**FILED**
December 9, 2022
**ANA C. VISCOMI, J.S.C.**

| | |
|---|---|
| WILLIAM DESIMONE, as executor of the Estate of EVELYN DESIMONE, deceased, individually in such capacities and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>SPRINGPOINT SENIOR LIVING, INC., SPRINGPOINT AT MONROE VILLAGE, INC., SPRINGPOINT AT MONTGOMERY, INC., SPRINGPOINT AT CRESTWOOD, INC., SPRINGPOINT AT MEADOW LAKES, INC., AND SPRINGPOINT AT THE ATRIUM, INC.,<br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION:<br>MIDDLESEX COUNTY<br>DOCKET NO. MID-L-4958-13<br><br>Civil Action<br><br>**ORDER** |

THIS MATTER having been opened to the Court by counsel for the defendants, pursuant to R. 4:46-1, for judgment of the pleadings and/or partial summary judgment, and the Court having considered the matter and good cause appearing,

IT IS this 9th day of December, 2022,

ORDERED that the defendants' motion for partial summary judgment be and hereby is **DENIED**, and it is further

~~ORDERED that the plaintiffs' claims for relief under N.J.S.A. 56:8-2.11 be and~~

~~hereby are dismissed with prejudice,~~ **DENIED**

ORDERED that a true and correct copy of this Order shall be deemed serve by posting on eCourts.

*/s/ Ana C. Viscomi*
Ana Viscomi, J.S.C.

[ x] Opposed
[ ] Unopposed

**For reasons set forth in the accompanying opinion**

# SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
**ANA C. VISCOMI, J.S.C.**
JUDGE

MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
New Brunswick, New Jersey 08903-0964

December 9, 2022

| | |
|---|---|
| WILLIAM DeSIMONE, as executor of the Estate of EVELYN DeSIMONE,<br>*Plaintiff,*<br><br>v.<br><br>SPRINGPOINT SENIOR LIVING INC., et al<br>*Defendants.* | SUPERIOR COURT OF NEW JERSEY<br>CIVIL DIVISION: MIDDLESEX COUNTY<br>**DOCKET NO: MID-L-4958-13**<br><br>Civil Action<br><br>**OPINION** |

In this action, Plaintiffs, current and former residents of Continuing Care Retirement Communities ("CCRCs") operated by Defendant Springpoint Senior Living, seek traditional Consumer Fraud Act ("CFA") damages under N.J.S.A. 56:8-19. Plaintiffs also seek consumer refunds under N.J.S.A. 56:8-2.11. These claims are related to purported misrepresentation and concealment of facts concerning entrance fee refunds that residents would receive upon leaving the CCRCs.

Defendant Springpoint Senior Living moved for summary judgment as to plaintiffs' claims under N.J.S.A. 56:8-2.11, asserting that the statute applies only to misrepresentations regarding food, not to the entire CFA. For reasons set forth below, the motion is denied.

Defendant asserts that the "refund provision" of N.J.S.A. 56:8-2.11 applies only to violations of the Truth in Menu Act of 1980, N.J.S.A. 56:8-2.9 et seq., and not to the CFA as a whole. Defendant details the history of the CFA, relevant statutory provisions and the 1971 amendment which provides a private cause of action for "any person" who suffered "an ascertainable loss of monies or property as a result of" an unlawful practice. N.J.S.A. 56:8-19. The 1971 amendment also provided that successful claimants could recover treble damages, attorneys' fees, and costs of suit.

Defendant further asserts that while the CFA provides a general definition of unlawful acts, N.J.S.A. 56:8-2, multiple statutes have been passed since which declare specific acts unlawful, some of which provide for consumer refunds. Defendant maintains that the Truth in Menu Act, enacted in 1980, is such a law. See N.J.S.A. 56:8-2.9 et seq. Id. The first section of the Truth in Menu Act defines the conduct prohibited under the statute:

> It shall be an unlawful practice for any person to misrepresent on any menu or other posted information, including advertisements, the identity of any food or food products to any of the patrons or customers of eating establishments including but not limited to restaurants, hotels, cafes, lunch counter or other places where food is regularly prepared and sold for consumption on or off the premises.
> N.J.S.A. 56:8-2.9
> N.J.S.A. 56:8-2.11 provides:
> Any person violating the provisions of the within act shall be liable for a refund of all moneys acquired by means of any practice declared herein to be unlawful.
> N.J.S.A. 56:8-2.12 provides:
> The refund of moneys herein provided for may be recovered in a private cause of action or by [the municipal office of consumer affairs].

> N.J.S.A. 56:8-2.13 provides:
> The rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or statutes of this State, and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition.

Defendant asserts that the plain language of the statute makes clear that the refund provision in the Truth in Menu Act applies only to cases involving food. Defendant asserts that the language "the within act" and "declared herein" limits the scope of this remedy to violations of the Truth in Menu Act. N.J.S.A. 56:8-2.11. Defendant quotes unpublished cases for the proposition that the refund provision was enacted as section 3 of a standalone statute; however, pursuant to R. 1:36-3, the court does not rely upon them in reaching this decision.

Defendant further asserts that the phrase "the within act" in the text of the statute confirms the same conclusion. Defendants cite to Ptaszynski v. Atl. Health Sys., Inc., 440 N.J. Super. 24, 35 (App. Div. 2015), in which the court considered similar language in the context of the Nursing Home Responsibilities and Residents' Rights Act, N.J.S.A. 30:13-1 et seq. (the "NHA"). Id. "Under the original version of the NHA passed in 1986, a person could bring a claim for a violation of a nursing home resident's "rights" as defined in the law but only the Department of Health could bring an action to enforce the nursing home's "responsibilities". Id. at 33-34. Fifteen years later, a new bill was passed which added two sections to the statute. The first section, N.J.S.A. 30:13-4.1, introduced new requirements with respect to nursing homes' handling of security deposits. Id. at 34. The second section, N.J.S.A. 30:13-4.2, created a private cause of action "for any violation of this Act." Id. The question presented was whether the private cause of action provision applied to the nursing home's responsibilities under the entire NHA, or only those dealing with security deposits. Ibid. The Appellate Division held that "[t]he plain language of N.J.S.A. 30:13-4.2 and the context in which the phrase 'this act' is used in N.J.S.A. 30:13-4.1 and N.J.S.A. 30:13-4.2 indicate that the Legislature intended the phrase to mean the amendatory legislation enacted in 1991, not the whole of the NHA." Id. at 35."

Additionally, Defendant asserts that the legislative history of N.J.S.A. 56:8-2.11 removes any doubt as to its proper application. Defendant quotes the intended purpose of the statute, which is to "prohibit restaurants, hotels, cafes, lunch counters or other eating establishments from misrepresenting food or food products in their menus or in their advertising." New Jersey Senate Bill 1408 (Oct. 23, 1978). Defendant also quotes a Memorandum from Governor Brendan Byrne to the New Jersey Senate dated December 10, 1979, in which Governor Byrne expresses his concern about "the need for state government agents to inspect menus and commercial kitchens or to taste test products at a time when other budgetary priorities exist." Memorandum from Governor Brendan Byrne to the New Jersey Senate (Dec. 10, 1979) at 11. Defendants also quote the Governor's Press release which indicated that the private cause of action provision was enacted to ensure that "defrauded consumers be entitled to a refund if the eating establishment is found to be in violation of the act…". Press Release Issued by Governor Brendan Byrne on Jan. 24, 1980.

Last, Defendant asserts that in Artistic Lawn & Landscaping Company, Inc. v. Smith, 381 N.J. Super. 78, 88-89 (Law Div. 2005), the court simply assumed that the refund provision applies to all CFA violations and did not mention the Truth in Menu Act, analyze its language, or examine its legislative history.

In opposition, Plaintiffs assert that the Supreme Court's pronouncements that the New Jersey Consumer Fraud act provides consumers with a cause of action to recover refunds are binding on this court. Plaintiffs quote Lemelledo v. Beneficial Corp. of Am., 150 N.J. 255, 264 (1997) for the proposition that the NJCFA "provides individual consumers with a cause of action to recover refunds." Plaintiffs then cite two other cases in which the Court also found that the CFA provides individual consumers with a cause of action to receive refunds. See Weinberg v. Sprint Corp., 173 N.J. 233, 248 (2002); Dugan v. TGI Fridays, Inc., 231 N.J. 24, 51 (2017) (quoting Weinberg, 173 N.J. at 248). Plaintiffs further assert that characterizing these decisions of the Supreme Court as "mere dictum" rests on a misconception of the binding nature of the Supreme Court's dicta. Plaintiffs rely upon State v. Rose, 206 N.J. 141, 183 (2011) (internal citations omitted), for the proposition that:

> An expression of opinion on a point involved in a case, argued by counsel and deliberately mentioned by the court, although not essential to the disposition of the case … becomes authoritative [] when it is expressly declared by the court as a guide for future conduct.

Plaintiffs assert that "the legal findings and determinations of a high court's considered analysis must be accorded conclusive weight by lower courts." State v. Rose, 206 N.J. 141 at 183-84. Plaintiffs further assert that the Court in Lemelledo v. Beneficial Corp. of Am., 150 N.J. 255, 264 (1997) noted that the "language of the CFA evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud." Id. citing Barry v. Arrow Pontiac, 100 N.J. 57, 69 (1985). Plaintiffs also rely upon Weinberg v. Sprint Corp., 173 N.J. 233, 249 (2002), in which the Court observed that "[t]he Act focuses on allowing individual consumers to recover refunds for losses caused by violations of the Act[.]". Id. citing N.J.S.A. 56:8-2.11 to -2.12. Plaintiffs therefore assert that with the Court having explained that refunds are available for "violations of the Act" without reference to N.J.S.A. 56:8-2.09 in a case in which there was no allegation of a violation of N.J.S.A. 56:8-2.09, the term "Act" as used by the Court could only mean the New Jersey CFA as a whole, and not just one subsection.

Plaintiffs also argue that the Weinberg Court's analysis of the refund provision faithfully follows the texts of the statute and had the Legislature intended to limit the refund provision as defendant suggests, it could have done so in clear and certain terms. Plaintiffs assert that the absence of such limiting language does not create an ambiguity.

Last, Plaintiffs assert that the weight of authority confirms that consumers can obtain refunds under N.J.S.A. 56:8-2.11 for all violations of the NJCFA. They cite to one published Law Division case, Artistic Lawn & Landscape Company, Inc., 381 N.J. Super 75 (Law Div. 2005), which is not binding on this court, some unpublished decisions for which the court does not rely upon pursuant to R. 1:36-3, and US District Court cases which are non-precedential.

Ultimately, this court finds State v. Rose, 206 N.J. 141, 183 (2011) to be controlling. In Rose, the New Jersey Supreme Court addressed the proposition that "any part of a judicial decision by this Court that goes beyond the minimum needed to accord relief to the parties to an action constitutes non-precedential dicta." Rose, 206 N.J. at 183. The Supreme Court rejected that notion, holding that

> [A]n expression of opinion on a point involved in a case, argued by counsel and deliberately mentioned by the court, although not essential to the disposition of the case … becomes authoritative [ ] when it is expressly declared by the court as a guide for future conduct
> Id.

In other words, "matters in the opinion of a higher court which are not decisive of the primary issue presented but which are germane to that issue … are not dicta, but binding decisions of the court." Rose, 206 N.J at 183 quoting 5 Am. Jur. 2d Appellate Review §564 (2007). The Court quoted the First Circuit's explanation in the context of the federal system:

> [A]ppellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement. If lower courts felt free to limit Supreme Court opinions precisely to the facts of each case, then our system of jurisprudence would be in shambles, with litigants, lawyers and legislature left to grope aimlessly for some semblance of reliable guidance.

Rose, 206 N.J. at 183 quoting McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (internal citations omitted), cert. denied. 540 U.S. 910 (1992).

The Rose Court also quoted a Seventh Circuit case which illustrated the absurdity of a contrary approach:

> As with Miranda v. Arizona, 384 U.S. 436 (1966), Wolff v. McDonnell, 418 U.S. 539 (1974), and other comprehensive decisions, almost all of the opinion could be labeled dicta. The details of Miranda, for example, could be disregarded in the ground that Ernesto Miranda had not been given any warning, so the Court could not pronounce on the consequences of giving three but not four warning on its list. The Court has rebuffered arguments of this sort, however.

Rose, 206 N.J. at 183 quoting Faheem-El v. Klincar, 841 F.2d 712 (7th Cir. 1988).

"In sum, the legal findings and determinations of a high court's considered analysis must be accorded conclusive weight by lower courts. Our courts have consistently followed this rule. See, e.g. State v. Breitwesier, 373 N.J. Super. 271, 282-83 (App. Div. 2004) certif. denied. 182 N.J. 628 (2005)." Id. at 183-84.

With this jurisprudence in mind, this court cannot ignore the precedential cases cited by Plaintiffs, Lemelledo v. Beneficial Corp. of Am., 150 N.J. 255 (1997); Barry v. Arrow Pontiac, 100 N.J. 57 (1985); Weinberg v. Sprint Corp., 173 N.J. 233 (2002); Dugan v. TGI Fridays, Inc., 231 N.J. 24, 51 (2017). In those cases, the Court noted that the "language of the CFA evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud." 150 N.J. at 264. Further, in Weinberg, the Court observed that "[t]he Act focuses on allowing individual consumers to recover refunds for losses caused by violations of the Act[.]" 173 N.J. at 249 (citing N.J.S.A. 56:8-2.11 to -2.12). The Court has thus explained that refunds are available for "violations of the Act" without reference to N.J.S.A. 56:8-2.09. While Defendant cites to several cases in which a different analysis was applied, those cases are unpublished and therefore of no moment to this court. Furthermore, while the Legislative history cited by Defendant sheds light as to the intent and purpose of the present statute, this court cannot ignore the controlling dicta in the New Jersey Supreme Court cases that broadly apply the refund provision. Rose, requires that result. For these reasons, defendant's Motion for Summary Judgment is denied.

*/s/ Ana C. Viscomi*
ANA C. VISCOMI, J.S.C.