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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4926-04T2

SAIDA JORGE, on behalf of herself
and others similarly situated,

Plaintiff-Respondent,

v.

TOYOTA MOTOR INSURANCE SERVICES,
INC.,

Defendant-Appellant.

Argued April 26, 2006 - Decided August 1, 2006

Before Judges Conley, Weissbard, and
Sapp-Peterson.

On appeal from the Superior Court of New
Jersey, Law Division, Passaic County,
L-5745-02.

Michael R. McDonald argued the cause for
appellant (Gibbons, Del Deo, Dolan,
Griffinger & Vecchione, attorneys; Mr.
McDonald and Christine A. Amalfe, on the
brief).

Madeline L. Houston argued the cause for
respondent (Houston & Totaro, attorneys; Ms.
Houston and Melissa J. Totaro, on the
brief).

PER CURIAM

Defendant Toyota Motor Insurance Services (TMIS), Inc., appeals the entry of two orders by the trial court on November 2, 2005, denying defendant's motion for summary judgment and certifying the matter as a class action. We now reverse both orders.[1]

The salient facts, for purposes of our disposition, are not in dispute. Defendant sold plaintiff Saida Jorge a new Toyota in April 2002. As part of that sale, plaintiff purchased a Gold Plan Toyota Extra Care Vehicle Service Agreement (VSA) for an additional $1550, which, according to its terms, provided payment for repair or replacement services of specified vehicle components through the earlier of April 19, 2008, or 100,000 miles. The agreement also provided additional benefits, including towing, rental, and dislocation benefits. Seven months into the VSA's six-year term, plaintiff, on the advice of counsel, cancelled her VSA because she decided that she no longer needed it. She received a partial refund of $1396.35, pro-rated over the six-year term of the agreement. During those first seven months plaintiff owned her new vehicle, she never reported experiencing any problems with it and never submitted a claim for any benefits under the VSA.

[1] A third order entered by the court denied plaintiff's motion for summary judgment. No appeal was taken of that decision.

On June 23, 2004, plaintiff filed an amended complaint against defendant, in which she claimed defendant engaged in unconscionable and illegal conduct in the sale of its VSAs, contrary to the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. Among the allegations, plaintiff specifically claimed that because of the exhaustive list of exclusions and restrictions, the VSAs entitled the car owners to nothing, and gave TMIS "unfettered discretion as to what repairs it will and will not pay." The plaintiff also sought to bring this action as a class action pursuant to R. 4:32-1(b)(2) and (3). On July 16, 2004, plaintiff moved for class certification for:

> all persons who have purchased, within the state of New Jersey, since six years prior to the date of the filing of the Complaint, those Vehicle Service Agreements sold by Toyota Motor Insurance Services, Inc. and designated "Gold" plans, or designated any term that preceded the use of the term "Gold" plan, and all persons who will purchase them in the future.

On July 29, 2004, plaintiff moved for summary judgment and on August 5, 2004, defendant cross-moved for summary judgment. The trial court denied the summary judgment motions but granted the motion for class certification. Defendant sought leave to file an interlocutory appeal, which we denied, and subsequently moved for leave to appeal before the Supreme Court. The Court granted defendant's motion, and in light of its decision in

Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234 (2005), summarily remanded the matter to the Appellate Division for consideration of defendant's appeal on the merits. Jorge v. Toyota Motor Ins. Servs., 183 N.J. 582 (2005).

On remand, both parties moved to supplement the record. We denied those motions, but we ordered a temporary remand of the matter to the Law Division for reconsideration of the trial court decision as supplemented with the materials the parties sought to include in the appellate record.

Upon reconsideration, the court again denied defendant's summary judgment motion. In its written opinion, the court stated, "[p]laintiff has presented substantial evidence supporting her contention that the consumers who buy defendant's VSA receive nothing of value because the VSA's are written in such a way that the defendant not the VSA is the sole arbiter of what is covered and not covered." The court also found plaintiff's ascertainable loss flowed from the mere purchase of the contract and the failure to receive a full refund.

On the issue of the class action certification, the court found that plaintiff satisfied the prerequisites for class certification because: (1) there were 23,000 people in the class; (2) there were common questions of law or fact, namely, "[t]hey all had this contract" and "[i]t's valid or it's

invalid"; and (3) the validity of the agreement presented "a common legal grievance." The court acknowledged that a person who had been denied a refund "might be in a better position to argue the invalidity," but was nonetheless satisfied by "liberally construing the statute [that] the plaintiff will fully and adequately protect the interests of the class particularly when the central issue is whether the contract is unconscionable, not necessarily the behavior of the parties under the contract."

We "employ the same standard that governs trial courts in reviewing summary judgment orders[,]" Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J.Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998), but "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Defendant argues the trial court's denial of its motion for summary judgment was erroneous because plaintiff was unable to establish defendant had engaged in any conduct that violated the CFA, could not establish an ascertainable loss under the CFA, and could not establish a causal relationship between defendant's alleged unlawful conduct and any asserted loss.

Because the Court's remand was limited to consideration of the merits of plaintiff's claims in light of Thiedemann, we focus primarily upon the "ascertainable loss" prerequisite to maintaining a private cause of action under the CFA.

The CFA provides consumers with broad protections against unlawful general commercial practices, as well as unlawful specific practices. See, e.g., N.J.S.A. 56:8-2 (false advertising and misrepresentation); N.J.S.A. 56:8-2.8 (limitations on "going out of business" sales); N.J.S.A. 56:8-2.9 (mislabeling of food products). To establish a claim under the CFA, "a private 'plaintiff must allege each of three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss.'" Dabush v. Mercedes-Benz USA, LLC, 378 N.J. Super. 105, 114 (App. Div.) (quoting N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003)), certif. denied, 185 N.J. 265 (2005).

The trial court found plaintiff's ascertainable loss flowed from the mere purchase of the contract and the failure to receive a full refund. Defendant, relying upon Thiedemann, supra, argues plaintiff suffered a hypothetical loss at best,

which the Court expressly rejected in Thiedemann, 183 N.J. at 248. Plaintiff urges in its brief, as the trial court similarly found, the decision in Thiedemann is "firmly grounded in the specific factual record of that case, which is materially different from the record in this case, and on policy considerations which have no applicability to the case at hand." We disagree.

In Thiedemann, the plaintiffs each had purchased Mercedes-Benz C-280 automobiles that experienced inaccurate readings on the fuel gauges. Id. at 240. All the vehicles were under warranty and all were repaired at no cost to the plaintiffs. Id. at 242-44. It was undisputed that none of the plaintiffs had suffered any out-of-pocket expenses in connection with the defective fuel gauge or fuel sending unit. Id. at 251-52. The trial court granted defendant's summary judgment motion and dismissed the complaint. Id. at 243. The court concluded that damages are an essential element of any claim brought under the CFA and that no jury could reasonably conclude that the plaintiffs suffered an objectively ascertainable loss, even giving consideration to the expansive protection afforded consumers under the CFA and this state's broad legislative policy to protect consumers against deceptive commercial practices. Ibid.

On appeal, we accepted the plaintiffs' argument that they had established an ascertainable loss because the existence of the defect impaired the value of their vehicles to a measurable, if presently unknowable degree. Id. at 250. The Supreme Court disagreed. Id. at 255. The Court held, "when a plaintiff fails to produce evidence from which a finder of fact could find or infer that a plaintiff suffered a quantifiable or otherwise measurable loss as a result of the alleged CFA unlawful practice, summary judgment should be entered in favor of defendant . . . ." Id. at 238.

Although Thiedemann did not involve breach of contract or misrepresentation claims, the Court specifically considered such claims in its discussion of "ascertainable loss":

> In cases involving breach of contract or misrepresentation, either out-of-pocket loss or a demonstration of loss in value will suffice to meet the ascertainable loss hurdle and will set the stage for establishing the measure of damages. See, e.g., [Furst v. Einstein Moomjay, Inc., 182 N.J. 1, 13 (2004)] (applying loss in value to consumer in breach of contract case). That said, a claim of loss in value must be supported by sufficient evidence to get to the factfinder. To raise a genuine dispute about such a fact, the plaintiff must proffer evidence of loss that is not hypothetical or illusory. It must be presented with some certainty demonstrating that it is capable of calculation, although it need not be demonstrated in all its particularity to avoid summary judgment.

[Id. at 248.]

Defendant argues that the facts here are analogous to Thiedemann because if plaintiff had submitted a claim under the VSA, and the claim had been paid, then she would have suffered no ascertainable loss under Thiedemann. However, her cancellation of the VSA and her failure to even make a claim cannot amount to an ascertainable loss. In addition, her benefit-of-the-bargain claim rests on the kind of subjective assertions rejected by the Court in Thiedemann as a sufficient basis for a CFA claim.

Defendant also relies upon an Appellate Division decision decided earlier this year, Perkins v. DaimlerChrysler Corp., 383 N.J. Super. 99 (App. Div. 2006), in further support of its position. In Perkins, the plaintiff filed a CFA claim alleging she was defrauded because defendant did not reveal that the exhaust manifold of her 1998 Jeep, which she already had driven 108,000 miles, was susceptible to cracking and premature failing and was unlikely to last for the 250,000 miles that she claimed, without support, to be the industry standard. Id. at 103. The plaintiff suffered no out-of-pocket expenses or actual loss as the result of the condition. Id. at 106. Despite the limited scope of the plaintiff's claim, she sought to act as the class representative for all New Jersey residents who owned or leased

her model vehicle for the years 1991 through 1999 and had either paid for repair or replacement of their exhaust manifolds or who would need to pay for such repair or replacement "at some point in the future." Id. at 106-07. The panel observed plaintiff had provided no evidence of any diminution of her vehicle's value, and it questioned the sufficiency of a claim that one allegedly substandard part would have even a negligible impact on the resale value of a five-year-old vehicle. Id. at 110.

We agree with defendant that under both Thiedemann and Perkins, plaintiff presented no genuinely disputed issue of fact as to any ascertainable loss. During the seven months the VSA was in effect, plaintiff never submitted a claim for repair or replacement of parts under the agreement. Hence, she was never denied any benefit under the agreement. We likewise reject the trial court's finding that plaintiff's refund, minus $155, is an "ascertainable loss" under the CFA. As the Court in Thiedemann recognized, a private cause of action is afforded "only to those who can demonstrate a loss attributable to conduct made unlawful by the CFA." Thiedemann, supra, 183 N.J. at 246-47. Plaintiff's loss is attributed solely to her voluntary decision to cancel the policy, not to any out-of-pocket expense incurred as a result of the defendant's failure to honor the VSA. In reaching this conclusion, we do not ignore the Court's very

clear holding in Cox v. Sears Roebuck & Co., 138 N.J. 2 (1994), that an ascertainable loss may be established without the consumer having actually experienced any out-of-pocket loss. Id. at 22-23. In such circumstances, however, the consumer must still present evidence of a quantifiable loss. See Ibid. Here, plaintiff is unable to present proof of any measurable loss, even in terms of an estimate. See Thiedemann, supra, 183 N.J. at 248. Thus, plaintiff is unable to satisfy the "ascertainable loss" prerequisite to recovery under the Act. Ibid.

Nor do we agree with the trial judge's conclusion that a jury could reasonably conclude plaintiff's "ascertainable loss" may be "that she did not get the benefit of her bargain, namely an enforceable promise by the defendant to pay for the repair or replacement of clearly identified components of her car." This reasoning is not supported by the record which indisputably established that defendant paid millions of dollars in claims.

Similarly, the court's reliance upon Miller v. Am. Family Publishers, 284 N.J. Super. 67 (Ch. Div. 1995), as supportive of plaintiff's position is misplaced. In Miller, the defendant advertised magazine subscriptions to the four plaintiffs. Id. at 72. As part of its promotional campaign, the defendant offered a chance to win a sweepstake prize. Ibid. Two of the plaintiffs purchased subscriptions and two did not. Ibid.

Although the defendant asserted that one did not have to purchase a subscription to participate in the sweepstake or win the prize, the defendant conceded its mailings so stated. Id. at 72-73. The plaintiffs alleged that the defendant's mailings accordingly misled the public and violated the CFA. Id. at 73.

In denying summary judgment to the plaintiffs, the Chancery Division judge found, "[f]or their money, [these plaintiffs] received something less than, and different from, what they reasonably expected in view of defendant's presentations. That is all that is required to establish 'ascertainable loss,' and it is sufficient to withstand defendant's motion for summary judgment." Id. at 90-91.

Unlike the plaintiffs in Miller, the record before us does not establish that plaintiff, in purchasing the VSA, received something less than and different from what she reasonably expected under the agreement. Ibid. Plaintiff purchased a warranty for the repair or replacement of vehicle components in accordance with the VSA. Presumably, by purchasing the agreement, plaintiff expected that parts and components covered under the agreement would be repaired in accordance with the agreement, should the need for such repairs arise. Plaintiff, however, cancelled the agreement prior to experiencing any car problems and never submitted a claim for any other benefits

offered under the agreement. Consequently, her claimed loss is simply a hypothetical loss, incapable of being measured and, therefore, under Thiedemann, not cognizable, even if the allegations, when favorably viewed, raise a genuinely disputed issue of fact as to whether defendant engaged in unconscionable commercial practices. See Perkins, supra, 383 N.J. Super. at 111-12.

Having determined plaintiff has not sustained an ascertainable loss within the meaning of the CFA, we find it unnecessary to address whether the VSA, as drafted, is illusory, except to reject the trial court's conclusion that the purchase of the VSA, without more, is sufficient to establish an "ascertainable loss."

Finally, given our determination that plaintiff has failed to satisfy the requisite element of "ascertainable loss" in order to maintain a private action for damages under the CFA, and the absence of any evidence that any other putative class member has sustained an ascertainable loss, there is no representative class. See Thiedemann, supra, 183 N.J. at 253-54. Consequently, the order certifying this matter as a class action is vacated.

Reversed and remanded to the trial court for the entry of judgment in favor of defendant. We do not retain jurisdiction.