

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 469-8-18 Rdcv

Richard Kelton,
Lori Kelton,
Plaintiffs

v.

Criterium Lalancette Engineers,
Daniel Moe,
Robyn Moe,
Defendants

DECISION ON MOTION TO DISMISS COUNT FOUR

In November 2015, Plaintiffs Richard and Lori Kelton purchased a home in Castleton from Defendants Daniel and Robyn Moe. Soon after moving in, the Keltons discovered defects in the roof, which they repaired at great cost. They then filed this suit, alleging a variety of theories against the Moes and others. The Moes now move to dismiss the consumer fraud claims (Count Four) against them. For the reasons set forth below, the court grants the motion.

Count Four of the Complaint arises under Vermont's Consumer Fraud Act (CFA), which prohibits "[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 9 V.S.A. § 2453(a). Key to the decision here is the meaning of "in commerce." Defendants contend that a residential real estate transaction between private parties is not "in commerce," while Plaintiffs contend that the frequency with which these transactions occur and the policy goal of maintaining their integrity weigh in favor of holding such real estate transactions to be "in commerce" for purposes of the CFA.

In *Foti Fuels, Inc. v. Kurrle Corp.*, the Vermont Supreme Court defined "in commerce" as it applies to the CFA. 2013 VT 111, 194 Vt. 524. The Court held that "the 'in commerce' requirement narrows the CFA's application to prohibit only unfair or deceptive acts or practices that occur in the consumer marketplace." *Id.* ¶ 21. The Court continued: "To be considered 'in commerce,' the transaction must take place 'in the context of [an] ongoing business in which the defendant holds himself out to the public.'" *Id.* (citation omitted). Thus, "transactions resulting not from 'the conduct of any trade or business' but rather from 'private negotiations between two individual parties who have countervailing rights and liabilities established under common law

principles of contract, tort[,] and property law’ remain beyond the purview of the statute.” *Id.* (citation omitted).

This holding is dispositive here. The Keltons have not alleged—nor, on the facts alleged, does it appear that they could have alleged, consistent with V.R.C.P. 11—that the Moes were engaged in an ongoing business. Rather, even viewing the allegations in the light most favorable to the Keltons, the most that could fairly be said is that the sale here arose from “private negotiations between two individual parties who have countervailing rights and liabilities established under common law principles of contract, tort[,] and property law.” *Id.* Indeed, in other counts, the Keltons have alleged violations of these common law principles.

In their motion papers, the Keltons ignore the “in commerce” requirement of the statute; rather, they appear to dismiss it altogether with the blithe observation that “ ‘[c]ommerce’ is not defined anywhere in the statute, but the statute proceeds to unequivocally include real estate transactions.” Pls.’ Mem. ff Law in Opp’n 6. They then place principal reliance on two real estate cases, in which the liability of the private seller was not at issue; the focus instead was on liability of real estate brokers under the CFA. *Id.* at 7–8 (citing *PH West Dover Prop. LLC v. Lalancette Eng’rs*, 2015 VT 48, 199 Vt. 1, and *Carter v. Gugliuzzi*, 168 Vt. 48 (1998)). They make no attempt to address the *Foti* Court’s dispositive teachings; instead, they argue that *Foti* is “easily distinguishable” as arising out of a “sophisticated commercial transaction.” *Id.* at 10–11.

These efforts miss the mark. First, Plaintiffs’ cases do not address the liability of a private seller of real estate. Indeed, in the *Carter* case, which Plaintiffs quote at length, in holding that a real estate broker could be liable as a “seller” involved “in commerce” within the meaning of the CFA, the Court noted the distinction between a “private vendor” and a “realtor engaged in the business of selling homes.” 168 Vt. at 54 (discussing *Lantner v. Carson*, 373 N.E.2d 973 (Mass. 1978)).

More fundamentally, while the *Foti* case did not involve a real estate transaction, to dismiss it on that ground betrays a most superficial reading of the case. Indeed, the citations omitted from the *Foti* Court’s central discussion, quoted above, were to a Georgia case, *Zeeman v. Black*, 273 S.E.2d 910 (Ga. Ct. App. 1980). There, the court, in the very sections on which the *Foti* Court relied, determined that a private vendor of residential real estate could not be liable under the Georgia Fair Business Practices Act (Georgia’s CFA analog) for misrepresentations made in the course of the sale. *Id.* at 915.

Having been endorsed by the *Foti* Court, the Georgia court’s reasoning is particularly instructive here:

Based upon our interpretation of the underlying purpose and intent of the FBPA we construe the language . . . , “in the conduct of any trade or commerce,” as requiring that the alleged wrongful act in a “consumer transaction” occur in the context of the ongoing business in which the defendant holds himself out to the public. Otherwise, the duty the breach of which is being sued upon would be one owed by the defendant not to the consuming public generally but to the individual “consumer” only. There is insufficient public interest in a single instance in which an owner undertakes to sell his own property to invoke the FBPA. Any misrepresentation made by the seller in the context of selling his own home is not made by the homeowner “in the conduct of any trade or business” but rather in the course of private negotiations between two individual parties who have countervailing rights and liabilities established under common law principles of contract, tort[,] and property law. A misrepresentation made by a homeowner selling his own house is not likely to be a recurring “consumer” threat and, therefore, has no potential “impact” on the general consuming public. Thus when viewed in terms of the parties and the “impact,” the sale of a home by the private homeowner is an isolated act by the individual and not a transaction by the homeowner in the conduct of trade or business. The objective of the FBPA is the elimination of deceptive acts and practices in the “consumer marketplace.” For there to be a “consumer marketplace” the underlying transaction must involve a businessman as well as a consumer.

Id. (internal citations omitted).

The Supreme Court’s favorable adoption of the *Zeeman* analysis compels the conclusion that far from being distinguishable, *Foti* is dispositive here. The Keltons have not alleged that the Moes are in the business of selling homes, or that they have held themselves out to the public as doing so. Nor, indulging all inferences in their favor, does it appear that they could credibly so allege. *See Mahoney v. Tara, LLC*, 2011 VT 3, ¶ 7, 189 Vt. 557 (mem.) (on motion to dismiss, court must “assume that all factual allegations pleaded in the complaint are true, accept as true all reasonable inferences that may be derived from plaintiff’s pleadings, and assume that all contravening assertions in defendant’s pleadings are false”). Rather, at least as regards the Moes, the negotiations and sale appear in every way to be a private transaction between two individual parties. Notably, even in their motion papers, the Keltons do not contend otherwise. Nor is there a suggestion of bargaining or knowledge imbalance as would exist between an experienced commercial seller and a one-time buyer. Even if the Moes did engage in unfair or deceptive practices, this isolated sale has little impact on the consumer marketplace. *Cf. Foti*, 2013 VT 111, ¶ 21 (“in commerce” requirement “narrows the CFA’s application to prohibit only unfair or deceptive acts that occur in the consumer marketplace”).

ORDER

The Supreme Court has made clear that the CFA applies only to acts “in commerce”; it cannot be read to expose the Moes to punitive liability for an isolated private transaction. Rather,

the Keltons have an adequate remedy under breach of contract and other tort theories, which appear to have been amply pleaded, and which the Moes have not (yet) challenged. The court leaves them to those theories. The Motion to Dismiss is **granted**. Count Four of the Complaint is **dismissed**.

Electronically signed on January 07, 2019 at 04:49 PM pursuant to V.R.E.F. 7(d).

A handwritten signature in black ink, appearing to read 'S. Hoar, Jr.', written over a horizontal line.

Samuel Hoar, Jr.
Superior Court Judge