

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
BRYAN D. BARRUTO
JUDGE



MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 284
NEW BRUNSWICK, NEW JERSEY 08903-0284

MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

TO: Jeffrey L. Chase, Esq.
James Crawford Orr, Esq.
Gerald A. Lilloia, Esq.

RE: Yacout v. Federal Pacific, et. al.
MD-L-2904-97

NATURE OF MOTION: Plaintiffs' Motion for Summary Judgment,
Defendant Federal Pacific's Motion for
Summary Judgment, and Defendant Reliance
Electric Company's Motion for Summary
Judgment

Having carefully reviewed the moving papers and any response filed, I have made the following findings of fact and conclusions of law in support of my determination:

Plaintiffs' motion for summary judgment is granted as to the issue of whether FPE violated the Consumer Fraud Act. Plaintiffs' motion for summary judgment is denied on the issue of whether Reliance violated the Consumer Fraud Act. FPE's motion for summary judgment on the statute of limitations issue is denied. Reliance's motion for summary judgment as to the issues of successor liability and the statute of limitations is denied.

Plaintiff is entitled to summary judgment on the issue of whether Defendant FPE violated the Consumer Fraud Act. The Consumer Fraud Act provides in part:

(t)he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as

aforsaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . .

N.J.S.A. 56:8-2.

Defendant FPE knowingly and purposefully distributed circuit breakers which were not tested to meet UL standards as indicated on their label. This constitutes an unlawful practice proscribed by the Act. Accordingly, Plaintiff is entitled to summary judgment on this issue.

Plaintiff is also entitled to summary judgment as to Defendant FPE on the issue of the imposition of treble damages. Defendant FPE's mislabeling of the circuit breakers constitutes an affirmative representation and therefore, Plaintiffs are entitled to treble damages, regardless of Defendant FPE's intention. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 605 (1997). This court notes that Plaintiffs' "ascertainable loss" is the cost of replacement of the circuit breakers. Imposition of treble damages upon Defendant Reliance is necessarily contingent upon the issue of whether or not Reliance has successor liability. Since this court has determined the issue of successor liability to be one of fact (see infra), the resolution of this issue must await a full hearing.

The issue of whether or not Defendant Reliance has successor liability is a fact issue. The general rule in New Jersey is that the purchaser of stock is not liable as the successor to the company whose stock was acquired. Dep't of Transportation v. PSC Resources, Inc., 175 N.J. Super. 447, 453 (Law, Div. 1980). However, there are fact issues as to whether or not Reliance acquired FPE's assets in addition to the stock. Furthermore, even if Reliance did not acquire FPE's assets, under New Jersey law, a corporate veil can be pierced, and liability imposed upon a corporate parent for the acts of its subsidiary, where the parent so dominated the subsidiary that it had no separate existence and the parent used the corporate form to perpetrate a fraud. See Karo Marketing Corp. v. Paydrome America, 331 N.J. Super. 430, 442 (App. Div. 2000). This inquiry is a fact sensitive one that must be resolved by the finder of fact.

The issue of whether Reliance's own conduct violated the Consumer Fraud Act is necessarily contingent upon whether or not Reliance has successor liability. If Reliance is determined to have successor liability, then Reliance's own conduct may be used to support a claim. The Act provides in relevant part:

[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that

others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . .

N.J.S.A. 56:8-2 (emphasis added).

The statute indicates that the subsequent performance language only applies to the person making the original representations to the consumer. See Annunziata v. Miller, 241 N.J. Super. 275, (Ch. Div. 1990) ("subsequent performance" language refers to an affirmative representation of a future act by the promisor); See also D'Erocole Sales, 206 N.J. Super. at 25-31 (finding that "subsequent performance" language applies to actions of the original seller of product who subsequently disavows a warranty given in conjunction with original sale). However, if Reliance is determined to have successor liability, then Reliance stands in the shoes of FPE in that Reliance and FPE will be considered one and the same. Thus, while the FPE circuit breakers were advertised, warranted and sold by FPE, if Reliance is determined to have successor liability, then Reliance is the person making the original misrepresentations to the consumers. Accordingly, Reliance would be "such person" within the meaning of the Act. On the other hand, if Reliance is not determined to have successor liability, then Reliance is not "such person" within the meaning of the act. Therefore, this issue must await a full hearing on the issue of successor liability.

Finally, if successor liability is found to exist, any act on the part of Reliance that implicates the Consumer Fraud Act would necessarily be considered continuous/ongoing conduct on the part of FPE/Reliance. Therefore any concealment on the part of Reliance regarding the fraudulent nature of the UL labels, would be considered continuous and thus, would impact upon Defendants' statute of limitations defense.

Defendants also seek summary judgment based on the statute of limitations. This relief is denied. A claim for a violation of the New Jersey Consumer Fraud Act must be brought within six years from the date on which the claim accrues. N.J.S.A. 2A:14-1; See Mirra v. Holland America Line, 331 N.J. Super. 86, 90 (App. Div. 2000). Plaintiffs complain that Defendants sold them circuit breakers with fraudulent UL labels. Thus, Plaintiffs' claims accrued when the circuit breakers were sold. Therefore, for some members of the Plaintiff class, the statute of limitations began running as early as 1965, well beyond the six year statute of limitations period. Nevertheless, the discovery rule can be applied to postpone the accrual of a claim when a plaintiff does not and cannot know the facts that constitute an actionable claim. Grunwald v. Bronkesh, 131 N.J. 483, 521 A.2d

459 (1993). As a result, a cause of action will accrue when the injured party discovers or by the exercise of reasonable diligence and intelligence, should have discovered, that he or she may have a basis for an actionable claim. Mancuso v. Neckles ex rs, Neckles, 163 N.J. 26, 747 A.2d 255 (2000). Here, the Defendants actively and publicly addressed the issue of fraudulent labeling in the early 1980's via press releases, 48,000 notification letters, and national and local newspaper and magazine articles. Nevertheless, whether or not Defendants' widespread publicity of the matter from 1980 to 1983 forward was sufficient to put a reasonable person on notice that they may have a cause of action, is a fact issue. The burden of demonstrating that each plaintiff lacked such knowledge of a potential claim is placed on the plaintiff. Accordingly, A Lopez hearing must be held to determine whether the statute of limitations barred any of the plaintiffs claims. The statute of limitations issue will necessarily be impacted upon by the jury findings on Reliance's successor liability.

In light of the required Lopez hearings, the Plaintiff class may ultimately be dissolved. This Court notes that the class representatives do not even meet the class criteria, and therefore, cannot represent the class. Therefore, the issue of class certification may be revisited due to the statute of limitations issues which may destroy the commonality prong of class certification.

Defendants Federal Pacific Electric and Reliance's motions for summary judgment are granted as to any claims based on sales of the circuit breakers that occurred before 1971, as well as any claim asserted by subsequent purchasers of homes or buildings in which FPE circuit breakers were installed part and denied in part.

Defendants are entitled to summary judgment on any claims based on sales of the circuit breakers that occurred before 1971. Prior to 1971, the New Jersey Consumer Fraud Act did not confer a private right of action and the Attorney General had the sole authority to enforce the Act. Skear v. EMK Motors, Inc, 187 N.J. Super. 465, 472 (App. Div. 1982); D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 24 (App. Div 1985). The Act was amended effective June 29, 1971 to permit private plaintiffs to assert claims. N.J.S.A. 56:8-19. Thus, any plaintiff whose claim is based on a sale of the circuit breakers that occurred before 1971, may not assert a claim under the Act, because the statute did not permit such a claim at the time the conduct occurred.

Furthermore, Defendants are entitled to summary judgment on any claim asserted by subsequent purchasers of homes or buildings in which FPE circuit breakers were installed. These plaintiffs

lack standing to assert a claim under the Consumer Fraud Act. In Chattin v. Cape May Greene, 216 N.J. Super. 618 (App. Div.), cert. denied, 107 N.J. 148 (1987), the Appellate Division held that subsequent purchasers of homes containing allegedly defective doors and windows could not bring claims under the Consumer Fraud Act because they were not the people to whom the misrepresentations had been made. Absent an assignment from the original purchaser, subsequent purchasers of homes and buildings that contained the FPE circuit breakers cannot bring a claim under the Consumer Fraud Act because they were not the people to whom the misrepresentations were made. As a result, Defendants are entitled to summary judgment on these claims.

The Defendants also seek summary judgment for post 1976 claims. This relief is denied. The case of Katz v. Schacter, 251 N.J. Super. 467 (App. Div. 1991), wherein the Appellate Division held that misrepresentations made by a real estate broker prior to a 1976 amendment to include real estate transactions, were not actionable when the misrepresentation was discovered after 1976, is not applicable to this case. The matter at hand does not deal with the misrepresentations of real estate brokers and therefore, Katz is not relevant to this matter.

In light of the foregoing discussion, Plaintiffs' motion for summary judgment is granted as to the issue of whether FPE violated the Consumer Fraud Act. Plaintiffs' motion for summary judgment is denied as to the issue of whether Reliance violated the Consumer Fraud Act. FPE's motion for summary judgment on the statute of limitations issue is denied. Reliance's motion for summary judgment on the issues of successor liability and the statute of limitations is denied. Defendants Federal Pacific Electric and Reliance's motions for summary judgment are granted as to any claims based on sales of the circuit breakers that occurred before 1971, as well as any claim asserted by subsequent purchasers of homes or buildings in which FPE circuit breakers were installed part and denied in part.

DATE OF DECISION: 8/15/02


BRYAN D. GARRUTO, J.S.C.

Order is attached

Proposed form of Order and envelope to be submitted pursuant to R.4:42-1 by James Crawford Orr.