

The Consumer Fraud Act's "Writing Requirement" Protects Community Associations Too

By: Samuel J. McNulty, Esq.
Hueston McNulty & Mueller, P.C.
Attorneys
Florham Park and Toms River, N.J.

New Jersey has a strong policy in favor of consumer protection. Community Association boards, property managers and individual unit owners should be aware of their rights when hiring independent contractors to perform improvements to a unit or to the common elements, common areas or facilities. One of the strongest yet least known of these rights is the "writing requirement" for all home improvement contracts found in the "Consumer Fraud Act" N.J.S.A. 56:8-1 et seq.

THE WRITING REQUIREMENT

The administrative regulations enacted in conjunction with the Consumer Fraud Act hold that "All home improvement contracts for a purchase price in excess of \$200.00 and all changes in the terms and conditions thereof shall be in writing." N.J.A.C. 13:45A-16.2(12). The failure to reduce home improvement contracts or subsequent "extras" to writing, constitutes an "unlawful practice" under the Consumer Fraud Act and at the very least will deprive the independent contractor of the right to enforce the oral home improvement or "extras" agreement. See Blake Construction v. Pavlick, 236 N.J. Super. 73 (Law Div. 1989) overruled on other grounds by R. Wilson Plumbing v Wademan, 246 N.J. Super. 615 (App.Div. 1991). More importantly, however, such an "unlawful practice" can also serve as a basis for the award of compensatory damages as well as an award of treble damages (3x whatever the compensatory damages awarded), costs and attorneys fees. See N.J.S.A. 56:8-2.

In Blake, a home improvement contractor entered into a written construction contract with defendants, the owners of a Garfield, N.J. 2 1/2 story brick and frame building. The first floor was used as a tavern and the upper stories as the defendant's residence. During construction, "extras" (changes in the written contract) in the amount of \$7,509.31 were allegedly ordered and authorized by defendants. A dispute arose and the contractor walked off of the job, later suing the defendants for the "extras" which were the subject of an alleged oral agreement.

The Court in dismissing the contractor's action, held that it had violated the Consumer Fraud Act by failing to reduce the "extras" to a written agreement containing the information specified in N.J.A.C. 13:45A-16.2(12). The Court denied the contractor any enforcement capacity of the oral contract and dismissed the complaint "notwithstanding what may be characterized as substantial good-faith performance" by the contractor. Blake at 75. An excerpt of the Blake opinion is worth repeating:

The purpose of ensuring fidelity to the principles of the Consumer Fraud Act and the administrative regulations promulgated thereunder is to promote the act's deterrent effect to prevent unscrupulous acts against the protected class. However, the statute and its regulations also serve the salutary purpose of forcing home improvement contractors to provide forthright and timely disclosures which, for example, if plaintiff had provided here, might have obviated the need for court intervention by derailing the dispute. The facts of this case manifestly demonstrate how, if the statute and regulations were followed, there probably would have been no misunderstanding between the parties and the need for litigation might have evaporated. . . . If this means that home improvement contractors must keep a pad of pre-printed forms on the job to be initialed to authorize field changes, that is but a small price to pay for enhancing the understanding between the contractor and its customers. Id. at 78, 80.

This strong consumer protection right belongs to unit owners in contracting for general construction, plumbing, electrical, carpentry and renovation work. The Consumer Fraud "writing requirement" also can be used by a community association for work done to the common elements and common facilities that are residential in nature as well as appurtenant structures. Arguably, this would also include clubhouses and recreational halls which are used for community events.

N.J.A.C. 13:45A-16.1 defines a home improvement contract as follows:

An agreement between a seller and an owner of residential or non-commercial property, or a seller

and a tenant or lessee of residential or non-commercial property, if the tenant or lessee is to be obligated for the payment of home improvements made in, to, or upon such property, and includes all agreements under which the seller is to perform labor or render services for home improvements, or furnish materials in connection therewith.

Further, the regulation defines "residential or non-commercial property" as:

a structure used, in whole or in substantial part, as a home or place of residence by any natural person, whether or not a single or multi-unit structure, and that part of the lot or site on which it is situated and which is devoted to the residential use of the structure, and includes all appurtenant structures.

At least one other court had taken an expansive view of the "residence" definition, holding that an unoccupied building used both as an office and apartment fit the definition of a "residential or non-commercial property". See Marascio v. Campanella, 298 N.J. Super. 491 (App. Div. 1997). In Marascio, the Appellate Division ruled against an electrical subcontractor who was attempting to argue that the Consumer Fraud "writing requirement" did not apply.

CONCLUSION

It is not advocated that the "writing requirement" be used to cheat honest contractors out of their honest wage. On the contrary, such use of the "writing requirement" is unethical and immoral. A community association, however, should be aware of its rights and should not be hesitant to fight an unscrupulous contractor who argues for entitlement to "extras" which were not set forth in the written agreement between the parties.