

Affirmed in part
2010 VT 12 (2/24/10)

STATE OF VERMONT
RUTLAND COUNTY

FRANK VASTANO and TRACY LEES)
Plaintiffs,)
v.)
KILLINGTON VALLEY REAL ESTATE))
Defendant.)

Rutland Superior Court
Docket No. 751-12-01 Rdcv

CONFORMED COPY
RUTLAND SUPERIOR COURT
JAN 10 2008

Upon Remand from the Vermont Supreme Court
RULINGS ON DAMAGES and PENDING MOTIONS

The claim in this case is based on the Consumer Fraud Act. The Vermont Supreme Court has remanded for consideration of damages as a consequence of its decision to reverse the court below and grant Plaintiffs' Motion for Summary Judgment on liability. In the trial court, Plaintiff's summary judgment motion was denied on the ground that a factual determination was needed and the case went to trial. A jury found for Defendant on liability, and the jury was discharged without considering damages. On appeal, the Supreme Court concluded that the undisputed facts support liability as a matter of law, and the case has been returned to this court "to enter judgment for plaintiffs and to consider the question of damages." *Vastano v. Killington Valley Real Estate*, 2007 VT 33, 18 Vt. L. Wk. 129.

A status conference was held on September 5, 2007. The parties dispute legal standards and procedures applicable to the damages phase of the case. In addition, Plaintiffs have filed a Motion to Amend the complaint to encompass an alternative claim for damages, a Motion for Summary Judgment on damages, and a Motion for Determination of Attorneys' Fees.

The posture of the case calls for the court to address a number of procedural and legal issues in order to determine how to proceed to judgment. The most significant challenge is to interpret the remedy provisions of the Consumer Fraud Act in relation to a factual scenario to which the Act applies, but one that was probably not specifically contemplated by the legislature. Both parties have briefed the issues extensively and helpfully.

Plaintiffs paid \$225,000 for a property in Killington and only later learned that the well on it was being monitored on an ongoing basis to test for possible contamination from a leaking underground storage tank on a nearby property. Plaintiffs brought suit under the Consumer Fraud Act for false or fraudulent representations or practices against two defendants: their own broker and the broker who listed the property for the seller.

They did not sue the seller in this action. Plaintiffs settled with their own broker, and the case has proceeded against the listing broker, KVRE. The listing broker received a commission on the sale of \$7,875. At some point, apparently after this litigation had started, Plaintiffs sold the property for a sales price greater than \$225,000.

Plaintiffs' complaint sets forth a claim for \$225,000 plus interest, exemplary damages, and attorneys fees. The CFA allows a private party plaintiff to "sue for appropriate equitable relief" and to recover either "the amount of his damages" or "the consideration or the value of the consideration given by the consumer." 9 V.S.A. § 2461(b). It also provides for recovery of attorneys fees and exemplary damages no greater than three times the amount of the consideration paid.¹ Plaintiffs' complaint was based on consideration paid and requested relief of the full consideration of \$225,000 as well as attorneys fees and exemplary damages. In response to discovery requests, Plaintiffs specified that they had no actual damages, and were proceeding on the basis of consideration paid.

Plaintiffs' original Motion for Summary Judgment was denied on the grounds that one of the elements of required proof for liability was that the failure to disclose the monitoring of the well was "material," and this was an issue of fact for the jury. The case proceeded to trial by jury. At a pretrial hearing just prior to the trial, Plaintiffs' attorney confirmed that the claim was based only on consideration paid and not on any claim for actual damages. Judge Cohen was apparently concerned that the jury would be confused about finding liability where there was no claim for actual damage, and he ordered bifurcation of the trial into liability and damages phases. He clarified this in detail with the attorneys. At that point, the Defendants apparently took the position they assert now (among others), which is that since KVRE was not the recipient of the full consideration, Plaintiffs could not recover the full \$225,000 from KVRE. Judge Cohen clarified that if the jury found liability for Plaintiffs, it would be up to the court to address the legal issue represented by a claim of \$225,000 against KVRE. Plaintiffs agreed. In addition, Plaintiffs confirmed that they were not seeking exemplary damages. The trial proceeded.

The jury found that the failure to disclose the monitoring was not material, and the jury was discharged without considering any evidence on damages. As stated above, the Supreme Court reversed on the grounds that the failure to disclose the monitoring was material as a matter of law. Plaintiffs argue that the Supreme Court's ruling puts them back in the same situation they should have been in if the trial court had originally granted their summary judgment motion, and that therefore they are free to seek any form of damages authorized by statute. Defendant objects to the Plaintiffs' alternative claim for actual damages. Plaintiffs have filed a Motion to Amend the Complaint to broaden the claim for damages to encompass the alternative claim for relief they now wish to assert.

¹ The Act created civil causes of action in addition to enforcement actions the Attorney General may bring on behalf of the State.

Plaintiffs' Motion to Amend, filed September 20, 2007

Plaintiffs' original complaint sought as relief: entry of judgment in the amount of \$225,000 as consideration paid, plus interest and costs; exemplary damages; and reasonable attorneys' fees. Plaintiffs now seek to amend the prayer for relief in the complaint to include "consequential damages." Plaintiffs' position is that if the court does not award the full consideration paid by Plaintiffs of \$225,000, plus interest to date (\$135,000 to December 21, 2006) and attorneys fees (originally requested at \$73,722.50), then Plaintiffs seek a hearing at which they wish to prove actual damages. They acknowledge that Defendant should have an opportunity for discovery on the issue of actual damages.

Defendant's general argument on damages is that Plaintiffs cannot recover return of the full consideration of \$225,000 for three reasons: it is not appropriate relief against KVRE which only received \$7,875; it is not available as Plaintiffs have suffered no injury since they sold the property for more than their purchase price; and such a recovery is unconstitutionally excessive because it is out of proportion to any compensatory component of damages. These arguments will be addressed later. In response to Plaintiffs' Motion to Amend the original complaint to enlarge the scope of damages in the prayer for relief, Defendant argues that it is too late and prejudicial to Defendant for Plaintiffs to change the claim so substantially by adding a request that they previously committed themselves to decline to pursue. *Bevins v. King*, 143 Vt. 252, 255-56 (1983).

For the reasons argued by Defendant, Plaintiffs' motion is too late, and it is prejudicial to Defendant. Under the Consumer Fraud Act, Plaintiffs had two possible ways to prove their claim, and they made a clear choice at the time of the complaint. Defendant propounded interrogatories to test this issue, which makes sense: if Plaintiffs were going to claim a change in theory, or seek alternative forms of damages, Defendant would reasonably want to know during the discovery period, as it would affect decisions regarding discovery, settlement, cost, and overall case strategy. Plaintiffs were quite clear in their discovery responses that their claim was based on consideration paid, and they did not have evidence on actual damages. Plaintiffs framed the case issues clearly, and continued to do so on the record the day before the jury trial, at which time Plaintiffs also dropped their request for exemplary damages: they took an all-or-nothing approach on the claim based on full consideration paid.

Both the Defendant in case strategy and the court in rulings for trial procedure relied on the commitment made by Plaintiffs in their consistent representations in pleadings, discovery responses, and positions stated on the record. Judge Cohen made a decision to bifurcate the trial based on Plaintiffs' clear position that they had no evidence on actual damages, and that they were not pursuing exemplary damages. Plaintiffs agreed that if they proved liability to the jury, the court would decide the legal issues on damages posed by the legal position to which they had committed: the full amount of \$225,000 consideration paid plus interest and attorneys fees. They made no request to preserve any right to trial on the issue of exemplary damages.

Defendant has made arguments that if Plaintiffs wished the full consideration paid, they should have been willing to give up title to the property. Plaintiffs argue that the Defendant could not force Plaintiffs into seeking a rescission remedy as opposed to other remedies available under the Act, and this is true. Nonetheless, Defendant is correct that Plaintiffs could have taken action to preserve a claim to an alternative form of relief prior to the start of the jury trial, as it had all the information necessary to do so, and might reasonably have anticipated wanting to do so in the event it lost on its claim for the full \$225,000, either at trial or on appeal. Plaintiffs did not do so. Rather, they committed themselves to a theory of the case that led Judge Cohen to make rulings accordingly. Both the Defendant and the court would be prejudiced in the form of unnecessary and wasteful use of resources and delay if Plaintiffs were permitted to change and enlarge their theory of the case at this stage, resulting in prolongation of the case and more expense to Defendant.

For the foregoing reasons, the Motion to Amend is denied. The effect is that Plaintiffs are in exactly the position they expected to be in if they had succeeded on their summary judgment motion in the trial court, or if they had succeeded in proving liability at trial: the court will decide the legal issue of whether they are entitled to a judgment that includes \$225,000 plus interest and attorneys fees. Having failed to preserve, in a timely manner, the opportunity to amend their prayer for relief to encompass an alternative remedy to the one on which they pursued the case, they may not now seek an alternative form of relief. Moreover, despite the fact that they originally sought exemplary damages, they failed to make a timely preservation of a claim to such relief, and cannot now revive it.

Legal Arguments for Damages and Plaintiffs' Motion for Summary Judgment

In legal memoranda submitted before and after the pretrial conference on September 5, 2007, both spontaneously and at the court's invitation, the parties argued their interpretations of the scope of recovery available to the Plaintiffs. In addition, Plaintiffs have filed a Motion for Summary Judgment seeking a ruling that as a matter of law, Plaintiffs are entitled to \$225,000 plus prejudgment interest at the legal rate from December 21, 2001 until judgment (as well as post judgment interest at the legal rate). Additional legal memoranda have been filed as a result of the filing of the motion.

This is the central issue: whether Plaintiffs are entitled to judgment for the full \$225,000 in this case, plus interest, when such amount was never paid to KVRE and when they have since sold the property for more than that amount. Plaintiffs rely on the express language of the Act for the position that they had the statutory right to choose to select to sue KVRE rather than the seller, and that they may "sue and recover" from any eligible defendant "the consideration or the value of the consideration given by the consumer." 9 V.S.A. § 2461(b). They argue that they paid \$225,000, and that they are therefore entitled to that sum as a matter of law, and that it is irrelevant that they have sold the property or that the full consideration was not paid to KVRE. Their argument rests on the language of the Act and their position that such an extensive remedy is warranted because the CFA was designed to give incentive to private plaintiffs to enforce

the CFA against any eligible defendant, and that this result fulfills the Act's regulatory purposes of deterring fraud and policing the marketplace.

Defendant argues that there is no actual injury, and thus no right to damages. Defendant also argues that Plaintiffs cannot "recover" \$225,000 from KVRE because KVRE was not the recipient of the full consideration, as it only received a commission of \$7,875 on the sale, so any judgment should be limited to that amount. Defendant argues that it would be out of proportion for Plaintiffs to receive \$225,000 plus interest of over \$135,000 as they would receive more than \$350,000 in addition to the prior return of their \$225,000 purchase price, plus whatever profit they received when they sold the property.

As to the first argument, the court cannot conclude that there was no injury. The property that Plaintiffs purchased had different characteristics than the one that the Plaintiffs thought they were purchasing. Each piece of real estate is unique, and the fact of the monitoring of the well for possible contamination was a material feature of the property. Even though the Plaintiffs sold the property for more than they paid, that does not mean that they were not injured when the result of the transaction was that the property they owned was not what they had bargained for. The Act promotes private enforcement by relieving a plaintiff from the burden of having to quantify damages when that may be difficult, and allowing the option of using the consideration as the basis of the claim for relief, and that is what has happened in this case, but the fact that the Plaintiffs elected this form of remedy and later recovered the purchase price on resale does not mean that they suffered no injury in the first place.

Defendant's second argument is the one that makes this case difficult: does it make sense for a seller's broker, who only received a commission of \$7,875, to become liable for \$225,000 plus interest at the legal rate until the date of payment (now over 6 years), when the Plaintiffs have resold the property and recouped their full expenditure? It is undeniable that the broker KVRE is a proper defendant under the statute; and that the language of the Act allows a plaintiff to elect to pursue either actual damages or consideration paid, and that the language specifies "consideration or the value of the consideration given by the consumer." It is also likely that there are many situations in which it is not unjust for a seller's agent to have liability for up to the full amount of consideration paid a seller, even though the agent himself or herself received less money from the transaction.

As to Defendant's third argument, in some situations the judgment, with or without exemplary damages, might be out of proportion to the amount of money that passed between the seller and the consumer, and yet still not be unjust in relation to the deterrent purpose of the Act. Defendant's third argument is not persuasive for this reason.

The problem arises from the windfall to Plaintiffs in this case that would result from a judgment for \$225,000. While it is possible that if there had been no monitoring well at all, Plaintiffs might have been able to resell the property for a greater profit than

they did, the fact that they have resold at a profit, thereby recovering in full already the consideration they paid, means that they have been made whole with respect to their out-of-pocket expenditure, thus satisfying one of the remedial purposes of the Act. The real difficulty is that if they are not only made whole, but also allowed to make a profit on the resale *and* are legally entitled to pocket an additional \$225,000 with interest at the legal rate, plus have their attorneys fees for doing so be paid, a serious question is raised about whether a remedy of this magnitude is consistent with the provisions of the Act. It is the unjust enrichment aspect of the outcome advocated by Plaintiffs in this case that is troubling, and raises the issue of whether such a result makes sense in relation to the purpose and intended effect of the Act.

As Plaintiffs point out, the Act provides for remedies for consumers, incentives for private enforcement, and remedies sufficiently strong to deter consumer fraud and police the marketplace. It cannot be imagined that the legislature intended to create windfalls for consumers, however, or to set up a situation in which plaintiffs can actually generate wealth through private CFA actions while having their attorneys fees paid by others.

It may be argued that "consideration" should be limited to the level of consideration which the particular defendant being sued received. In other words, the sentence structure could be interpreted as "consideration *or* [the value of the consideration given by the consumer]." Under this reading, the term "consideration" standing alone can be read as consideration received by the defendant, as opposed to the alternate definition of 'consideration given by the consumer.' This would be in contrast to Plaintiffs' interpretation, which is "consideration [or the value of the consideration] *given by the consumer.*"² (emphasis added). Plaintiffs rely on this interpretation, strictly construed. 9 V.S.A. § 2461(b).

Although the first interpretation requires legalistic gymnastics with language, there is something compelling about the principle that as long as the consumer has already been made whole, the starting point for a defendant/deceiver's liability is a disgorging of the amount of money received in the transaction. The goal of deterrence of deceptive practices is achieved by eliminating any possible financial benefit to be obtained from engaging in the practices.³ While the principle itself is consistent with the purpose and spirit of the Act, the language regarding consideration provides only thin support for such an interpretation.

A more compelling basis for such a result is that the Act itself incorporates and invokes the court's exercise of equity: "Any consumer who . . . sustains damages or injury . . . may sue for *appropriate equitable relief* and may sue and recover . . ." *Id.* (emphasis added). While the particular phrase may be understood to refer specifically to an authorization for private plaintiffs to seek injunctive relief, the reference to

² Defendant argues that it was paid not by the Plaintiffs but by the non-party sellers, but this glosses over the fact that normally the seller's broker's commission is paid by the consumer-buyers as part of the price, and passed through to seller's broker at closing from purchase money funds.

³ The deterrent effect is enhanced by the availability of exemplary damages and attorneys fees.

'appropriate equitable relief' suggests that equitable considerations are meaningful points of reference points for a court when considering remedies under the statute. Certainly the principle of unjust enrichment has a long and revered history as an important principle to check the windfall effects of legal rules applied technically. This interpretation of the Act is more consistent with furtherance of its overall goal. While a recovery against a non-seller *may* be up to the full amount of the consideration given by the consumer, a court may invoke equitable principles in specific cases in order to temper the amount of the judgment to achieve a result that serves the goals of the Act and avoids an inequitable result, such as a windfall that constitutes unjust enrichment.

Here, equity recognizes that the Plaintiffs have been made whole and their reasonable attorneys fees will be covered. It nonetheless makes sense for them to receive an additional component of judgment, or private plaintiffs would have no incentive to pursue enforcement under the CFA. On the Defendant's side, equity calls for the Defendant to disgorge receipts from the transaction, at a minimum, so as to have received no benefit from it. In this case, the principle of disgorgement, when combined with prejudgment interest and attorneys fees, provides sufficient disincentive to the CFA violator to achieve a policy-based deterrent effect, while assuring that the consumer Plaintiffs are reasonably rewarded for their role in enforcement. Such an outcome is consistent with the purposes and terms of the Act, yet prevents unjust enrichment on the part of the Plaintiffs.

The court concludes that in order to prevent an unjust windfall to Plaintiffs in this case, in consideration of the fact that Defendant KVRE did not receive the benefit of the full consideration but only \$7,875 and is also liable for interest and attorneys fees, resulting in a hefty deterrent effect even at that level, the remedy to Plaintiffs should be reduced from the full consideration paid by Plaintiffs to the amount actually received by Defendant, that is \$7,875.

With respect to prejudgment interest, the deterrent policy of policing the marketplace is best implemented by the usual rule that prejudgment interest applies. In this case, both parties might reasonably have anticipated that any judgment would be in at least the amount of KVRE's commission received; in other words, at least that portion of the judgment was reasonably ascertainable. *EBWS, LLC v. Britley Corp.*, 2007 VT 37, ¶ 36, 18 Vt. L. Wk. 136. Liability for prejudgment interest furthers the purpose of giving defendants incentive to pay as quickly as possible, and there is no reason to deviate from that norm in this case.

Thus, Plaintiffs' summary judgment is granted to the extent that Defendant is liable for \$7,875 plus prejudgment interest to date of judgment (plus postjudgment interest to date of payment). The motion is denied with respect to Plaintiffs' claim for judgment in excess of that amount, except for attorneys fees, which is addressed in the next section.

Attorneys fees; Plaintiffs' Motion for Attorneys Fees, filed June 28, 2007

Plaintiffs seek attorneys fees as one of the statutory remedies, and have submitted billing material showing attorneys fees as of June 26, 2007 in the amount of \$73,722.50. Defendant argues that there has been no injury, and therefore attorneys fees are not recoverable. Defendant further argues that it made an offer of judgment of \$10,000 on August 13, 2004, and therefore Plaintiffs are not entitled to recover attorneys fees under V.R.C.P. 68.

As previously stated, Defendant's argument that there has been no injury is not persuasive, and Plaintiffs are entitled to the remedy described above. Hence, they are also entitled to attorneys fees. An award of attorneys fees is mandatory "upon a finding that the consumer fraud laws have been violated." *Gramatan Home Investors Corp. v. Starling*, 143 Vt. 527, 535-36 (1983). Because attorneys fees are a specified remedy under the CFA, and because of their importance in relation to the purpose of the Act, the provisions of Rule 68 are inapplicable; Plaintiffs' claim for attorneys fees is not precluded by the fee-shifting terms of the procedural rule.

Plaintiffs seek recovery for the full amount expended, whereas Defendant claims that components of the request are unreasonable. For the benefit of the attorneys in addressing the issue, the court is providing the attorneys with four trial court decisions demonstrating how the court has ruled on attorneys fees claims in the past. *Robertson v. Rome Family Corp.*, No. S0458-97 Rdcv (Teachout, J., Aug. 26, 1999); *Sessions v. State*, No. 39-1-99 Wncv (Teachout, J., Dec. 1, 2003); *Sessions v. State*, No. 39-1-99 Wncv (Teachout, J., Feb. 12, 2004); *Ford Motor Credit Co. v. Sicely*, No. 430-7-02 Wncv (Teachout, J., Feb. 3, 2003).


In accordance with the procedure set forth in those decisions, the court will hold a non-evidentiary hearing to hear oral argument on factors the court should consider in ruling on the request. First, however, Plaintiffs will be required to update their specific request, and Defendants will have an opportunity to file a written response specifying challenges to the request, and if Defendant requests an evidentiary hearing, Defendant must specify the specific facts it seeks to present at such a hearing.

Order

Based on the foregoing,

1. Plaintiffs' Motion to Amend filed September 20, 2007 is *denied*,
2. Plaintiffs' Motion for Summary Judgment is *granted* within the limits described above,
3. Plaintiffs' Motion for Attorneys Fees filed June 28, 2007 is *granted* in general, subject to the specific procedures as set forth herein to determine the amount,
4. Plaintiffs shall file an updated request for attorneys fees by January 25, 2007,
5. Defendant shall file any objection or request for evidentiary hearing by February 8, 2007, and
6. The court will schedule oral argument thereafter on the issue of attorneys fees.

Dated at Rutland, Vermont this 10th day of January, 2008.



Mary Miles Teachout
Superior Court Judge