STATE OF VERMONT

SUPERIOR COURT
Windsor County

CIVIL DIVISION
Docket No. 580-8-08 Wrcv

Thomas Schreck and Gaspare Buscaglia
Plaintiffs

v.

Martin Nitka, Esq.
Defendant

Decision re: Defendant's Renewed Motion for Judgment as a Matter of Law and Defendant's Motion for New Trial

A jury awarded plaintiffs Thomas Schreck and Gaspare Buscaglia $190,000 on their claim for consumer fraud against their former attorney, defendant Martin Nitka, in connection with his representation of them during the purchase of commercial real estate.[1] Plaintiffs had alleged in the CFA claim that defendant failed to disclose his prior representation of the sellers, and that he omitted this fact for the purpose of inducing plaintiffs to close the deal with him as their attorney.

Defendant now seeks post-trial relief primarily on the ground that the evidence was insufficient to establish whether he concealed his prior representation of the sellers for the purpose of inducing plaintiffs to close the deal. He also argues that the CFA claim was not actionable in the first instance, that the damage award was excessive, and that the court erred by "excluding" one of his expert witnesses and permitting plaintiff's expert to testify about whether defendant's performance fell below the professional standard of care.

The first question is whether the evidence was sufficient to establish that defendant concealed his prior representation of the sellers for the purpose of inducing plaintiffs to close the deal with him as their attorney. In evaluating this claim, the court views the evidence in the light most favorable to plaintiffs. *Follo v. Florindo*, 2009 VT 11, ¶ 26, 185 Vt. 390. Viewed in that light, the trial testimony established that: (1) defendant represented the sellers in the past; (2) defendant did not disclose the representation to plaintiffs even after the boundary issue created a potential conflict of interest; (3) at the time the boundary issue arose, the deal was on shaky footing, and plaintiffs were on the verge of backing out of the deal; (4) plaintiffs would have backed out of the deal if they had known about the conflict of interest; and (5) this was a real estate transaction in which defendant's payment depended upon a successful closing. Although it is true that there was no *direct* evidence of defendant's intent in failing to disclose the conflict of interest, the aforementioned *circumstantial* evidence was more than sufficient to support the inference that defendant concealed his prior representation of the sellers for the purpose of avoiding disclosure of a potential deal-breaker, and thus for the purpose of ensuring payment. Evidence of intent is

[1] The jury also returned a verdict in favor of plaintiffs on their claim for professional negligence. That claim is not at issue in the post-trial motions, however, and so is not addressed in this opinion.

often inferred from the circumstantial evidence, especially in cases of fraud, *Fireman's Fund Ins. Co. v. Knutsen*, 132 Vt. 383, 388 (1974), and this case is no exception. As such, the court stands on its original ruling: the trial evidence was sufficient to submit the consumer-fraud claim to the jury.

The second issue involves the adequacy of the jury instructions. During trial, both plaintiffs and defendant submitted proposed jury instructions. The court gave its own instructions, but expressly modeled the consumer-fraud instruction upon defendant's requested instruction. See *Defendant Martin Nitka Esquire's Proposed Jury Instructions* at 7–8, filed Aug. 6, 2010. Defendant now claims that the consumer-fraud instruction he requested was incomplete, in that did not adequately charge the jury that any misrepresentation had to be made for the purpose of inducing the transaction to close. Yet defendant did not raise this issue in his proposed instructions, or at the charge conference, or after the instructions were read to the jury. As such, the issue is not preserved for post-trial review. See V.R.C.P. 51(b) ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."); *Venturella v. Addison-Rutland Supervisory Union*, 2010 VT 115, ¶ 5; see also *Harrington v. Decker*, 134 Vt. 259, 261 (1976) (litigants may not put the court into error).

The third question is whether the consumer-fraud claim is actionable in the first instance. Although this issue was litigated during defendant's motion for summary judgment, defendant has uncovered two new reasons why he believes his motion should have been granted: (1) certain Connecticut cases have held that inadequate disclosures of conflicts of interests by attorneys are not actionable under consumer-fraud laws, e.g., *Ayalon v. Breakstone*, 2003 WL 22413669 (Conn. Super. Oct. 14, 2003); and (2) other cases from other states have held that application of consumer-fraud laws to attorneys violates separation-of-power principles contained in state constitutions, e.g., *Beyers v. Richmond*, 937 A.2d 1082, 1086–93 (Pa. 2007). On both of these points, this court is obliged to follow the approach that has already been laid out in the Vermont cases: the CFA applies to professionals, and an attorney's failure to disclose a conflict of interest may be actionable if the omission was made for the purpose of retaining clients or increasing profits. *Webb v. Leclair*, 2007 VT 65, ¶¶ 22–24, 182 Vt. 559 (mem.); see also *Kessler v. Loftus*, 994 F. Supp. 240, 243–44 (D. Vt. 1997) (endorsing *Eriks v. Denver*, 824 P.2d 1207, 1214 (Wash. 1992) (en banc)). It is not within the authority of this court to overrule *Webb*, even if the constitutional arguments were not expressly discussed in the *Webb* opinion.

The fourth question is whether the amount of the CFA verdict was excessive. Defendant argues that the jury impermissibly awarded the difference between the amount that plaintiffs paid for the property and the amount they opined it was actually worth. Defendant argues that under the recent decision in *Vastano v. Killington Valley Real Estate*, 2010 VT 12, the proper measure of damages under the CFA is limited to return of consideration paid to him for his work on the transaction.

Vastano was a materially different case. There, the plaintiffs bought a house and discovered later that the sellers and the real-estate broker had concealed the fact that the well was being monitored for the presence of gasoline-related contaminants. Sometime thereafter, however, the plaintiffs resold the house for more than they had paid for it, and thus they had no actual damages. During the discovery process, the *Vastano* plaintiffs expressly clarified

that they were seeking a CFA remedy against the real-estate broker for return of consideration paid rather than for actual damages.[2] See 2010 VT 12, ¶ 3 n.1; see also 9 V.S.A. § 2461(b) (providing that consumers may recover from the seller, solicitor, or other violator either "the amount of his damages" or "the consideration or the value of the consideration given by the consumer"). The discussion in the *Vastano* opinion, therefore, was focused on determining how consideration should be disgorged under the CFA when the consideration was paid to more than one seller, solicitor, or other violator. Actual damages were not at issue in *Vastano*, and nothing in that opinion purports to limit the amount of actual damages that are recoverable under the CFA. The difference in value between the purchase price and the fair market value remains a classic measure of actual damages under the CFA. *Follo v. Florindo*, 2009 VT 11, ¶¶ 51, 56, 185 Vt. 390.

Defendant also argues that the damages award was unsupported by the evidence. On this point, Mr. Schreck testified as to his opinion of the value of the property as it was received after closing. As the property owner, he was competent to provide this opinion, and the jury was entitled to give the opinion whatever weight they thought it deserved when making their calculations. 12 V.S.A. § 1604. For these reasons, the court finds no error in the damages award.

The fifth question is whether the court erred by "excluding" one of defendant's expert witnesses. The background here is as follows. The trial was originally scheduled for five days. On the morning of the fifth day (the Friday before Bennington Battle Day), the court met with the parties and expressed its hope that "we would get all of the evidence in today." The court then said that it was "prepared to work late today" to finish the evidence, and specifically asked defendant to be "ready" with all of his witnesses, adding that it "would not like to hear that we don't have a witness available until Tuesday." Defendant did not object.

Consistent with this plan, the evidence continued past the normal closing time of 4:30 p.m. The time then came for defendant to call his last witness, but the expert was not present at the courthouse. Attorney Reis explained that the expert was not present because he "didn't anticipate going to 5:30 [p.m.]" and assumed that the evidence would continue on the next business day (Tuesday). After a bench conference in which the morning conversation was revisited and reaffirmed, Attorney Reis rested his case.

Defendant now claims that it was error to "exclude" his witness on the basis of a time constraint. However, it is within the discretion of the court to impose reasonable limits on the presentation of evidence. V.R.E. 611(a). Here, the parties were told at the beginning of the day that the court was "prepared to work late today" to finish all of the evidence, and that all witnesses should be ready to testify. Defendant had all day to make arrangements with his expert witness but chose not to; there was no claim that the expert had been contacted but was unable to come on short notice, or that the expert was unreachable despite diligent efforts to contact him. Given this, the court perceives no reversible error.

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[2] The relevant trial court opinion from the *Vastano* case is available online; it provides more background information about plaintiff's claim and the procedural history of the case than is available in the Supreme Court opinion. See *Vastano v. Killington Valley Real Estate*, No. 751-12-01 Rdcv (Teachout, J., Jan. 10, 2008), available at http://www.vermontjudiciary.org/2006Present%20TCdecisioncvl/2008-01-21-1.pdf.

The final question is whether the court erred by allowing plaintiff's expert witness to testify that certain aspects of the real-estate transaction fell below the professional standard of care. The background here is that defendant filed a pretrial motion in limine seeking to prevent plaintiffs' expert, Attorney Murphy, from discussing so-called "miniscule errors" that did not result in any harm to plaintiffs. The court agreed that the expert testimony should not include simple disagreements between attorneys over the way things were done. The court accordingly ruled that any testimony about deviations from the professional standard of care needed to be causally related to the damage for which plaintiffs were seeking relief.

At trial, this standard was met. Attorney Murphy discussed certain errors and explained that they cumulatively affected plaintiffs' ability to make an informed decision about whether to close the real-estate transaction. Attorney Murphy further explained that plaintiffs' damages resulted from their inability to make an informed decision. As such, the court admitted the testimony.

In other words, the court did not "change" its pretrial ruling. What "changed" was that defendant had represented that Attorney Murphy would not be able to provide an opinion on causation with respect to certain errors, but as it turned out, Attorney Murphy was able to explain how those errors affected plaintiffs' decision-making process, and thus how the errors were causally related to the damages. His testimony was admitted consistent with the pretrial ruling. No error or inconsistency occurred here.

Having reviewed the trial as a whole, the court is persuaded that defendant's motions for judgment as a matter of law, and for a new trial, must be denied. Because the issues involved herein were capable of being decided on the briefs, defendant's request for a hearing is denied. V.R.C.P. 78(b)(2).

ORDER

(1) Defendant's Renewed Motion for Judgment as a Matter of Law (MPR #15), filed October 1, 2010, is ***denied***;

(2) Defendant's Motion for New Trial (MPR #16), filed October 1, 2010, is ***denied***; and

(3) Defendant's Motion for Remittitur and Request for Hearing (MPR #17), filed October 1, 2010, is ***denied***.

Dated at Chelsea, Vermont this 19 day of January, 2011.

Hon. Harold E. Eaton, Jr.
Superior Court Judge

FILED

JAN 24 2011

VERMONT SUPERIOR COURT
WINDSOR UNIT