

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0465-13T1

GALE ROSENTHAL,

Plaintiff-Respondent,

v.

TEDDY MACALLAN GROUP, INC., d/b/a  
HOME CARE ASSISTANCE OF RED BANK  
NEW JERSEY, LLC,

Defendant-Appellant,

and

MICHAEL FLIEGLER,

Defendant.

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Submitted February 3, 2015 – Decided April 14, 2015

Before Judges Nugent and Accurso.

On appeal from Superior Court of New Jersey,  
Law Division, Monmouth County, Docket No.  
L-4744-08.

Taylor R. Ward, attorney for appellant.

Respondent has not filed a brief.

PER CURIAM

Defendant Teddy Macallan Group, Inc., doing business as Home Care Assistance, once provided home care aides to the elderly and others in need of such services. Plaintiff Gale

Rosenthal contracted with Macallan Group to provide such services based on an advertisement that represented, among other things, the home aides were bonded and insured. She sued Macallan Group after jewelry and cash were taken from her home and she learned that neither of the home aides was bonded or insured. Macallan Group appeals from the judgment entered on the jury verdict in plaintiff's favor. We affirm.

In October 2008, plaintiff filed a four-count complaint against Macallan Group and its principal, Michael Fliegler, alleging that she contracted with the Macallan Group and that during the time the Macallan Group's home care aides were in her home, jewelry and money were stolen. Plaintiff pled causes of action for consumer fraud, common law fraud, breach of contract, and breach of the covenant of good faith and fair dealing. Defendants answered, discovery ensued, and the case was tried to a jury.

The jury returned a verdict in favor of plaintiff on all counts and awarded her \$23,000 to compensate her for the stolen property. The trial court trebled that amount under the Consumer Fraud Act and added \$35,000 in stipulated attorney's fees plus prejudgment interest and costs. Thereafter, the court denied defendants' motion for a new trial. The court entered a

final judgment against Macallan Group in the amount of \$112,409. Macallan Group appealed.

Plaintiff and her daughter testified at trial. Defendant Fliegler testified on behalf of Macallan Group. According to plaintiff, she read about Macallan Group from a "value pack coupon" that said Macallan Group provided bonded and insured health care givers. Relying on that representation as well as representations from Fliegler and his employees that Macallan aides were bonded and insured, plaintiff entered into a contract with the Macallan Group, who provided aides in late November and December 2007. The theft occurred during that time.

Plaintiff had two roommates whom she had known for more than seven years. One was like a son to her. During the time they had stayed with her, nothing had been stolen from her home.

The first Macallan Group healthcare aide, Marcella Jackson, stayed with plaintiff one day, became ill, was hospitalized, and did not return. The second aide, Vanessa SaJous, stayed with plaintiff through late November and December. The day before Thanksgiving, in anticipation of spending the next day with her niece, plaintiff looked over her jewelry. Nothing was missing at that time. Several weeks later, SaJous was putting away plaintiff's clothing and remarked about \$350 in cash she noticed in a dresser drawer.

On December 30, in anticipation of spending New Year's Eve with her niece, plaintiff looked for her jewelry. It had been stolen. She telephoned the Macallan Group and the police and reported the theft. SaJous was gone. Plaintiff testified that the police were unable to locate her. Fliegler could not recall whether SaJous ever returned to Macallan Group's employment after the theft of plaintiff's jewelry.

Plaintiff identified a list of the jewelry items that were stolen. She never recovered the jewelry or the money taken by the thief. According to her, she lost \$31,000 in jewelry and cash. Plaintiff's daughter confirmed that her mother, the plaintiff, owned the jewelry that was on the list plaintiff identified.

Fliegler, Macallan Group's principal, testified that the Macallan Group had both a surety bond and liability insurance in place during the period when plaintiff's jewelry was stolen. He testified that the State conducted background checks on his employees before they were hired. Macallan Group also contacted three work references for each employee. Although he claimed that his company followed that procedure with respect to the two aides provided to plaintiff, Fliegler implicitly acknowledged on cross-examination that perhaps that was not done with Jackson and SaJous. On Jackson's employment application, someone from

Macallan Group noted that her first referenced employer had died and her second was not home when called. There were no notes documenting any contact with her third employer reference.

Additionally, when Macallan Group first contracted with Jackson and SaJous, they were designated as independent contractors, not employees. Fliegler also admitted that neither Jackson nor SaJous were individually bonded; rather, Macallan Group was bonded. Fliegler insisted that he complied with the State's bonding requirements and the franchise insurance requirements, though he admitted that neither the bonding company nor the insurance company paid plaintiff's loss, and he further acknowledged that the company's insurance policy did not cover theft.

Macallan Group raises two points in support of its argument that it is entitled to a new trial:

I. THE COURT ERRED IN DENYING A MOTION FOR A NEW TRIAL BECAUSE THE JURY CHARGES AND INSTRUCTIONS FAILED TO ADDRESS THE NECESSARY ISSUE OF WHETHER THE DEFENDANT COMMITTED THE THEFT ALLEGED BY PLAINTIFF.

II. THE COURT COMMITTED PLAIN ERROR IN PERMITTING A DAMAGE AWARD BECAUSE PLAINTIFF FAILED TO PROVE THERE WAS A QUANTIFIABLE AND MEASURABLE ASCERTAINABLE LOSS.

Having considered Macallan Group's arguments in light of the record and controlling law, we find them to be without merit.

Macallan first contends it is entitled to a new trial because the jury was not asked in the jury questionnaire whether a Macallan employee stole plaintiff's jewelry, and because the judge did not explicitly instruct the jury that for plaintiff to succeed in her claims, the jury must find that Jackson and SaJous committed the theft. We disagree.

A proper jury instruction provides "'an explanation of applicable legal principles and how they are to be applied in light of the parties' contentions and evidence produced in the case.'" Viscik v. Fowler Equip. Co., 173 N.J. 1, 18 (2002) (quoting Rendine v. Pantzer, 276 N.J. Super. 398, 431 (App. Div. 1994), aff'd as modified, 141 N.J. 292 (1995)). Furthermore, the charge must accurately state the applicable law, outline the jury's function and clearly explain how the jury should apply the legal principles to the facts of the case. Ibid. (citing Velazquez v. Portadin, 163 N.J. 677, 688 (2000)). In determining whether the trial court erred in instructing the jury, a reviewing court must examine the charge as a whole, rather than focus on one portion in isolation. Ibid. (citing Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 137 (3d Cir. 1997), cert. denied, 552 U.S. 1116, 118 S. Ct. 1052, 140 L. Ed 2d 115 (1998)).

In the case before us, Macallan did not object to either the jury verdict questionnaire or the court's instructions on the law. Consequently, the omission alleged by Macallan Group "shall be disregarded . . . unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. There was no unjust result here. Viewed as a whole, the jury charge adequately explained the elements of consumer fraud, including that the jury had to determine whether plaintiff proved by a preponderance of the evidence that she suffered an ascertainable loss as a result of defendant's unconscionable commercial practice.

The New Jersey Consumer Fraud Act (CFA) permits a plaintiff to recover damages if the person has suffered an ascertainable loss as the result of the use or employment by another of an act or practice declared unlawful under the CFA. N.J.S.A. 56:8-19. Here, the court instructed the jury, "[i]f plaintiff has shown . . . an unconscionable commercial practice, you must next decide whether that conduct brought about damage proximately caused to the plaintiff, and if so, how much." The court advised the jury that proximate cause is:

cause that in a natural and a continuous sequence produces the incident and resulting loss, and without which the resulting incident or loss would not have occurred. A person who is in violation of the Consumer Fraud Act is held responsible for any

incident or loss that results in the ordinary course of events from his or its violation.

Furthermore, after instructing the jury on the elements of plaintiff's claims, along with a detailed explanation of proximate cause, the court reminded the jury: "[p]laintiff claims that she lost money and property as a result of the defendants' conduct." Thus, it was clear that plaintiff was claiming as an ascertainable loss the theft of her money and jewelry as a result of theft by Macallan Group's aides. Moreover, based on the parties' theories of the case and proofs, the arguments of counsel, and the instructions of the court, the jury could not possibly have understood anything other than that the ascertainable loss had to result from the theft of property by Macallan's aides. The judge did not explicitly reiterate that plaintiff was claiming that Macallan's aides stole her jewelry and money, and the omission from the jury verdict questionnaire on an explicit finding that the aides stole the jewelry, were not omissions that were clearly capable of producing an unjust result. R. 2:10-2.



Macallan Group's second argument – that there was not a proper valuation of plaintiff's jewelry – is without sufficient merit to warrant discussion in a written opinion.<sup>1</sup>

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION

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<sup>1</sup> Not only did Macallan Group fail to object to plaintiff's valuation proofs at trial, but it has failed to include in its appellate appendix the exhibit admitted into evidence at trial that itemized plaintiff's jewelry. Macallan Group was required to include in its appellate appendix "such . . . parts of the record . . . as are essential to proper consideration of the issues . . . ." R. 2:6-1(a)(1)(I).