential Construction Litigation: New Case Highlights the Perils of Failing to Adhere to Statutory Obligations

The New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1 et seq. (“CFA”) has become a potent weapon for residential homeowners hoping to avoid payment to contractors in the residential home construction context, even where the contractor has done everything in its power to meet its obligations to the homeowner under their contract. In the last few years, countless cases have come down which have demonstrated the clear dangers to construction firms for failing to comply with the veritable thicket of regulations that apply in the residential context (N.J.A.C. § 13:45A-16.1 and § 13:45A-16.2 (implementing regulations)), as well as their obligations under the Contractor’s Registration Act, N.J.S.A. § 56:8-136 et. seq. Operating without registering can, and has, resulted in criminal liability (State v. Rowland, 396 N.J. Super. 126, 132 (App. Div. 2007)), and can (as has been discussed in my blog in the past) form the basis for substantial civil liability against not just the construction company, but its principal officers as well.

A new case by the Appellate Division demonstrates that even where the contractor is owed money and has done nothing to harm the homeowner, that contractor will have difficulty recovering any affirmative relief, and stands a good chance of getting hit with an award of attorneys’ fees in favor of the homeowner.

In Czmyr v. Avalanche Heating & Air Conditioning, Inc., 2011 N.J. Super. Unpub. LEXIS 351 (App. Div. Feb. 16, 2011), the Appellate Division followed Branigan v. Level on the Level, Inc., 326 N.J. Super. 24, 30-31 (App. Div. 1999), and awarded attorneys’ fees to a homeowner who breached a contract for replacement of an HVAC system, and denied the HVAC contractor any affirmative relief beyond the initial deposit it had retained. The case is remarkable because the Appellate Division squarely addressed the situation where the

contractor's statutory violations of the CFA (failing to put a 3-day right of rescission notice, and failing to include the contractor's registration information, in the contract) did not lead to any "ascertainable loss" on the homeowner's part. In other words, the homeowner breached the contract when she decided she did not have enough money to move forward, and was permitted to seize on the statutory violations as a reason to avoid her obligations under the contract and to impose the costs and fees of the lawsuit on the contractor. The Appellate Division ruled that the *per se* statutory violations prohibited the contractor from recovering any monies above and beyond the deposit given by the homeowner, and required that the homeowner pay the attorneys' fees and costs of the homeowner.

The decision in Czmyr points to the need for any construction firms doing business in the residential context to ensure that its contracts and overall business practices fully comply with the myriad regulations applicable in this field. Any contractors having a need for assistance in reviewing their contracts and business practices to ensure compliance with the applicable regulations should contact the undersigned.