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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5999-07T3

CINDY J. BETHEA, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation,

Defendant-Respondent.

Argued February 2, 2009 - Decided March 18, 2009

Before Judges Sabatino and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-3499-08.

Bruce D. Greenberg argued the cause for appellant (Lite, DePalma, Greenberg & Rivas, LLC, attorneys; Mr. Greenberg, on the brief).

Michael J. Eng of the New York bar, admitted pro hac vice, argued the cause for respondent (McCarter & English, LLP, and Mr. Eng, attorneys; Mr. Eng and B. John Pendleton, Jr., of counsel; Mr. Pendleton and Sharon T. Boland, on the brief).

PER CURIAM

Plaintiff appeals the Law Division's dismissal of her consumer fraud complaint against defendant under Rule 4:6-2(e) for failure to state a claim upon which relief may be granted. Because the trial court did not sufficiently treat the complaint with the indulgence required under the Rule and also hinged its ruling upon a mistaken legal premise, we vacate the dismissal and remand for further proceedings.

We summarize the facts alleged in the detailed complaint, which contains fifty-two paragraphs and numerous attachments, in a light most favorable to plaintiff. Printing Mart v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989).

Plaintiff Cindy J. Bethea resides in Edison. At the time of the events in question, plaintiff and her granddaughter, Shikera Bethea ("Shikera"), both resided in Maplewood.

In February 2002, plaintiff completed an application for whole life insurance with defendant, Metropolitan Life Insurance Company ("MetLife"), seeking $10,000 in coverage on Shikera's life. Plaintiff was the proposed owner and beneficiary of the life policy to insure her granddaughter's life.[1]

As part of MetLife's standard application form, a copy of which is attached to the complaint, plaintiff (and, apparently,

[1] The form indicates that plaintiff, who was born in 1944, is Shikera's mother, but the complaint avers that she is Shikera's grandmother.

Shikera) answered several inquiries. Both plaintiff and Shikera signed the application's last page. The form included inquiries about whether the proposed insured, i.e., Shikera, had used tobacco. In particular, Question 13 on the form asked them to indicate the dates on which Shikera had last smoked or used (1) cigarettes, (2) cigars, (3) a pipe, or (4) smokeless tobacco. The response "never" was checked as to each of these four inquiries.

The form also requested several disclosures about Shikera's health and activities, seeking responses to such things as the name of her family physician, whether she is regularly taking medication, whether she is engaged in certain dangerous forms of recreation, and whether she has been diagnosed with various specified illnesses, including lung disorders or allergies. Plaintiff and Shikera supplied the requested information, including the contact information for Shikera's doctor. Their responses also stated that Shikera had passed a physical examination for school sports within the past year, and that Shikera had not been treated for any of the listed illnesses or conditions.

Based upon the information supplied, MetLife quoted plaintiff a monthly premium of $11.80 for $10,000 in coverage. The policy was issued effective August 1, 2002. The policy

listed the insured's age and gender as "15 Female," and the policy classification as "Standard." The plan was designated as a "Life Paid Up at Age 98."

In connection with the transaction, MetLife provided plaintiff with a separate document, which is also attached to the complaint, containing a series of policy illustrations. Each of the illustrations specified, in the upper right-hand corner, the "Risk Class" applicable to Shikera as "Female Standard <u>Nonsmoker</u> Age: 15." (Emphasis added).

The document further stated:

> The Premiums are based on the proposed insured's age, sex, <u>risk class</u> and premium payment mode shown above. If you apply for this policy and the actual age, sex, <u>risk class</u> or premium payment mode as shown in the policy (if issued) are different than those shown above, your MetLife representative will provide you with a revised illustration and can explain any differences to you. This illustration was designed to help you understand how this policy works and is not a projection of how it will perform.
>
> [(Emphasis added).]

The illustrations are dated August 5, 2002, which was four days after the policy became effective on August 1, 2002. However, that August 5 date is apparently within the ten-day period under the insurance contract during which plaintiff had a right to revoke the coverage and obtain a full refund.

Additionally, plaintiff contended in her complaint that she had also received from MetLife a consumer privacy notice, which allegedly stated that "MetLife would tell plaintiff if the policy on Shikera Bethea were issued on a different basis than that stated in the application." Plaintiff did not attach this privacy notice to her complaint.

After the policy became effective and the ten-day revocation period passed, plaintiff learned that MetLife does not actually maintain a separate risk classification for juvenile non-smokers. Rather, as MetLife acknowledges, the insurer's risk classification for juveniles combines both smokers and non-smokers. Consequently, plaintiff's monthly premium did not reflect any discount or rate differential because of Shikera's status as a non-smoker.

In this regard, the complaint further alleged that:

> Despite the "non-smoking" statements in the illustration, application and policy contract, and MetLife's written promises to disclose to plaintiff if her granddaughter's policy were issued and charged on a different basis than those "non-smoking" statements reflected, MetLife never did so. Instead, unbeknownst to plaintiff, MetLife secretly did not treat her granddaughter's policy as non-smoking and instead charged her a higher aggregate smoker-based premium.

The complaint not only sought relief on behalf of plaintiff individually, but also sought relief on behalf of other

similarly-situated MetLife policyholders. It alleged that plaintiff and the other class members had suffered an "ascertainable loss" under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -20, "by among other things, (a) paying higher premiums, and/or suffering increased costs of insurance for those policies as the result of MetLife's use of an aggregate, smoker-based rate for those policies."

The complaint does not elaborate what "higher premiums" or "increased costs" that plaintiff and the other putative class members sustained as a result of MetLife's alleged misrepresentations. However, plaintiff's counsel has represented that, if the court had allowed discovery to be completed in this case, he would have proffered the damages report of an expert "who created non-smoker premium rates for juvenile life insurance policies issued by two other [competing] life insurers." Plaintiff's counsel explains that he had tendered such an expert's opinion in similar litigation against MetLife on behalf of other plaintiffs in federal court, but that he had not referred to the expert in his complaint in this case because of a protective order in that federal litigation.

The complaint does maintain, however, that MetLife's use of an aggregate juvenile risk classification that combines smokers with non-smokers will prevent plaintiff and others from

upgrading their whole-life policies to a non-smoker risk class once the juvenile reaches the age of eighteen. With respect to universal life policies, the complaint alleges that the aggregate juvenile classification can hinder such an upgrade at age eighteen where there have been intervening issues of insurability.

The sole cause of action set forth in the complaint asserts violations of the CFA. The complaint alleges, in essence, that MetLife violated the CFA by affirmatively misleading plaintiff and the other class members about the "non-smoking" rate classification for their juvenile policies. By way of relief, the complaint sought compensatory damages, treble damages, a constructive trust and other injunctive relief, interest and counsel fees.

Two months after the complaint was filed, MetLife moved to dismiss the complaint for failure to state a claim upon which relief may be granted. After hearing oral argument, the motion judge granted MetLife's application, on the basis that plaintiff had failed to plead with sufficiency an "ascertainable loss" under the CFA. In his oral ruling, the judge found significant that plaintiff had been charged the exact premium that MetLife had quoted her, and that the absence of a separate non-smoker risk classification for juveniles is inconsequential. This

appeal followed. Because motions to dismiss under Rule 4:6-2(e):

> are usually brought at the earliest stages of litigation, they should be granted in 'only the rarest instances.' In deciding whether to dismiss a complaint for failure to state a cause of action, courts should search the complaint 'in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'
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> [Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993) (quoting Printing Mart, supra, 116 N.J. at 772 (1989)) (internal citations omitted).]

On appeal, the court approaches review of dismissal rulings "mindful of the test for determining the adequacy of a pleading: whether a cause of action is 'suggested' by the facts." Printing Mart, supra, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Although appellate review of a complaint dismissed under Rule 4:6-2(e) "is limited to examining the legal sufficiency of the facts alleged on the face of the complaint," the reviewing court "'searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Ibid. (quoting Di

Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957)) (internal citations omitted).

Given these well-established standards governing motions to dismiss, and mindful that discovery did not proceed in this case, we are persuaded that the trial court's dismissal of the complaint was premature. In particular, we find that the trial court's analysis was based upon an incorrect premise about whether plaintiff could have sustained an "ascertainable loss" under the CFA.

The CFA makes the following acts unlawful, in connection with sale or advertisement of merchandise or real estate:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.
>
> [N.J.S.A. 56:8-2.]

"The term 'merchandise' shall include any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c).

Violations of the CFA can arise under three different categories: (1) "[a]n affirmative misrepresentation, even if unaccompanied by knowledge of its falsity or an intention to deceive"; (2) "[a]n omission or failure to disclose a material fact, if accompanied by knowledge and intent"; and (3) "'violations of specific regulations promulgated under the [CFA],'" which are reviewed under strict liability. Monogram Credit Card Bank of Georgia v. Tennesen, 390 N.J. Super. 123, 133 (App. Div. 2007) (internal citations omitted).

The CFA limits private causes of action to instances where a plaintiff can "'allege each of three elements: (1) unlawful conduct by the defendant; (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. 2005) (citing New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003)).

To have standing under the Act, a plaintiff must make a claim of "'an ascertainable loss of moneys or property, real or personal,' as a result of the defendant's unlawful conduct," sufficient to survive summary judgment. Id. at 116 (citing N.J.S.A. 56:8-19; Weinberg v. Sprint Corp., 173 N.J. 233, 237

(2002); <u>Pron v. Carlton Pools, Inc.</u>, 373 <u>N.J. Super.</u> 103, 113 (App. Div. 2004)). "Determination of what constitutes an 'ascertainable loss' under the CFA, although nebulous, is not novel." <u>Romano v. Galaxy Toyota</u>, 399 <u>N.J. Super.</u> 470, 479 (App. Div. 2008). As defendant notes, actual loss is required. <u>Ibid.</u> ("'To give effect to the legislative language describing the requisite loss for private standing under the CFA, . . . a private plaintiff must produce evidence from which a factfinder could find or infer that the plaintiff suffered an actual loss.'") (quoting <u>Thiedemann v. Mercedes-Benz USA, LLC</u>, 183 <u>N.J.</u> 234, 248 (2005)). The loss has to be "quantifiable or measurable," and cannot be hypothetical. <u>Thiedemann</u>, <u>supra</u>, 183 <u>N.J.</u> at 248.

According to plaintiff, she suffered monetary loss by paying "higher premiums than she would have paid had her premium rate truly been based on a 'non-smoker' risk class as MetLife represented it would be, or had she purchased a policy from an insured that, unlike MetLife, does offer 'non-smoker' rates to juveniles." The motion judge found that contention unavailing because plaintiff was charged the premium that she was quoted and ostensibly, therefore, was not harmed.

However, plaintiff maintains that she was harmed because, had she known that she was not receiving a non-smoker's rate

from MetLife, she could have procured such a preferential rate from at least two other competing insurers. It was not necessary for the complaint to mention her expert's opinion confirming these supposed alternatives. See R. 4:5-2 (listing requirements for pleading claims for relief); Jardine Estates v. Koppel, 24 N.J. 536, 542 (1957) (noting that pleadings simply need to "fairly apprise the adverse party of the claims and issues to be raised at the trial").

Although plaintiff could have been more specific about this theory of damage in her complaint, we are satisfied that, under the indulgent standards of Printing Mart, the trial court should not have rejected it at the pleadings stage. Moreover, the complaint further alleges that the blended nature of the juvenile risk classification could result in future harms if she attempted to convert the policy to an adult non-smoker risk class once Shekira turned eighteen. Whether or not such harms are ultimately compensable should be explored after expert discovery has been completed.

We likewise are satisfied that plaintiff adequately pled actionable misrepresentations under the CFA. Viewed in a light most favorable to plaintiff, what plaintiff is saying is that MetLife misled her about the existence of a non-smoker risk classification. The various questions on the policy

applications about Shekira's smoking history and whether she has been treated for lung disease comport with such a perception by the applicant.

Plaintiff's claims here are consistent with, if not entirely identical to, the CFA claims that survived pre-discovery dismissal in Leon v. Rite Aid Corp., 340 N.J. Super. 462 (App. Div. 2001). In that case, plaintiff claimed that although "Rite Aid prominently advertised that it had 'the lowest and best prices' on pharmaceuticals [and] promoted a best-price guarantee," Rite Aid directed its pharmacists to "charge more than Rite Aid's stated retail price to uninsured customers and other pharmacy customers who were unlikely to challenge its prices," such as those "purchasing 'emergency-type' drugs, or drugs designed to remedy an acute condition." Id. at 467. Rite Aid also directed and required its pharmacists "to 'round up' the stated retail price to the next figure ending in .89 on every prescription." Ibid. In addition, Rite Aid directed pharmacists to reply to price inquiries consistently with their listed prices and to allege error in their computer if confronted with differences between listed prices and charged prices. Ibid.

We noted in Leon that "the gravamen of plaintiff's complaint [was] not Rite Aid's failure, as such, to inform its

customers of specific prices or of a variable pricing policy," but rather the absence of such information when "juxtaposed against Rite Aid's advertising" claiming "best and lowest" price. Id. at 472. Accordingly, we concluded that the plaintiff's allegations "constitute a cause of action under the Consumer Fraud Act," and were improperly dismissed because the trial court had not given plaintiff's complaint "the generous reading it was entitled to under Printing Mart, supra," and had not confined itself to an evaluation of the complaint as appropriate on a motion pursuant to Rule 4:6-2(e). Leon, supra, 340 N.J. Super. at 462.

Here, although MetLife did not falsely promise plaintiff that it was quoting her the "best and lowest" premium for a policy on Shekira's life, the complaint alleges that, through its policy illustrations and other allied documents, MetLife misled plaintiff into believing that her granddaughter's non-smoking status was going to provide her with a benefit in the premium structure. We are mindful that MetLife argues that its policy-related documents and its interactions with plaintiff conveyed no such promise or reasonable expectation. That disagreement is something that should be addressed in a more plenary manner after discovery has been completed. Plaintiff

received the premium rate that it quoted, but that begs the question of whether she was misled in agreeing to that rate.

We do not find dispositive the published and unpublished[2] cases cited to us that were brought against MetLife and other insurers in other forums, which have challenged similar rate classifications. See Ross v. Metropolitan Life Ins. Co., No. 07-4651, 2008 U.S. App. LEXIS 23906 (3d Cir. Pa. Oct. 28, 2008) (granting MetLife summary judgment dismissing plaintiff's challenges to the insurer's juvenile risk classification combining smokers with non-smokers); Alleman v. State Farm Life Ins. Co., 508 F. Supp. 2d 452, 453 (W.D. Pa. 2007) (denying summary judgment, in a case against another insurer with a similar blended risk classification, on plaintiff's constructive fraud and unjust enrichment claims, without prejudice, pending additional discovery); see also Richards v. AXA Equitable Life Ins. Co., 2007 U.S. Dist. LEXIS 78052 (S.D.N.Y. Oct. 18, 2007) (denying, in a case challenging the insurer's use of aggregate mortality rates for juveniles, the insurer's motion to dismiss as to breach of contract but granting dismissal as to fraudulent misrepresentation, fraudulent concealment and unjust

[2] We bear in mind that the unpublished cases are not precedential in our courts. R. 1:36-3. We mention them only for sake of completeness, and to emphasize that they have no preclusive effect.

enrichment); Thompson v. Am. Gen. Life & Accident Ins. Co., 404 F. Supp. 2d 1023, 1027 (M.D. Tenn. 2005) (denying, in another aggregate mortality rate case, the insurer's motion to dismiss as to breach of contract but granting it as to breach of fiduciary duty and constructive fraud and unjust enrichment).

None of those cited cases were litigated under the CFA, which, among other things, does not require proof of actual reliance upon the alleged misrepresentations. See N.J.S.A. 56:8-2; see also Byrne v. Weichert Realtors, 290 N.J. Super. 126, 136 (App. Div. 1996). Further, in two of those out-of-state cases, Richards, supra, and Thompson, supra, the courts recognized that at least some of the plaintiff's claims were sufficiently viable to withstand a motion to dismiss, and in Alleman, supra, the court maintained the non-contractual claims pending further discovery.

Lastly, we discern no basis to adopt, particularly at the pleadings stage, MetLife's argument that plaintiff's cause of action is barred by the parol evidence rule. The parol evidence rule does not apply to claims alleging, as here, fraud in the inducement of a contract. Filmlife, Inc. v. Mal "z" Ena, Inc. 251 N.J. Super. 570, 573 (App. Div. 1991). The actual timing of the policy illustrations in this case is something that should be sorted out in discovery. Moreover, the provision of the

illustrations before the ten-day cancellation period expired may suffice to justify the court's consideration of those proofs. We also note that the quasi-fiduciary relationship between MetLife as an insurer and plaintiff as an insured may also bear upon the applicability of the parol evidence bar. See Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 305 (1965). We defer an assessment of the parol evidence issue until after a fuller record has been developed in discovery.

The trial court's order of dismissal is consequently vacated, and the case is remanded for discovery and other further proceedings consistent with this opinion. Our disposition does not foreclose renewed consideration of the substantive issues on a motion for summary judgment after discovery, including expert discovery, has been completed.