NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0355-12T1

AIRE ENTERPRISES, INC.,

Plaintiff-Respondent/
Cross-Appellant,

v.

WARREN COUNTY,

Defendant-Appellant/
Cross-Respondent.

Argued October 7, 2014 – Decided October 27, 2014

Before Judges Koblitz, Haas and Higbee.

On appeal from Superior Court of New Jersey, Law Division, Warren County, Docket No. L-0151-09.

Joseph J. Bell, County Counsel, argued the cause for appellant/cross-respondent (Joseph J. Bell, Warren County Counsel, attorney; Joseph V. Bell, IV, Assistant County Counsel, and Michael J. Edwards, Assistant County Counsel, on the brief).

John G. Webb, III, argued the cause for respondent/cross-appellant.

PER CURIAM

Defendant Warren County entered into a contract with plaintiff-contractor Aire Enterprises, Inc. to renovate a county building. After Aire finished the more than $300,000 project and sought final payment, the County failed to make the last

payment without providing its reasons in a written notice. Aire sued defendant under the Prompt Payment Act (PPA), N.J.S.A. 2A:30A-1 to -2, which requires an owner either to fully pay a contractor within a specified timeframe or give written notice why payment was withheld. Aire filed a concurrent claim for breach of contract. The County counterclaimed for breach of contract, alleging that Aire either supplied defective carpet tiles or defectively installed them. The County also sought damages under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -195, and regulations pertaining to Home Improvement Practices, N.J.A.C. 13:45A-16.1 to -.2.

After a bench trial, Judge Amy C. O'Connor ordered the County to pay Aire the $12,250 balance due plus interest. She found that Aire breached the contract because certain carpet tiles did not adhere to the floor and awarded the County damages of $150. In a subsequent decision, the judge also awarded reduced counsel fees of approximately $44,000 to Aire under the fee-shifting provision of the PPA. The County appealed the judgment and Aire cross-appealed. We affirm in all respects, based substantially on Judge O'Connor's thorough written opinions of December 30, 2011 and August 13, 2012.

Aire commenced the project in the summer of 2007. It installed approximately 400 Milliken, Inc. carpet tiles

purchased from Home Depot[1] at the end of the project, in January 2008. Between thirty and fifty tiles began lifting up from the floor, which Aire remedied.

On February 13, 2008, Aire submitted an Application for Payment to the County. The architect signed the Application for Payment on February 28, 2013, recommending payment and certifying that "all work items and materials specified for payment have been completed satisfactorily to the best of my knowledge." A few days later the keys to the renovated building were given to the County. About twenty carpet tiles began to lift again, and representatives of the two parties met at the site to review the carpet. The County wanted Aire to bring a Milliken representative to the site to review the carpet tiles. In April, frustrated that no representative had yet visited the site, the County purchased entirely new carpet tile at the cost of $6,792. County employees installed the new carpet. The County did not pay the $12,250 remaining balance on the contract, nor give written reasons for failing to do so.

In pertinent part the PPA states:

> a. If a prime contractor has performed in accordance with the provisions of a contract with the owner and the billing for the work has been approved and certified by the owner

[1] The carpet was purchased from Home Depot for $3,436.56, although the County was billed only $3,000.

> or the owner's authorized approving agent, the owner shall pay the amount due to the prime contractor for each periodic payment, final payment or retainage monies not more than 30 calendar days after the billing date, which for a periodic billing, shall be the periodic billing date specified in the contract. The billing shall be deemed approved and certified 20 days after the owner receives it unless the owner provides, before the end of the 20-day period, a written statement of the amount withheld and the reason for withholding payment, except that in the case of a public or governmental entity that requires the entity's governing body to vote on authorizations for each periodic payment, final payment or retainage monies, the amount due may be approved and certified at the next scheduled public meeting of the entity's governing body, and paid during the entity's subsequent payment cycle, provided this exception has been defined in the bid specifications and contract documents.
>
> [N.J.S.A. 2A:30A-2(a).]

Paragraph (b) makes similar provisions for the payment of subcontractors by a prime contractor. N.J.S.A. 2A:30A-2(b). The next section sets forth the consequences for failure to comply:

> c. If a payment due pursuant to the provisions of this section is not made in a timely manner, the delinquent party shall be liable for the amount of money owed under the contract, plus interest at a rate equal to the prime rate plus 1%. Interest on amounts due pursuant to this section shall be paid to the prime contractor, subcontractor or subsubcontractor for the period beginning on the day after the required payment date and ending on the day

> on which the check for payment has been drawn. . . .
>
> [N.J.S.A. 2A:30A-2(c).]

Pursuant to another provision of the PPA, N.J.S.A. 2A:30A-2(f), a "prevailing party shall be awarded reasonable costs and attorney fees." Further, the PPA provides that its rights and remedies are "in addition to other remedies provided pursuant to any other provision of State law" and "[t]o the extent that the provisions of this section provide greater rights, remedies or protections . . . the provisions of this section shall supersede those other provisions." N.J.S.A. 2A:30A-2(e)(1).

Judge O'Connor found that the County did not comply with the PPA. It was undisputed that Aire gave the County the final bill on February 13, 2008, but the County never gave Aire a written statement within twenty days stating why it would not pay the bill. Judge O'Connor recognized the County's argument that because Aire did not perform in accordance with the contract, the County's obligation to pay Aire was never triggered. In her written decision of December 30, 2011, Judge O'Connor opined:

> While the statute gives the owner the power to withhold a payment if work has not been done in accordance with a contract, to preserve that right, the owner must advise the contractor of the amount it is withholding and reason why payment is being withheld, and must do so within a specified

> time period. Otherwise, the owner has to pay the bill within 30 days of the billing date.

We need not decide whether in every situation the failure to respond within twenty days or pay within thirty days should trigger the PPA remedies. If the contractor had not performed "in accordance with the provisions of a contract," N.J.S.A. 2A:30A-2(a), in a significant way, an argument could certainly be made that the remedies of the PPA should not be applied. We view the problem with the carpet tiles popping up as de minimis[2], the type of lingering issue that happens frequently in renovation projects, and not a significant breach of the contract. The architect was well aware of the original carpet issue before he signed off on the Application for Payment and, as Judge O'Connor noted, the architect never nullified his certificate for payment "despite discovering in March that new tiles had lifted." In addition, Aire was obligated to provide a

[2] The "time-honored doctrine—de minimis non curat lex, or that '[t]he law does not concern itself with trifles[,]' Black's Law Dictionary 496 (9th. ed. 2009)—is comfortably part of New Jersey's jurisprudence." Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 607 (2010). "The doctrine . . . 'has been considered to apply where no damage is implied by law from the wrong, and only trifling or immaterial damage results therefrom.'" Paternoster v. Shuster, 296 N.J. Super. 544, 559 (App. Div. 1997) (quoting Schlichtman v. New Jersey Highway Auth., 243 N.J. Super. 464, 472 (Law Div. 1990)).

maintenance bond with a one-year warranty at the completion of the project.

The County's argument that Judge O'Connor's ruling after trial was inconsistent with her denial of summary judgment to Aire, prior to the end of discovery, is without merit. Interlocutory orders are always subject to revision in the interests of justice. Lombardi v. Masso, 207 N.J. 517, 536 (2011). The denial of summary judgment does not ordinarily survive as an issue post-trial. "It is firmly established that controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed." Cinque v. Dep't of Corrs., 261 N.J. Super. 242, 243 (App. Div. 1993).

The County also argues that Judge O'Connor erred in not finding that Aire violated the CFA. "Consumer fraud violations are divided broadly 'into three . . . categories: affirmative acts, knowing omissions, and regulatory violations.'' Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., 192 N.J. 372, 389 (2007) (quoting Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994). Judge O'Connor noted that the Home Improvement Practices regulations, N.J.A.C. 13:45A-16.1 to -.2, cited in the County's cross-complaint did not apply and the County did not allege that Aire violated any other regulations. Judge O'Connor dismissed the CFA claim, finding that the County

did not demonstrate that Aire had made an affirmative misrepresentation or failed to disclose a material fact. This issue does not merit further discussion, nor does the County's disagreement with some of the judge's discretionary evidentiary rulings. R. 2:11-3(e)(1)(E).

The County argues also that the damages award was insufficient. Judge O'Connor found it was unreasonable for the County to have removed all of the carpet when only twenty tiles were lifting, because there was no evidence that the other tiles would lift, as the thirty to fifty tiles that plaintiff had fixed earlier had not lifted again. The judge awarded as damages the cost of twenty Milliken tiles, $150, and did not make any award for the labor of defendant's employees in laying the new carpet. Judge O'Connor made these findings after listening to testimony and reviewing the evidence in a lengthy, thoughtful opinion. We defer, as we must, to her factual findings as we find them amply supported by the relevant, credible evidence. See Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974).

Aire argues in its cross-appeal that Judge O'Connor did not award sufficient counsel fees. Judge O'Connor wrote a separate detailed opinion delineating her reasons for setting counsel fees at $44,056. Judge O'Connor painstakingly reviewed the

legal bills and ordered the County to pay only the reasonable fees incurred in connection with the PPA claim. She found that Aire accumulated $180,896 in costs and counsel fees over the $12,250 dispute.

The trial court's award of counsel fees "will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). Under state fee-shifting statutes, "the first step in the fee-setting process is to determine the 'lodestar': the number of hours reasonably expended multiplied by a reasonable hourly rate." Id. at 334-35. This is the "most significant element in the award of a reasonable fee because that function requires the trial court to evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application." Id. at 335. The Supreme Court cautioned that trial courts "should not accept passively the submissions of counsel to support the lodestar amount[.]" Ibid. "'It does not follow that the amount of time actually expended is the amount of time reasonably expended.'" Ibid. (quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980). Hours are not considered reasonably expended if they are "excessive, redundant, or otherwise unnecessary" or are spent on "claims on

which the party did not succeed" or "that were distinct from claims on which the party did succeed." Rendine, supra, 141 N.J. at 322 (internal quotation marks and citations omitted). Bearing in mind the judge's discretion in awarding counsel fees, we affirm based on Judge O'Connor's well-reasoned opinion of August 13, 2012.

Affirmed.