SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3309-15T4

MAUREEN CROSSMAN, individually and as a class representative on behalf of others similarly situated,

Plaintiff-Appellant,

v.

RESOURCE MS STONYBROOK NJ MFP LLC; YES ENERGY MANAGEMENT, INC.; and ALLSTATE MANAGEMENT CORP.,

Defendants-Respondents.

Argued October 2, 2017 – Decided March 27, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1579-15.

Lewis G. Adler argued the cause for appellant (Lewis G. Adler and Paul DePetris, attorneys; Lewis G. Adler and Paul DePetris, on the briefs).

Alan C. Milstein argued the cause for respondents Resource MS Stonybrook NJ MPF, LLC and Allstate Management Corp. (Sherman, Silverstein, Kohl, Rose & Podolsky, PA, attorneys; Alan C. Milstein, on the brief).

Daniel C. Gibbons argued the cause for respondent Yes Energy Management, Inc. (Nixon Peabody, LLP, attorneys; Daniel C. Gibbons, on the brief).

James M. Graziano argued the cause for amicus curiae New Jersey Apartment Association and National Apartment Association (Archer & Greiner, PC, attorneys; James M. Graziano, of counsel and on the brief; Maureen T. Coghlan, on the brief).

PER CURIAM

Plaintiff Maureen Crossman leased an apartment in the 258-unit Stonybrook Apartments complex. The complex was owned by defendant Resource MS Stonybrook NJ MPF, LLC (Resource), and managed by defendant Allstate Management Corp. (Allstate). Defendant Yes Energy Management, Inc. (Yes), provided "utility billing" to the complex.

Apartment units were not billed directly for water and sewerage services because the units were not individually metered. Instead, each tenant was billed using a Ratio Utility Billing System (RUBS), whereby Yes allocated total charges to the complex among the tenants "based on a combination of square footage of [a tenant's] apartment unit and the number of persons residing in [a tenant's] unit." Prior to occupancy, plaintiff executed a written lease that included a utility addendum, which plaintiff also signed. The addendum explained that plaintiff was responsible for

water and sewerage charges computed by the use of RUBS; the lease further explained she would be billed directly by Yes.[1]

Unhappy with the condition of the apartment, plaintiff moved out less than two months later. Resource provided a final account statement reflecting a $61.57 water, trash and sewer reimbursement deducted from plaintiff's security deposit. Approximately one year later, plaintiff filed a putative class action complaint claiming defendants' use of RUBS was unlawful, and alleging causes of action for constructive eviction and violation of the New Jersey Truth-in-Renting Act, N.J.S.A. 46:8-43 to -49, against Resource and Allstate, and violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, and civil conspiracy against all defendants.[2]

When Yes moved to dismiss plaintiff's complaint for failure to state a cause of action, Rule 4:6-2(e), the other defendants joined in the motion, and plaintiff moved for partial summary judgment on liability on all but the constructive eviction count of the complaint. In a comprehensive written decision, Judge

[1] The lease actually states plaintiff would be billed by "ISTA." Plaintiff alleged ISTA and Yes are one in the same entity, and Yes does not dispute it billed plaintiff.

[2] Plaintiff's amended complaint contained significantly more factual allegations but alleged the same causes of action.

Richard J. Geiger granted defendants' motion and denied plaintiff's motion.[3] This appeal followed.

Before us, plaintiff limits her argument to the dismissal of her CFA claim and denial of partial summary judgment in her favor on that count of the complaint. Plaintiff argues she established the liability of Resource and Yes under the CFA, because utilizing RUBS is unlawful. She contends the Board of Public Utilities (BPU) regulates the sale and resale of water, and Resource and its agent Yes engaged in the sale and resale of water utilizing the RUBS billing method without BPU approval. Plaintiff contends she suffered an ascertainable loss as a result. We disagree and affirm substantially for the reasons expressed by Judge Geiger.[4]

Although defendants' motions to dismiss were brought pursuant to Rule 4:6-2(e), they were supported by exhibits outside the pleadings themselves, for example, plaintiff's deposition testimony. The rule provides

> [i]f, on a motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be

[3] Plaintiff dismissed her constructive eviction claim against Resource with prejudice before filing this appeal.

[4] Plaintiff asserts no argument in her brief as to Allstate. An issue not briefed is deemed waived. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011).

> given reasonable opportunity to present all material pertinent to such a motion.
>
> [Ibid.]

Plaintiff filed her motion for partial summary judgment in accordance with Rule 4:46. The judge's written opinion explained the proper standard of review under both rules. He decided the motions by resolving purely legal questions, since the facts were essentially undisputed. Whether considered in the context of a motion to dismiss or one seeking summary judgment, we review questions of law de novo. Vitale v. Schering-Plough Corp., ___ N.J. ___, ___ (2018) (slip op. at 11).

"The CFA requires a plaintiff to prove three elements: '1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss.'" D'Agostino v. Maldonado, 216 N.J. 168, 184 (2013) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009)).

> The language of the CFA specifically identifies a variety of affirmative acts, including "deception, fraud, false pretense, false promise, [and] misrepresentation," and it also identifies as actionable "the knowing[ ] concealment, suppression or omission of any material fact," if intentional, N.J.S.A. 56:8-2. In addition, by referring to "unconscionable commercial practice[s]," ibid., and by authorizing the Attorney General to promulgate regulations that shall have the force of law, see N.J.S.A.

> 56:8-4, the CFA permits claims to be based on regulatory violations.
>
> [Allen v. V & A Bros., Inc., 208 N.J. 114, 131 (2011).]

As she did in the Law Division, plaintiff argues Resource and Yes operate a "public water system," as defined by the Safe Drinking Water Act because they provided water to more than twenty-five separate residential units and, therefore, are subject to BPU jurisdiction. See N.J.S.A. 58:12A-3(l) ("'Public water system' means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year."). Because BPU never approved the use of RUBS, plaintiff contends defendants' conduct was illegal and actionable under the CFA.

Judge Geiger properly rejected plaintiff's argument that Lewandowski v. Brookwood Musconetcong River Property Owners' Association, 37 N.J. 433 (1962), supported a finding that defendants operated a public utility, as defined by N.J.S.A. 48:2-13(a).[5] In Lewandowski, the Court considered whether the BPU

[5] N.J.S.A. 48:2-13(a) provides the BPU
> shall have general supervision and regulation
(footnote continued next page)

properly determined a residential property owners' association's operation of a water system was under the Board's jurisdiction. Id. at 435-36. The Court held the statute "requires the existence of two conditions in order to bring a water supplier within the definition [of a public utility], i.e., (1) that it owns, operates, manages or controls a water system for public use, and (2) that it does this under privileges granted by the State or any of its political subdivisions." Id. at 443-44; see also In re Petition of N.J. Natural Gas Co., 109 N.J. Super. 324, 331 (App. Div. 1970) (providing for the same two-prong analysis); Junction Water Co. v. Riddle, 108 N.J. Eq. 523, 525-526 (1931) ("A water company, or an individual, does not become a public utility unless it owns, operates, manages or controls a (water) plant or system for public

---

(footnote continued)

> of and jurisdiction and control over all public utilities as defined in this section and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Title.
>
> The term "public utility" shall include every individual, copartnership, association, corporation or joint stock company . . . that now or hereafter may own, operate, manage or control . . . any . . . pipeline, . . . water, . . . sewer, . . . plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.

use, and does this under privileges granted by the state."). In conducting that two-prong analysis, the Court held that "public use" depended on the "character and extent of use and not upon agreements or understandings between the supplier and those supplied." Lewandowski, 37 N.J. at 445.

Judge Geiger properly distinguished Lewandowski from this case. He noted that in Lewandowski, the association operated "a water supply system which included constructing wells, thereby diverting significant quantities of water from the State's natural resources for use by a larger number of property owners," and "[t]he water system operated under privileges granted by the State Department of Health and two municipalities" given "some 24,000 feet of water mains were constructed in dedicated streets."

Instead, Judge Geiger found Antique Village Inn, Inc. v. Pacitti, Robins & Anglin, Inc., 160 N.J. Super. 554, 559 (Law Div. 1978), to be persuasive. There, the court ruled a commercial landlord had the right to purchase electrical energy from a utility company and distribute it to tenants pursuant to a lease agreement without being required to submit to the jurisdiction of the Public Utility Commission, the BPU's predecessor. Id. at 555-59. Judge Geiger also noted the BPU "has declared that it does not have jurisdiction over RUBS," citing a letter dated January 28, 2005,

from the Office of Chief Counsel to the BPU which was part of the motion record.

Plaintiff contends Antique Village is not binding precedent, nor does its reasoning apply because it involved commercial, not residential, tenancies. However, we find the Antique Village court's reasoning persuasive, at least as to whether defendants' use of RUBS makes them a public utility subject to the jurisdiction of the BPU. Moreover, in In Re Petition of South Jersey Gas Company, 116 N.J. 251, 261 (1989), the Court cited both Antique Village and Riddle, which dealt with residential tenancies, as examples of situations in which BPU's jurisdiction did not apply.[6]

[6] As amici New Jersey Apartment Association and National Apartment Association note, a number of courts in other jurisdictions have found arrangements between a landlord and a tenant for service of utilities are not "public" in nature and do not subject the provider to regulation as a public utility. See, e.g., Peter Daniels Realty, Inc. v. N. Equity Inv'rs, Grp., 829 A.2d 721, 722 (Pa. Super. Ct. 2003) ("[U]nless the water service is available to all members of the public who may require it, such a provider is not a 'public utility'"); Baker v. Pub. Serv. Co., 606 P.2d 567, 571 (Okla. 1980) ("[I]t has been consistently found . . . that landlords who only submeter electricity to their tenants are not public utilities."); see also Zehm v. Morgan Props., No. 1:17-CV-1758, 2017 U.S. Dist. LEXIS 178964, at *23-26 (D.N.J. 2017) (citing Antique Village and holding, under facts nearly identical to this case, "the allocation of charges for water are incidental to the dominant service provided by [defendants] — the leasing of apartments," and the landlord is not subject to BPU regulation); Phillip E. Haggman, Landlord Supplying Electricity, Gas, Water, or Similar Facility to Tenant as Subject to Utility Regulation,

(footnote continued next page)

Plaintiff also argues the use of RUBS results in an unlawful diversion of utility services, violating both N.J.S.A. 2A:42-88 and N.J.A.C. 14:3-7.8. We agree with Judge Geiger, who concluded the statute and regulation are "aimed at addressing utilities that are physically diverted 'by unauthorized connection to pipes' serving other living units," such as when a tenant is charged for electric services being used by another tenant as a result of a single electric meter or shared electrical circuits within the dwelling. Plaintiff's argument lacks sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).[7]

Finally, although the Legislature has chosen to regulate "indirect apportionment of heating costs" in multi-family dwellings through the Department of Community Affairs and indirectly the BPU, see N.J.S.A. 55:13A-7.8, none of the agency statements or unreported cases plaintiff cites in her brief supports the conclusion that the BPU or any other agency has

(footnote continued)
75 A.L.R. 3d 1204, 1208 (1977) ("The courts have uniformly rejected the need for consumer protection as the basis for public utility regulation of landlords who supply utility services to their tenants.").

[7] The same is true of plaintiff's briefly stated argument that RUBS is illegal because it violates N.J.S.A. 51:1-83, regarding the use of only "sealed weights and measures."

prohibited the use of RUBS or similar systems to apportion water and sewerage costs among tenants.

Affirmed.