Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-228

NOVEMBER TERM, 2005

Susan Elaine Byrd	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Superior Court
	}	
South Meadow Housing Associates	}	
	}	DOCKET NO. S1056-04 CnC
		Trial Judge: Richard W. Norton

In the above-entitled cause, the Clerk will enter:

Plaintiff in this landlord-tenant dispute appeals from a superior court decision denying her post-trial motion for judgment as a matter of law, additur, and attorneys= fees. Although plaintiff prevailed at trial on her breach of contract claim, and was awarded damages of $6500, she contends that she was further entitled to: (1) judgment on her claim under the Consumer Fraud Act; (2) an additur to the damage award; and (3) an award of attorneys= fees. We affirm.

In preparation for a move from Canada to Burlington, Vermont, plaintiff met in June 2004 with Stephanie Allen, the property manager for defendant South Meadow Housing Associates, which offers affordable subsidized housing units. Plaintiff left a deposit for one of two units, Nos. 64 or 89, for a lease to commence on July 1, 2004. Plaintiff later called Allen to select unit No. 89 based on the manager=s indication that the tenant in No. 64 might be subject to eviction proceedings. Subsequently, however, the manager informed plaintiff that No. 89 was not available until August 1, but that problems with the tenant in No. 64 had been worked out and that the apartment would be available July 1. Based on these representations, plaintiff signed a one-year lease agreement for unit No. 64 to commence on July 1, 2004, for a monthly rent of $658.

Contrary to the manager=s representation, the tenant in No. 64 did not voluntarily quit the premises by the end of June 2004. Instead, defendant was forced to commence eviction proceedings in early July, and did not obtain possession until mid-October. As a result, plaintiff delayed her arrival until July 9, at which time defendant allowed her stay in a different unit, No. 10, which was smaller and in need of repairs. Shortly thereafter, defendant offered plaintiff a temporary three-month lease for apartment No. 10, at a monthly rate of $725, while they worked to resolve the situation with the tenant in No. 64. Plaintiff rejected the offer, however, demanding a lease at the original rate of $658 per month. Defendant refused and commenced eviction proceedings, but plaintiff quit the premises before the complaint was served and leased a different apartment in South Burlington for one year, commencing on August 1, 2004, for a monthly rent of $1500.

Plaintiff then filed this action against defendant for breach of contract and violation of the Vermont Consumer Fraud Act, 9 V.S.A. " 2451-2480n. The case proceeded to trial in March 2005. At the close of the evidence, the trial court granted plaintiff=s motion for judgment as a matter of law on the question of defendant=s liability for breach of the lease agreement, but denied a companion motion for a similar judgment concerning defendant=s liability under the Consumer Fraud Act. The jury awarded damages of $6500 for breach of the lease agreement, but found that defendant had not violated the Consumer Fraud Act. Plaintiff then filed a post-trial motion for judgment as a matter of law on the consumer fraud claim, for additur to the damage award, and for attorneys= fees. The court issued a written decision, denying the motion. This appeal followed.

Plaintiff argues that she was entitled to judgment as a matter of law on her consumer fraud claim because the lease agreement, which provided for the tenancy in unit No. 64 to begin on July 1, 2004, failed to disclose that the current tenant=s lease ran until November 1, and therefor misrepresented that the apartment would be available on the date indicated. The trial court rejected the argument, observing that Athere was conflicting evidence [as to whether] defendant=s failure to have Apt. 64 ready for the plaintiff was the result of a deceptive or fraudulent act or a simple mistake by the agent in advising the availability of the unit.@ Defendant=s property manager, Stephanie Allen, testified in this regard that the current occupant had been threatened with eviction and, in response, had stated that she intended to move out at the end of June. Thus, there was evidence from which the jury could reasonably have concluded that defendant believed the apartment would be available on July 1. Whether, under the circumstances, it was nevertheless deceptive or fraudulent to omit from the lease agreement more specific information concerning the current tenant=s lease status, as plaintiff contends, was a question properly left to the jury to decide. See Winton v. Johnson & Dix Fuel Corp., 147 Vt. 236, 243 (1986) (question whether defendant=s acts were deceptive involved Afactual matters to be decided by the trier of fact@).[1]

We have held, as plaintiff notes, that A[t]he Consumer Fraud Act does not require a showing of intent to mislead,@ Id. at 244, but this does not compel a conclusion that an erroneous statement is fraudulent or deceptive where, as here, there was evidence ,which the jury could reasonably credit, that the defendant believed the representation to be truthful and accurate. We also recognized in Carter v. Gugliuzzi that Aa lack of knowledge or expertise@ will not negate a statutory fraud action. 168 Vt. 48, 58 (1998). This holding concerned, however, a real estate agent whose duty consisted Aprecisely of acquiring and conveying information@ about conditions in the neighborhood and property, and who could therefore reasonably be held to have constructive knowledge of those conditions. Id. at 55; see also Hoke v. Beck, 587 N.E.2d 4, 8 (Ill. App. Ct. 1992) (holding proof of intent to deceive not required under consumer fraud act where plaintiff knew representation was false or evidence demonstrated culpable ignorance of its truth or falsity); Glickman v. Brown, 486 N.E.2d 737, 741 (Mass. App. Ct. 1986) (liability under unfair practices act does not require knowledge of falsity of representation where evidence showed Ano effort to determine the truth@) overruled on other ground by Cigal v. Leader Dev. Corp., 557 N.E.2d 119 (1990); Stevenson v. Louis Dreyfus Corp., 811 P.2d 1308, 1311-12 (N.M. 1991) (noting that while misrepresentation Aneed not be intentionally made@ under Unfair Practices Act, it must have been Aknowingly made@ in the sense that defendant was aware the statement was false or misleading or Ashould have been aware that the statement was false or misleading@). Therefore, while the evidence here clearly supported the court=s finding that defendant breached the lease agreement by failing to deliver the premises as promised, it did not compel a finding that defendant committed consumer fraud.

Plaintiff also contends the court erred in denying her motion for additur to the $6500 damages awarded by the jury. Plaintiff argues that she was entitled, as a matter of law, to damages of $9262, representing the difference between the monthly rent of $658 in the original lease, and the monthly rental of $1500 per month which she was compelled to pay for a different apartment for eleven of the twelve months of the lease period. A >[F]irst the jury, and then the court in ruling on the motion to set aside, have the liberty of broad discretionary judgment= in determining the adequacy of the damage award.@ Bradley v. H.A. Manosh Corp., 157 Vt. 477, 484 (1991) (quoting Kerr v. Rollins, 128 Vt. 507, 510 (1970)). The trial court here found that the jury could reasonably have awarded less than the full rent differential based on evidence that the rent of $658 for the income-sensitive unit was artificially low in light of plaintiff=s failure to disclose her full income. The court also noted that the jury could have found that plaintiff failed to adequately mitigate her damages by rejecting a substitute unit from defendant for three months, until the original unit became available, for a monthly rental of $725, which was assertedly below market value. Plaintiff offers no evidence or law to support her claim that the duty to mitigate in these circumstances represents an improper Asacrifice@ of a Asubstantial right@ by the non-breaching party, O=Brien v. Black, 162 Vt. 448, 453 (1994), or that the proposed three-month lease agreement was somehow inconsistent with defendant=s offer to make the original apartment available to plaintiff under the original lease when eviction proceedings were completed. Accordingly, we cannot conclude that the trial court abused its discretion in denying the motion for additur.

Finally, plaintiff contends the court erred in denying her motion for attorneys= fees. As noted, however, plaintiff was not entitled to judgment under the Consumer Fraud Act, and therefore was not eligible for an award of attorneys=

fees under that statute. Furthermore, the AAmerican Rule@ is that Aparties must bear their own attorneys= fees absent a statutory or contractual exception, @ or Ain exceptional cases and for dominating reasons of justice.@ D.J. Painting, Inc. v. Baraw Enters., 172 Vt. 239, 246 (2001) (citations omitted). Plaintiff has not demonstrated that the court here abused its discretion in finding that the facts did not warrant application of the exception. See L=Esperance v. Benware, 2003 VT 43, & 21 (trial court is accorded Awide discretion@ in determining whether to award attorneys= fees Abased on the specific facts of each case@). Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

_____

John A. Dooley, Associate Justice

_____

Denise R. Johnson, Associate Justice

_____

Marilyn S. Skoglund, Associate Justice

---

[1] Plaintiff also appears to suggest that the property manager=s testimony concerning her understanding as to the availability of the apartment was inadmissible under the parol evidence rule, which excludes evidence of prior oral agreements to vary the terms of a subsequent written agreement. Big G Corp. v. Henry, 148 Vt. 589, 591-92 (1987). However, the evidence here was relevant not for the purpose of altering the terms of the agreement, but rather to show defendant=s understanding as to the availability of the apartment on the date specified in the lease.