

Superior Court of New Jersey

CHAMBERS OF
JUDGE EDWARD M. OLES



OCEAN COUNTY COURT HOUSE
P.O. Box 2191
TOMS RIVER, N.J. 08754-2191

October 23, 2001

Bruce D. Greenberg, Esq.
Lite, DePalma, Greenberg & Rivas
Two Gateway Center - 12th Floor
Newark, NJ 07102-5003

Susan Schleck Kleiner, Esq.
Drinker, Biddle & Shanley
105 College Road East - Suite 300
P. O. Box 627
Princeton, NJ 08542-0627

Re: DELANEY v. ELRAC
Docket No. OCN-L-1160-01

Dear Counsel:

Please accept this letter as a disposition of the motion filed in the above captioned matter.

Because this is a motion to dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted, the legal issues are reviewed on the assumption that the facts, as alleged by the plaintiff are true. Feinberg v. Department of Environmental Protection, 137 N.J. 126 (1994).

On November 1, 1999 the plaintiff Michael Delaney rented a vehicle from Enterprise Rent-A-Car which was located at 1986 Route 37 East in Toms River, New Jersey. As part of this particular transaction the plaintiff purchased personal accident

RECEIVED

OCT 25 2001

LITE DEPALMA
GREENBERG & RIVAS, LLC

insurance from Enterprise, as well as a partial collision damage waiver. It is alleged by the plaintiff that these two forms of supplemental insurance were purchased based upon a false, fraudulent, misleading and deceptive practice by the defendant. It is alleged that the defendant sold these insurance provisions to the plaintiff knowing that the State of New Jersey required the defendants to obtain a license for the sale of insurance. In addition, the plaintiff alleges that Enterprise's rental agreement form is designed to deceive the public, and is designed to prevent the plaintiff from making an informed decision regarding the purchase of certain insurance items. Furthermore, the plaintiff alleges that the defendant deceived New Jersey consumers in particular in not advising the consumer of the fact that New Jersey requires a rental car company to maintain liability insurance on its rental vehicles consistent with the minimum financial responsibility threshold of the State of New Jersey.

The allegations of the plaintiff are divided into six counts. The first count of the complaint alleges a breach of a contract between the plaintiff and the defendant relative to the rental of the vehicle. It is alleged that the plaintiff's failure to obtain the appropriate licenses under the State of New Jersey's regulatory scheme results in a contract between the plaintiff and the defendant that is against public policy. As a result of this particular breach of the public policy, the plaintiff alleges that he has been harmed.

The second count of the complaint alleges a violation of the New Jersey Consumer Fraud Act. It is alleged that the various methods by which the defendant sold supplemental insurance to the plaintiff constituted an act of consumer fraud under

our statute. The third count of the complaint alleges common law fraud as to the dealings between the plaintiff and the defendant. The fourth count of the complaint alleges a breach of a contractual duty that both plaintiff and defendant act in good faith in connection with the entering into and the performance of a contract. Count five of the complaint alleges negligence. It alleges that defendant's failure to inform the plaintiff that it did not have a license to sell insurance and that providing additional supplemental insurance was contrary to New Jersey Law breached its duty to the defendant resulting in harm to the plaintiff. And the sixth count of the complaint alleges that the defendant was unjustly enriched by its actions and, therefore, the plaintiff has been harmed.

The moving party has suggested to the Court that because there is no private right of recovery under the Insurance Producer's Licensing Act, the allegations contained in count one and those in counts two through count six based upon the failure to obtain a license must be dismissed.

The Court must determine whether the Consumer Fraud Act of the State of New Jersey applies to the defendant's actions as they are alleged by the plaintiff. In Lemelledo v. Beneficial Management, 150 N.J. 255 (1997), our Supreme Court established a general principle of law that the Consumer Fraud Act is assumed to apply to the alleged fraudulent acts of a defendant within the provisions of N.J.S.A. 56:8-2. It is thus incumbent upon the defendant to overcome the presumption that the Consumer Fraud Act does not apply to the particular covered activity. While it is true that the Supreme Court acknowledged that the Insurance Producer's Licensing Act does not

provide for a private cause of action, that alone does not prohibit the plaintiff from basing a consumer fraud complaint upon violation of the statute. As noted by the Supreme Court, the Insurance Producer's Licensing Act rests with the Department of Banking and Insurance the power to revoke or to refuse to renew a license and to impose civil penalties on licensees who violate any provision of the statute. The Consumer Fraud Act simply compliments this statute. As noted in the Supreme Court where there may be an inconsistency with respect to jurisdiction between the Department of Banking and Insurance and the Court as to fashion a remedy, the Court may always defer to that agency for imposing an appropriate remedy on the defendants.

Since this particular action has just commenced, it is premature to make a determination as to what remedies will be applied by this Court and those by the appropriate administrative agencies. Suffice it to say that a jury may make a determination that a violation of the Insurance Producer's Licensing Act may constitute an act of consumer fraud.

Since the Court's ruling is that the Consumer Fraud Act of the State of New Jersey is applicable to this case, the other counts of the complaint are viable theories of recovery and must await the full disclosure of their merits through the discovery process.

Thus the motion to dismiss the various counts in the complaint that are contained within the notice of motion filed by the defendant is denied.

Please find enclosed a copy of the order that has been marked denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Edward M. Oles". The signature is fluid and cursive, with a prominent upward stroke at the beginning.

EDWARD M. OLES, J.S.C.

EMO:lf

Enclosure