

Safe Harbor Provision Is a Beacon for Realtors Seeking Exemption From Consumer Fraud Act Actions

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The New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 – 56:8-204, et al. (CFA) is often pled as a cause of action in suits filed against realtors concerning residential transactions. A defendant may be found liable under the CFA for an affirmative act or misrepresentation. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 605 (1997). The plaintiff must show a misrepresentation, material to the transaction, made to induce a purchase of real estate. Importantly, the statute includes a safe harbor provision applicable to realtors that specifies:

Notwithstanding any provision of P.L.1960, c.39 (C.56:8-1 et seq.) to the contrary, there shall be no right of recovery of punitive damages, attorney fees, or both, under section 7 of P.L.1971, c.247 (C.56:8-19), against a real estate broker, broker-salesperson or salesperson licensed under R.S. 45:15-1 et seq. for the communication of any false, misleading or deceptive information provided to the real estate broker, broker-salesperson or salesperson, by or on behalf of the seller of real estate located in New Jersey, if the real estate broker, broker-salesperson or salesperson demonstrates that he:

a. Had no actual knowledge of the false, misleading or deceptive character of the information; and

b. Made a reasonable and diligent inquiry to ascertain whether the information is of a false, misleading or deceptive character. For purposes of this section, communications by a real estate broker, broker-salesperson or salesperson which shall be deemed to satisfy the requirements of a "reasonable and diligent inquiry" include, but shall not be limited to, communications which disclose information:

(1) provided in a report or upon a representation by a person, licensed or certified by the State of New Jersey, including, but not limited to, an appraiser, home inspector, plumber or electrical contractor, or an unlicensed home inspector until December 30, 2005, of a particular physical condition pertaining to the real estate derived from inspection of the real estate by that person;

(2) provided in a report or upon a representation by any governmental official or employee, if the particular information of a physical condition is likely to be within the knowledge of that governmental official or employee; or

(3) that the real estate broker, broker-salesperson or salesperson obtained from the seller in a property condition disclosure statement, which form shall comply with regulations promulgated by the director in consultation with the New Jersey Real Estate Commission, provided that the real estate broker, broker-salesperson or salesperson informed the buyer that the seller is the source of the information and that, prior to making that communication to the buyer, the real estate broker, broker-salesperson or salesperson visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller.

The statute provides specific sources of information that may be obtained by a realtor in connection with a transaction that could provide an exemption from the Consumer Fraud Law, which carries penalties of treble damages and an award of attorneys' fees. These documents include an appraisal, a home inspection report, and/or reports from a plumber or electrical contractor. Section 3 discusses the circumstances that would trigger the safe harbor provision when a property condition disclosure statement is obtained. If a realtor is found exempt from the Consumer Fraud Law under the statute, this would limit any potential claim to one of negligence which would not provide for the award of attorneys' fees and/or treble damages.

This statute has only been interpreted in New Jersey State Courts in a few unpublished opinions. In the Appellate Division's recent decision in *DiRenzo v. Katchen*, 2017 N.J. Super. Unpub. LEXIS 1947, the plaintiff agreed to purchase his nephew's home with a mortgage in order to help his nephew with some financial difficulty. His nephew was to receive \$60,000 from the closing, make payments on the loan, and retain use of the property until he could buy it back. Subsequent to the closing, the nephew received substantially less from the closing. The trial court held that title producers were within the definition of real estate brokers and, thus, were included in the exception set forth at N.J.S.A. 56:8-19.1. The Appellate Division found that there was no evidence of any "knowing admission" committed by the title producer, Brooks, and affirmed the summary judgment granted to Brooks on the CFA claims.

Additionally, the Appellate Division in *Kieffer v. DeMeo*, 2016 N.J. Super. Unpub. LEXIS 634 addressed a suit that resulted from the sale of a condominium in which issues arose concerning the scope of information contained in a sellers' disclosure statement. There were allegations regarding a conversation between the seller and his realtor concerning information about the property that should have been disclosed in addition to that of the sellers' disclosure statement. This prevented summary judgment for the seller's realtor under the safe harbor provision.

The Appellate Division in *Issac v. Jeneby*, 2006 N.J. Super Unpub. LEXIS 2971 stated, "A real estate sales person may claim exemption from an award of treble damages and attorneys' fees under the CFA pursuant to N.J.S.A. 56:8-19.1 if that person obtains a disclosure statement."

The statute has also been addressed in the United States District Court for the District of New Jersey in the matter of *Wolfe v. Noble Learning Cmtys., Inc.*, 2006 U.S. Dist. LEXIS 93055 in which Judge Simandle acknowledged the safe harbor statute identified a class of defendants against whom punitive damages are not available."

The safe harbor provision discussed above shows the importance of obtaining as much documentation concerning the condition and value of the property as possible from sources such as appraisers and home inspectors, as well as from the seller, through the seller disclosure statement. Having these documents in the transaction file will increase the chances of the applicability of the safe harbor provision to a real estate professional. This will also provide a defense to an award of attorneys' fees and treble damages in connection with the CFA.

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