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[Gartner v. Rifflard](#)

Superior Court of New Jersey, Appellate Division

October 6, 2014, Argued; April 14, 2015, Decided

DOCKET NO. A-2920-12T4

Reporter

2015 N.J. Super. Unpub. LEXIS 861 *

CHRISTIAN S. GARTNER and BETTY GARTNER, Plaintiffs-Appellants, v. NEIL RIFFLARD, JOANNE RIFFLARD, JAMES VALVANO, ESQ., VALVANO REED AIBARA, LLC, DEFINO REALTY, and PRECISION CONSULTANTS, Defendants-Respondents.

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Prior History: [*1] On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-5431-10.

Core Terms

plaintiffs', damages, trial court, summary judgment, repair, defects, malpractice claim, diminution, extraordinary circumstances, substantial compliance, inspection, deadline, records, reconsideration motion, motion to dismiss, expert report, non-compliance, malpractice, proofs, cases, costs

Counsel: Richard S. Mazawey argued the cause for appellants.

Terry S. Bogorad argued the cause for respondents Neil and Joanne Rifflard.

Diana C. Manning argued the cause for respondents James Valvano, Esq. and Valvano Reed Aibara, LLC (Bressler, Amery & Ross, attorneys; Ms. Manning and Risa D. Rich, on the brief).

Christopher J. Carey argued the cause for respondent DeFino Realty (Graham Curtin, attorneys; Mr. Carey, of counsel; Patrick B. Minter, William D. Tully, Jr., and **Michelle M. O'Brien**, on the brief).

Rocco T. Casale argued the cause for respondent

Precision Consultants (Schwab & Arons, attorneys; Mr. Casale, of counsel and on the brief).

Judges: Before Judges Espinosa, St. John and Rothstadt.

Opinion

PER CURIAM

Plaintiffs Betty and Christian Gartner appeal from multiple orders of the trial court dismissing their complaint against defendants Neil and Joanne Rifflard (Rifflards), James Valvano, Esq. and Valvano Reed Aibara, LLC (Valvano), DeFino Realty (DeFino), and Precision Consultants (Precision). Plaintiffs' claims arise out of their purchase of a home previously owned and occupied by the Rifflards. Plaintiffs [*2] were represented in the transaction by Valvano. DeFino served as the real estate agent and Precision performed the home inspection. Subsequent to closing, plaintiffs allege they discovered numerous defects, from structural damage to code violations, requiring significant repairs. Plaintiffs' complaint asserts various common law theories, violations of the Consumer Fraud Act (CFA), [N.J.S.A. 56:8-1 to -195](#), and professional malpractice against Valvano.

On appeal, plaintiffs argue the trial court erred in: (1) dismissing the malpractice claim against Valvano based upon their failure to timely submit an Affidavit of Merit (AOM) pursuant to [N.J.S.A. 2A:53A-27](#); and (2) granting summary judgment in favor of defendants, the Rifflards, DeFino, and Precision in light of plaintiffs' failure to produce expert testimony on the diminution in the home's value. Upon our review in light of the record and governing law, we conclude the trial court properly dismissed plaintiffs' malpractice claim for non-compliance with the AOM statute and affirm the dismissal of the balance of the complaint on summary

judgment.

I.

The record discloses the following facts and procedural history. On an appeal from dismissal on dispositive motions, [*3] we recite the facts in the light most favorable to plaintiffs, the non-moving parties, giving them the benefit of all reasonably-drawn inferences. See [Green v. Morgan Props., 215 N.J. 431, 451-52, 73 A.3d 478 \(2013\)](#); [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 666 A.2d 146 \(1995\)](#).

In May 2007, plaintiffs contracted with the Riffards to purchase the home located in Ringwood for the asking price of \$729,000. Prior to the purchase, DeFino, which served as dual real estate agent, recommended plaintiffs offer the full asking price and purchase the home before it was listed because, once listed, "it would be off the market within a day." Furthermore, DeFino discouraged plaintiffs from using their previous home inspector and strongly recommended Precision: "If you don't use Precision . . . you don't get this house." Accordingly, plaintiffs hired Precision to conduct the home inspection. DeFino also recommended plaintiffs retain Valvano as their attorney for the purchase.

On May 8, 2007, plaintiffs and the Riffards entered into a standard realtors' real estate contract for the sale of the subject property. Section 20(c) of the agreement states in pertinent part:

The buyer acknowledges that the Property is being sold in an "AS IS" condition and that this Agreement is entered into based upon the knowledge of the Buyer as to the value [*4] of the land and whatever buildings are upon the Property, and not on any representation made by the Seller, the named Broker(s) or their agents as to character or quality. Therefore, the Buyer, at the Buyer's sole cost and expense, is granted the right to have the dwelling and all other aspects of the Property, inspected and evaluated by "qualified inspectors" . . . for the purpose of determining the existence of any physical defects or environmental conditions such as outlined above.

Under section 20(d), the Riffards were obligated to cure "any physical defects[] or environmental conditions" reported by plaintiffs within ten days after the expiration of the attorney review period. Failure on the part of the Riffards to agree within seven days of receipt to cure any such defects entitled plaintiffs to void the contract.

Precision performed its inspection on May 22, 2007.

Plaintiffs were not permitted to accompany the inspector during the inspection or take notes on his findings. Nevertheless, Precision's inspection report noted a number of items in need of repair or further inspection. There is nothing in the record indicating plaintiffs asked the Riffards to cure any of the defects noted in Precision's [*5] report.¹ The closing took place in August 2007.

Plaintiffs brought suit in November 2010 to recover damages arising from the purported concealment of known defects in the home. Plaintiffs allege in the years following the closing, they began to notice serious defects in the structure of the house, as well as problems in the heating, air conditioning, plumbing, insulation, and drainage systems. Plaintiffs further assert they have spent "\$60,000 to \$100,000 for costs incurred for repairs, remediation and reconstruction throughout [the] home," including:

- a. [HVAC] Units = \$35,873.00
- b. Masonry = [approximately] \$20,000
- c. Fuel costs = \$10,901.85
- d. Insulation = \$9,501.25
- e. Electric = \$3,000 + \$50.00/receptacle + \$100.00/recess light
- f. Oil Tank removal: \$2,400.00
- g. Electrical malfunction/failure: \$2,227.99
- h. Plumbing expenses = \$1,703.92
- i. Paint/miscellaneous hardware [*6] = \$1,073.92
- j. Heating supplies/materials: \$117.68
- k. HVAC service: \$95.00

On May 11, 2012, Valvano moved to dismiss the malpractice claim, arguing plaintiffs did not comply with [N.J.S.A. 2A:53A-27](#) by failing to serve an AOM on Valvano within the 120-day maximum statutory period. On June 6, one month after the 120-day statutory deadline expired, plaintiffs served an AOM signed by Steve M. Kalebic, Esq. Concurrently, plaintiffs opposed the motion to dismiss, arguing they substantially complied with the AOM statute because, before Valvano filed his answer, plaintiffs requested documents from Valvano for the purpose of obtaining an AOM. Plaintiffs blamed their non-compliance on Valvano's failure to provide the requested documents. The trial court

¹In Precision's nineteen-page report, numerous issues of concern were raised, including: damaged exterior siding; missing or damaged roof shingles; inoperable attic fan; loose electrical wiring; and problems with HVAC systems. Additionally, the report advised plaintiffs to require copies of all permits for any work done on the home.

granted Valvano's motion to dismiss the malpractice claim. Plaintiffs filed a motion for reconsideration, which the trial court denied.

By the close of discovery, plaintiffs had served expert reports from an electrician, an engineer, a mechanical contractor, and an architect. These reports detailed the flaws in the home, but only plaintiffs' architectural expert estimated the cost of repairing certain defects. Even so, the architect's report did not take into [*7] account depreciation, age, wear and tear, or the present condition of any of the allegedly deficient items or systems. Nor did plaintiffs submit an expert report estimating the value of the property in light of its defects, and they did not have the house appraised.

On November 8, 2012, the remaining defendants moved for dismissal on summary judgment. The Riffards and DeFino argued plaintiffs' proofs were insufficient as to both liability and damages. Precision limited its argument to damages, contending plaintiffs' failure to provide an expert report on the property's diminution in value was fatal to their complaint.

On December 18, 2012, the trial court granted Precision's motion and dismissed plaintiffs' claims against it.² That same day, after oral argument, the court denied the Riffards' and DeFino's motions for summary judgment in part, as to the question of liability. However, the trial court subsequently dismissed plaintiffs' common law and CFA claims against the remaining defendants for failure to prove damages.

Plaintiffs appeal from [*8] the trial court's: (1) July 27, 2012 order denying their motion for reconsideration of the dismissal of their malpractice claim against Valvano; (2) December 18, 2012 order granting Precision's motion for summary judgment; (3) January 10, 2013 order granting partial summary judgment to the Riffards and DeFino as to plaintiffs' common law claims; and (4) January 15, 2013 order granting summary judgment to the Riffards and DeFino as to the CFA claims and dismissing the balance of plaintiffs' complaint.

II.

A. Malpractice claim against Valvano

Plaintiffs first argue the trial court erred by denying their motion to reconsider and by not vacating its June 15,

²Although the order is dated December 7, the trial court dismissed plaintiffs' claims against Precision following oral argument on December 18.

2012 order, which dismissed their professional malpractice claim against Valvano for failure to submit an AOM in compliance with [N.J.S.A. 2A:53A-27](#). Plaintiffs do not dispute that they failed to submit an AOM before the statutory deadline. Rather, they contend because Valvano hindered plaintiffs' efforts to obtain an AOM, and since they ultimately submitted an AOM, albeit untimely, they substantially complied with the AOM statute and their claim should have survived the motion to dismiss. Plaintiffs further argue that the trial court should have [*9] held a case management conference consistent with [Ferreira v. Rancocas Orthopedic Assocs.](#), 178 N.J. 144, 836 A.2d 779 (2003).

We review a trial court's decision on a motion for reconsideration under an abuse of discretion standard. [Fusco v. Bd. of Educ.](#), 349 N.J. Super. 455, 462, 793 A.2d 856 (App. Div.), cert. denied, 174 N.J. 544, 810 A.2d 64 (2002).

"Reconsideration should be used only for those cases . . . [where] either (1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence."

[*Ibid.* (quoting [D'Atria v. D'Atria](#), 242 N.J. Super. 392, 401, 576 A.2d 957 (Ch. Div. 1990)).]

Reconsideration is "'a matter within the sound discretion of the [c]ourt, to be exercised in the interest of justice,'" [Palombi v. Palombi](#), 414 N.J. Super. 274, 288, 997 A.2d 1139 (App. Div. 2010) (quoting [D'Atria, supra](#), 242 N.J. Super. at 401), but is not appropriate as a vehicle to bring the court's attention to evidence that was not presented, although available, in connection with the initial argument. [Fusco, supra](#), 349 N.J. Super. at 463.

[N.J.S.A. 2A:53A-27](#) requires plaintiffs to serve defendants with an AOM in all professional malpractice matters, providing in pertinent part:

In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint [*10] by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment,

practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

In cases where a defendant has improperly impinged upon the plaintiff's ability to provide an AOM through the failure to timely produce necessary records, the plaintiff may provide

a sworn statement in lieu of the affidavit setting forth that: the defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit; a written request therefor along with, if necessary, a signed authorization by the plaintiff for release of the medical records or other records or information requested, has been made by certified mail or personal service; and at least 45 days have elapsed since the defendant received [*11] the request.

[\[N.J.S.A. 2A:53A-28.\]](#)

Absent a showing of good cause, a plaintiff's failure to serve either an AOM or a statement in lieu thereof within the standard sixty-day deadline "shall be deemed a failure to state a cause of action." [N.J.S.A. 2A:53A-29](#). Furthermore, where a plaintiff has been granted an additional period of 60 days, "[i]f defense counsel files a motion to dismiss after the 120-day deadline and before plaintiff has forwarded the affidavit, the plaintiff should expect that the complaint will be dismissed with prejudice provided the doctrines of substantial compliance and extraordinary circumstances do not apply." [Ferreira, supra, 178 N.J. at 154](#).

However, concluding that "[t]he purpose of the [AOM] statute is to weed out frivolous complaints, not to create hidden pitfalls for meritorious ones," [Buck v. Henry, 207 N.J. 377, 383, 25 A.3d 240 \(2011\)](#), the Supreme Court has developed procedural protections intended to avoid the dismissal of meritorious claims on account of the AOM statute. In [Ferreira](#), the Court "propose[d] that an accelerated case management conference be held within ninety days of the service of an answer in all malpractice actions." [Ferreira, supra, 178 N.J. at 154](#). At the "[Ferreira](#) conference," as it has become known,

the court will address all discovery issues, including whether an [AOM] has been served [*12] on

defendant. If an affidavit has been served, defendant will be required to advise the court whether he has any objections to the adequacy of the affidavit. If there is any deficiency in the affidavit, plaintiff will have to the end of the 120-day time period to conform the affidavit to the statutory requirements. If no affidavit has been served, the court will remind the parties of their obligations under the statute and case law.

[\[Id. at 155.\]](#)

Nevertheless, the Court has subsequently emphasized that because "[i]t was never intended, nor could it have been, as an overlay on the statute that would effectively extend the legislatively prescribed filing period," [Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 419, 997 A.2d 982 \(2010\)](#), "the absence of a [Ferreira](#) conference cannot toll the legislatively prescribed time frames." [Id. at 425](#).

The Court has also recognized "two equitable remedies that temper the draconian results of an inflexible application of the statute." [Ferreira, supra, 178 N.J. at 151](#). First, "[a] complaint will not be dismissed if the plaintiff can show that he has substantially complied with the statute." [Ibid](#). Second, "a complaint will be dismissed without prejudice if there are extraordinary circumstances to explain noncompliance." [Ibid](#). The doctrine of substantial compliance requires [*13] a plaintiff to show:

"(1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim; and (5) a reasonable explanation why there was not strict compliance with the statute."

[\[Ibid. \(quoting Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 353, 771 A.2d 1141 \(2000\)\).\]](#)

As to extraordinary circumstances, the Court has clarified that although the full scope of extraordinary circumstances in this context has not yet been defined, "attorney inadvertence is not such a circumstance entitling plaintiff to a remedy of dismissal of a complaint *without* prejudice." [Paragon, supra, 202 N.J. at 423](#) (quoting [Ferreira, supra, 178 N.J. at 152](#)).

Here, plaintiffs' malpractice claim against Valvano as their attorney for the acquisition of the home unquestionably falls within the AOM statute's ambit. [N.J.S.A. 2A:53A-26\(c\)](#). It is also undisputed that

plaintiffs failed to provide Valvano with an AOM or a sworn statement in lieu thereof within the maximum 120-day statutory deadline. Therefore, plaintiffs' sole sanctuary from dismissal for statutory non-compliance rests in the additional procedural protections enunciated by the Supreme Court. We conclude the correctness of the trial court's decisions granting [*14] Valvano's motion to dismiss and subsequent denial of reconsideration was unaffected by these additional protections.

First, the absence of a *Ferreira* conference does nothing to change the fact plaintiffs failed to comply with the AOM statute. Consequently, plaintiffs' reliance thereon to argue dismissal of their malpractice claim was improperly granted is misplaced. As the Court unequivocally clarified in *Paragon*, "lawyers and litigants should understand that, going forward, reliance on the scheduling of a *Ferreira* conference to avoid the strictures of the [AOM] statute is entirely unwarranted and will not serve to toll the statutory time frames." *Paragon, supra, 202 N.J. at 426*. In fact, it was the then-existing "lack of uniformity in [New Jersey] courts" as to *Ferreira*'s proper interaction with the AOM statute, which the Court in *Paragon* addressed as the basis for "counsel[ed] lenience in [that] case." *Id. at 425*. In *Paragon*'s wake, no such confusion exists and plaintiffs' argument that the lack of a *Ferreira* conference requires reversal is unavailing.

Second, plaintiffs fail to establish substantial compliance, which requires, among other things, "a reasonable explanation why there was not strict compliance with the statute." [*15] *Ferreira, supra, 178 N.J. at 151* (quoting *Galik, supra, 167 N.J. at 353*). Plaintiffs point to Valvano's irresponsiveness to their request for documents as the explanation for failing to timely procure an AOM. However, in doing so, plaintiffs mistakenly focus solely on *N.J.S.A. 2A:53A-27*, thereby neglecting the clearly defined statutory remedy provided in *N.J.S.A. 2A:53A-28. Section 28* accounts for the precise scenario plaintiffs allege here, where a defendant improperly frustrates a plaintiff's ability to procure an AOM through foot-dragging or outright heedlessness, by permitting the serving of "a sworn statement in lieu of an [AOM] setting forth" the defendant's failure to provide the pertinent requested records in a timely manner. *N.J.S.A. 2A:53A-28*. Plaintiffs offer no explanation for their failure to file a sworn statement in lieu of an AOM and, consequently, cannot argue substantial compliance with the AOM statute. See *Ferreira, supra, 178 N.J. at 151*.

Similarly, although the parameters for showing extraordinary circumstances justifying leniency despite statutory non-compliance are not as well-defined, in light of plaintiffs' inability to explain their failure to conform to the AOM statute, both *N.J.S.A. 2A:53A-27* and *-28*, their argument regarding extraordinary circumstances is unpersuasive. See *Paragon, supra, 202 N.J. at 423* ("[A]ttorney inadvertence is [*16] not such a circumstance entitling plaintiff to a remedy of dismissal of a complaint *without* prejudice." (quoting *Ferreira, supra, 178 N.J. at 152*)); *Palanque v. Lambert-Woolley, 168 N.J. 398, 405, 774 A.2d 501 (2001)* ("[C]arelessness, lack of circumspection, or lack of diligence on the part of counsel are not extraordinary circumstances which will excuse missing a filing deadline." (quoting *Burns v. Belafsky, 326 N.J. Super. 462, 470, 741 A.2d 649 (1999)*)).

In light of the foregoing, the trial court was neither palpably incorrect nor did it obviously fail to consider probative and competent evidence in rendering its initial decision dismissing plaintiffs' malpractice claim against Valvano. See *Fusco, supra, 349 N.J. Super. at 462*. We therefore conclude the court did not abuse its discretion in denying plaintiffs' motion for reconsideration. See *Palombi, supra, 414 N.J. Super. at 288*.

B. Plaintiffs' common law and CFA claims against the Riffards, DeFino, and Precision

Plaintiffs next argue the trial court erred in granting summary judgment to the Riffards, DeFino, and Precision on their common law and CFA claims, challenging the court's conclusion they failed to provide expert testimony on damages sufficient to present their case to a jury.³ Plaintiffs contend their own testimony adequately establishes the home's diminution in value. Alternatively, plaintiffs argue they have provided an expert report quantifying their repair costs, [*17] which is sufficient to prove damages under both common law doctrine and the CFA. We conclude plaintiffs' proofs regarding damages are deficient under any potentially applicable standard and therefore affirm the dismissal of the remaining claims.⁴

³ As Precision notes in its brief, plaintiffs never asserted a CFA claim against it. However, in the interest of clarity and brevity, we address all remaining claims collectively.

⁴ Precision moved for summary judgment solely on the issue of damages. The Riffards and DeFino each argue in their briefs that plaintiffs' proofs, in addition to their insufficiency regarding damages, fail to demonstrate a genuine dispute of material fact as to liability. We need not consider these

We review summary judgment orders de novo, applying the same standard that governs the trial court. [Davis v. Brickman Landscaping, Ltd.](#), 219 N.J. 395, 405, 98 A.3d 1173 (2014). Pursuant to [Rule 4:46-2\(c\)](#), we first consider whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." [Town of Kearny v. Brandt](#), 214 N.J. 76, 91, 67 A.3d 601 (2013) (quoting [*18] [Brill, supra](#), 142 N.J. at 540). If no genuinely disputed material fact exists, we must "then decide whether the trial court's ruling on the law was correct," [W.J.A. v. D.A.](#), 210 N.J. 229, 237-38, 43 A.3d 1148 (2012) (citation and internal quotation marks omitted), a review which is not deferential.

As a general proposition, the purpose of compensatory damages is to compensate the plaintiff for his or her actual loss. [Nappe v. Anshelewitz, Barr, Ansell & Bonello](#), 97 N.J. 37, 48, 477 A.2d 1224 (1984); see also [525 Main St. Corp. v. Eagle Roofing Co.](#), 34 N.J. 251, 254, 168 A.2d 33 (1961) ("Compensatory damages are designed 'to put the injured party in as good a position as he would have had if performance had been rendered as promised.'" (quoting 5 [Corbin on Contracts](#) § 992 at 5 (1951))). Regarding proof, "[i]t is well-settled that the 'law abhors damages based on mere speculation.'" [Mosley v. Femina Fashions, Inc.](#), 356 N.J. Super. 118, 128, 811 A.2d 910 (App. Div. 2002) (quoting [Caldwell v. Haynes](#), 136 N.J. 422, 442, 643 A.2d 564 (1994)), *certif. denied*, 176 N.J. 279, 822 A.2d 609 (2003). However, a plaintiff is only required to "prove damages with such certainty as the nature of the case may permit, laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate." [Lane v. Oil Delivery](#), 216 N.J. Super. 413, 420, 524 A.2d 405 (App. Div. 1987).

Plaintiffs assert a variety of contract, tort, and statutory claims against the three remaining defendants. This case presents the question of the appropriate measure of damages for plaintiffs' divergent claims and, further, what showing of proof is required as to each measure of damages to sustain those claims. [*19] See [Mosteller v. Naiman](#), 416 N.J. Super. 632, 638, 7 A.3d 803 (App. Div. 2010) ("The appropriate measure of damages for injury done to land is a complex subject' and depends 'upon the evidence in the particular case.'" (quoting [Velop, Inc. v. Kaplan](#), 301 N.J. Super. 32, 64, 693 A.2d

[917 \(App. Div.\)](#), *certif. granted*, 152 N.J. 9, 702 A.2d 348 (1997), *appeal dismissed*, 153 N.J. 45, 707 A.2d 149 (1998)); [Correa v. Maggiore](#), 196 N.J. Super. 273, 284, 482 A.2d 192 (App. Div. 1984) ("The appropriate measure for damages in a fraud or concealment case is a perplexing problem and has been the source of much litigation and concern.").

For common law claims such as these, courts usually employ the diminution in value measure, which consists of "the difference in the value of [the] property immediately before and immediately after the injury to it, that [is], the amount [the] property has diminished in value as a result of the injury." [Mosteller, supra](#), 416 N.J. Super. at 638 (second alteration in original) (quoting [Velop, supra](#), 301 N.J. Super. at 64); see also [Correa, supra](#), 196 N.J. Super. at 284 (framing the choice in fraud or misrepresentation cases as one between the "out-of-pocket" rule measuring "the difference between the price paid and the actual value of the property acquired," and the "benefit-of-the-bargain" standard, which "allows recovery for the difference between the price paid and the value of the property had the representations been true"); [Perth Amboy Iron Works, Inc. v. Am. Home Assurance Co.](#), 226 N.J. Super. 200, 219, 543 A.2d 1020 (App. Div. 1988) ("[D]iminution in value is the standard measure of damages in breach of warranty cases."), *aff'd*, 118 N.J. 249, 571 A.2d 294 (1990).

Nevertheless, we have recognized that [*20] reasonable repair costs may be appropriate in certain circumstances where "[r]esorting solely to the diminished market value standard would deny [the] plaintiff adequate compensation for [a] defendant's actions even though [the] plaintiff suffered harm by those actions." [St. Louis, LLC v. Final Touch Glass & Mirror, Inc.](#), 386 N.J. Super. 177, 193, 899 A.2d 1018 (App. Div. 2006). In *St. Louis*, where the plaintiff homeowner sued a contractor for defective construction, we stated: "Whether the cost of repair or diminution in value is the measure of damages 'rests in good sense rather than in a mechanical application of a single formula.'" *Id.* at 188 (quoting [525 Main St., supra](#), 34 N.J. at 255).

The issue is further complicated when accounting for the CFA, which establishes a private cause of action for "[a]ny person who suffers any ascertainable loss of moneys or property . . . as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act." [N.J.S.A. 56:8-19](#). In attempting to clarify this standard, the Supreme

contentions in light of our conclusion that the plaintiffs' proof of damages was insufficient.

Court has concluded that, for "cases involving breach of contract or misrepresentation [under the CFA], either out-of-pocket loss or a demonstration of loss in value will suffice to meet the ascertainable loss hurdle." [Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248, 872 A.2d 783 \(2005\)](#). But see [Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 10, 860 A.2d 435 \(2004\)](#) ("[W]hen a merchant violates the [CFA] by delivering defective goods and [*21] then refusing to provide conforming goods, a customer's ascertainable loss is the replacement value of those goods.").

However, we need not decide which measure of damages applies to resolve the instant dispute. Under any of the measures discussed above, plaintiffs' proofs fall short of the showing required to survive summary judgment.

Plaintiffs concede they have not produced any expert report concerning the diminution in value of their property or a home appraisal. Contrary to plaintiffs' assertion, they are not capable of establishing diminution in value through their own testimony, as we have held expert testimony to be required where, "[w]ithout [such] testimony, a jury simply does not have the knowledge, training, or experience" to consider all the relevant factors to arrive at a proper award of damages. [Kelly v. Berlin, 300 N.J. Super. 256, 268-70, 692 A.2d 552 \(App. Div. 1997\)](#); cf. [Jiries v. BP Oil, 294 N.J. Super. 225, 230-31, 682 A.2d 1241 \(Law Div. 1996\)](#) (holding expert testimony required to prove damages for CFA claim alleging deficient repairs). Our reasoning in [Kelly](#) is readily applicable here, since a jury is ill-qualified to determine the pecuniary worth of plaintiffs' home without the aid of an expert who can testify based upon knowledge and experience regarding the appraisal value. See [Thiedemann, supra, 183 N.J. at 249](#) ("We can envision the possibility that [*22] an expert may be able to speak to a loss in value of real or personal property due to market conditions, with sufficient precision to withstand a motion for summary judgment."). As such, plaintiffs did not show diminution in value damages. See [Mosteller, supra, 416 N.J. Super. at 638](#); [Perth Amboy Iron Works, supra, 226 N.J. Super. at 219](#); [Correa, supra, 196 N.J. Super. at 284](#).

Moreover, plaintiffs' proofs regarding their repair costs are similarly insufficient. Their architectural expert's report does provide an estimation of the reasonable cost of repairing the numerous asserted defects in the home. However, the report does not account for "depreciation, age, wear and tear, [and present] condition," which are all relevant to damages, since plaintiffs are not entitled

to the full cost of repair or replacement of the defective portions of the property. [Lane, supra, 216 N.J. Super. at 420](#); see also [Correa, supra, 196 N.J. Super. at 285-86](#) ("It would be anomalous to compel defendant to provide plaintiff with what essentially amounts to a totally refurbished home, which would be a result far exceeding what is necessary to make plaintiff whole.").

Although "[p]roof of damages need not be done with exactitude," [Lane, supra, 216 N.J. Super. at 420](#), we conclude plaintiffs' proofs were wanting and failed to establish a genuine issue of material fact as to damages. See [Brandt, supra, 214 N.J. at 91](#). Therefore, the trial court properly granted summary judgment to the [*23] remaining defendants and dismissed the complaint.

Affirmed.

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