NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3098-10T2

DEBRA DUGAN, on behalf of
herself and all others
similarly situated,

Plaintiff-Respondent,

v.

TGI FRIDAY'S, INC, CARLSON
RESTAURANTS WORLDWIDE, INC.,
on behalf of themselves and all
others similarly situated,

Defendants-Appellants.

Argued September 28, 2011 - Decided October 25, 2011

Before Judges Fuentes, Graves, and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-0126-10.

Jeffrey L. O'Hara argued the cause for appellants (Clyde & Co US LLP, attorneys; Mr. O'Hara, of counsel and on the brief; Matthew S. Schultz, on the brief).

Sander D. Friedman and Donald M. Doherty, Jr., argued the cause for respondent (Law office of Sander D. Friedman and Law Office of Donald M. Doherty, Jr., attorneys; Mr. Friedman, Mr. Doherty, and Wesley G. Hanna, on the brief).

PER CURIAM

This is a putative class action seeking remedies pursuant to New Jersey's Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -184, and the Truth in Consumer Contract, Warranty, and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18. Defendants TGI Friday's, Inc., and Carlson Restaurants Worldwide, Inc. (collectively TGIF) appeal —— on interlocutory leave granted by the New Jersey Supreme Court —— the denial of their motion to dismiss the complaint with prejudice for failure to state a claim. We affirm.

I.

Because this is a review of a denial of TGIF's motion to dismiss pursuant to Rule 4:6-2(e), we derive the following facts from plaintiff's spartan complaint. Roa v. Roa, 200 N.J. 555, 562 (2010) (observing that motion to dismiss must be based upon the content of the pleading itself).

Plaintiff Debra Dugan was a customer at TGIF's Mt. Laurel restaurant. The TGIF menu listed prices for all food items and wine, but did not list prices for beer, mixed drinks, or soft drinks. Dugan complains that "[d]efendants charged plaintiff an undisclosed amount for beverages while dining at [d]efendants' establishment." On one occasion, Dugan purchased Coors Lite beer at the bar, and was charged $2.00 per serving. She then

sat at a nearby table, made a second order for the same beer, and was charged $3.59 per serving.

Dugan's grievance revolves around the undisclosed price differential for the same product that is based upon where in the restaurant —— at the bar or at a table —— the item is served. She also asserts that she is aggrieved because of the TGIF menu's "fail[ure] to disclose the price of beverages[,] and consumers only become aware of the prices when presented with an invoice (or 'check') after the beverage is consumed."

Based upon these limited factual assertions, Dugan's complaint, in count one, alleges that TGIF's activities constitute unconscionable commercial practices —— calling them (1) a "bait and switch" and (2) an unlawful practice countermanded by N.J.S.A. 56:8-2.5 (requiring all merchandise sold at retail to be accompanied by a posted price) —— and seeks remedies pursuant to the CFA. In addition, count two of the complaint alleges that TGIF's manner of offering to sell beverages to consumers —— its menu —— violates the TCCWNA because of "a clearly established right of the consumer to have the total selling price plainly marked or located at the point where the merchandise is offered for sale."

After Dugan filed her complaint, and issue was sharply joined by TGIF's answer, the parties engaged in limited

discovery under the close management of the Law Division. In due course, TGIF moved to dismiss the complaint with prejudice pursuant to Rule 4:6-2(e). Dugan responded, surprisingly, with a certification containing additional factual allegations, including specific information about the purchase of a soft drink at TGIF. Dugan did not seek to amend her complaint. Even more curiously, in defense of the motion to dismiss, Dugan's attorney submitted a certification attesting to facts concerning his personal visits to three local restaurants and attaching the menus from several eateries, including a TGIF restaurant at an undisclosed location.

The judge approached the motion pursuant to Rule 4:6-2(e), even though the parties presented (and the judge did not exclude) limited "matters outside the pleading," which arguably should have converted the motion to one for summary judgment.[1] R. 4:6-2(e). The judge ultimately denied the motion to dismiss, and entered an order memorializing the interlocutory ruling.

TGIF moved for leave to appeal, but we denied the motion. Thereafter, TGIF sought the same relief from our Supreme Court,

[1] The motion judge wrote a transmittal letter to the parties sending them his memorializing order in which he referred to the motion as one for summary judgment. The order itself, however, referred only to Rule 4:6-2(e), not Rule 4:46-1. The parties' appellate submissions have hewed to an analysis of only Rule 4:6-2(e), which we deem appropriate.

which was granted. The matter was summarily remanded to us with instructions to consider the issues on the merits.

II.

Our scope of review of a motion to dismiss for failure to state a claim "is governed by the same standard as that applied by the trial court." Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005) (citing Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002)).

A.

We start with principles that are not seriously disputed by the parties. In determining whether to dismiss a complaint under Rule 4:6-2(e), a court must "'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.'" Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting DiCristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)); see also NCP Litig. Trust v. KMPG, L.L.P., 187 N.J. 353, 365 (2006). The review must be performed in a manner that is "generous and hospitable." Printing Mart, supra, 116 N.J. at 746. The court's role is confined to determining "whether a cause of action is 'suggested'" by the complaint. Ibid. (quoting Velantzas v.

Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Consequently, dismissal motions for failure to state a claim "should be granted only in the rarest of instances." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165 (2005) (quoting Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993)).

The ordinary remedy to address a complaint's legal deficiency, once it has been identified upon a motion to dismiss pursuant to Rule 4:6-2(e), is to grant a plaintiff leave to file an amended pleading correcting that deficiency. However, "'courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted.'" Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) (quoting Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256-57 (App. Div. 1997)).

TGIF acknowledges these principles, yet argues that the complaint cannot be sustained. It posits five arguments in support of its view that the motion judge erred in not dismissing the complaint with prejudice: (1) the sale of alcoholic beverages is governed exclusively by the New Jersey Alcoholic Beverage Control Act (ABCA), N.J.S.A. 33:1-1 to -97, to the exclusion of the CFA; (2) the CFA (specifically, N.J.S.A.

56:8-2.5) does not require price disclosure of beverages on menus; (3) Dugan's allegations, even if true, do not satisfy the requisite elements for CFA remedies; (4) the TCCWNA is inapposite; and (5) Dugan is incapable of establishing the requisites for a class action. We find none of these arguments persuasive.

B.

Celebrated as "one of the strongest consumer protection laws in the nation," Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 555 (2009), the CFA has been propagated by an uninterrupted history "of constant expansion of consumer protection." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997). The CFA proclaims it an unlawful practice for sellers of merchandise or real estate to engage in "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 [such] merchandise or real estate[.]" N.J.S.A. 56:8-2. The statute is to be liberally construed to give effect to its remedial purposes in safeguarding the public. Lee v. Carter-Reed Co., 203 N.J. 496, 522 (2010); see also Furst v. Einstein Moomjy, Inc., 182 N.J. 1,

11-12 (2004).

Even when a statute or regulation declaring a practice unlawful under the CFA applies by its terms to particular circumstances, a violation may not provide a basis for a CFA claim if the rule is inconsistent with other legal obligations also applicable to the circumstances. Lemelledo v. Benefit Mgmt. Corp., 150 N.J. 255, 266 (1997). The CFA is broadly construed to protect consumers, thus courts presume that its rules apply even when there are other potentially applicable rules. Id. at 270. The presumption is overcome only if there is "a direct and unavoidable conflict . . . between application of the CFA and application of the other regulatory scheme or schemes." Real v. Radir Wheels, Inc., 198 N.J. 511, 522 (2009). To supplant the CFA, the other framework must "deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes." Ibid.

Only a robust discordance will suffice and there is "a real possibility of conflicting determinations, rulings and regulations affecting the identical subject matter." Lemelledo, supra, 150 N.J. at 267 (quoting Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 272 (1978)). Potential conflict is

insufficient: "[T]he conflict must be patent and sharp, and must not simply constitute a mere possibility of incompatibility." Id. at 270. "The measured application of those principles has led to few, very limited exceptions to the CFA's reach." Real, supra, 198 N.J. at 523.

The Legislature has declared that the public policy and legislative purpose of the ABCA is "[t]o strictly regulate alcoholic beverages to protect the health, safety and welfare of the people of this State." N.J.S.A. 33:1-3.1(b)(1). Additionally, the ABCA serves "[t]o protect the interests of consumers against fraud and misleading practices in the sale of alcoholic beverages." N.J.S.A. 33-3.1(b)(4). From these broad pronouncements, TGIF argues that the conduct complained of by Dugan is a regulated activity that is actionable only pursuant to the ABCA, and not through the CFA.

TGIF has not directed us to any specific regulations promulgated by the Division of Alcoholic Beverage Control (Division) that address point of sale price disclosures for alcoholic beverages intended to be consumed on site. By analogy, it mentions the regulatory bar against certain types of promotional activities. See N.J.A.C. 13:2-23.16. According to TGIF, the regulation countenances its Happy Hour practice, which it contends is "a similar promotion conducted by TGIF [that]

gave rise to [Dugan's] suit." In short, TGIF suggests that the pricing differential between bar and table purchases is a valid promotional activity. The principal flaw in this argument is the absence of evidence (from the complaint) that Dugan's purchases were either part of a promotion, much less part of a Happy Hour practice.

Notwithstanding the ABCA's limited point-of-sale price disclosure regulations, the Division issued a handbook[2] for the guidance of retail licensees such as TGIF. The handbook explains, "[p]rices can be advertised provided they are not below cost" (emphasis added). TGIF argues that this statement confirms the permissive nature of price disclosures. However, this guidance, together with the handbook's further admonition against "false, misleading, [or] deceptive" practices, including "bait and switch," appears under the heading "Advertising," which explains that "[r]etail licensees may individually run advertisements in newspapers, circulars, coupon packages, radio, television or any other media that regularly promotes business to potential customers."

[2] The document is entitled, "Alcoholic Beverage Control Handbook for Retail Licensees." The copy contained in TGIF's appendix is dated March 2004; however, a more current version, revised in April 2011, is available at http://www.nj.gov/oag/abc/abc-hb-eng-esp.html (last visited on October 13, 2011). The relevant provisions of the two versions are identical.

We are convinced that these statutory and regulatory provisions do not present a direct and unavoidable conflict with the CFA's statutory price disclosure, N.J.S.A. 56:8-2.5, or its overarching surveillance of sharp business practices. Prohibiting deceptive price differentials and requiring menu or other point of sale price disclosures (such as on a bulletin or chalk board), are complementary to the ABCA's goal of "protect[ing] the interests of consumers against fraud and misleading practices in the sale of alcoholic beverages." N.J.S.A. 33-3.1(b)(4). Aside from TGIF's entirely speculative view that application of the CFA will thrust TGIF (and other licensees) into conflict with the ABCA, nothing suggests that these two statutory frameworks are put at odds in the context of this case.

The handbook's statement that "prices can be advertised" is in harmony with the CFA. The most sensible understanding of this provision is as permission to place pricing information in distributed media advertisements. The handbook does not address the issue in this case, which involves real-time disclosures at the point of sale. We conclude that the ABCA provides neither specific, concrete, and pervasive oversight with the particular activities Dugan complains about nor is there "a direct and

unavoidable conflict . . . between application of the CFA and application of the [ABCA]." Lemelledo, supra, 150 N.J. at 270.

C.

TGIF next argues that the CFA does not mandate point-of-sale disclosure of the prices of beverages in a restaurant and therefore Dugan's complaint fails to state a viable CFA claim. Dugan argues that N.J.S.A. 56:8-2.5 is the source of her authority, notwithstanding the more specific provisions of the later-adopted Unit Price Disclosure Act, N.J.S.A. 56:8-21 to -25 (UPDA), which TGIF says trumps Dugan's claim.

N.J.S.A. 56:8-2.5 provides:

> It shall be an unlawful practice for any person to sell, attempt to sell or offer for sale any merchandise at retail unless the total selling price of such merchandise is plainly marked by a stamp, tag, label or sign either affixed to the merchandise or located at the point where the merchandise is offered for sale.

Dugan argues that beverages are merchandise and the statute therefore plainly governs her circumstances.

TGIF engages in legal gymnastics in a futile attempt to convince us that beverages are not embraced within the definition of merchandise in N.J.S.A. 56:8-2.5. It proceeds on the assumption that because the UPDA, which does not mandate price disclosures in menus, but touches and concerns beverages in some fashion, a restaurant like TGIF is inoculated against

the effects of N.J.S.A. 56:8-2.5. The UPDA, which supplements the CFA, applies to "consumer commodit[ies]," which are defined as "any merchandise, wares, article, product, comestible or commodity of any kind or class produced, distributed or offered for retail sale for consumption by individuals other than at the retail establishment." N.J.S.A. 56:8-22. Comestibles, although undefined in either the CFA or the UPDA, includes beverage items. Thus, argues TGIF, their inclusion in the UPDA —— separate from and in addition to general merchandise —— requires their exclusion from the more general CFA provision governing price disclosures of merchandise.

This interpretation of the legislative framework ignores principles of statutory harmonization, is implausible, and runs counter to the ever-expanding nature of the "wide and deep" scope of the CFA. Real, supra, 198 N.J. at 521. We are confident that if the legislature intended to excise beverage sales at restaurants from the sweep of the CFA by the adoption of the UPDA, it would have done so in plain language without the necessity of an advanced degree in either logic or linguistics.

The CFA's broad definition of merchandise is designed to apply expansively to restrain fraudulent practices in sales to consumers, while the UPDA's definition of consumer commodity denotes that it applies to the various sorts of things offered

for sale for off-premises consumption for which prices of a per-weight or per-volume nature will be helpful to consumers. Nothing in the interplay between the CFA and the UPDA suggests to us that TGIF's on-premises consumer sales of beverages are immunized from the application of N.J.S.A. 56:8-2.5.

We recognize that there is a specific CFA statutory provision prohibiting misrepresentation of the identity of food. N.J.S.A. 56:8-2.9. Since the general CFA provisions already prohibit misrepresentation in the sale of merchandise, this enactment would arguably be unnecessary if beverages were already included in the definition of merchandise. We are satisfied, however, that the legislature simply wanted to highlight the law's application to the proper identification of foodstuffs.

D.

We next address TGIF's position that Dugan cannot prove all of the necessary components of a CFA cause of action. To succeed on a CFA claim a plaintiff must satisfy three elements of proof: "(1) unlawful conduct by defendant; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss." Bosland, supra, 197 N.J. at 557. A complaint seeking remedies under the CFA must adequately plead these elements in order to

proceed. As we have already observed, on a motion to dismiss a court is obliged to be forgiving as to pleadings and willing to infer the necessary allegations or give the pleader the opportunity to amend. See Smith v. SBC Commc'ns Inc., 178 N.J. 265, 282-85 (2004).

"CFA claims brought by consumers as private plaintiffs can be divided, for analytical purposes, into three categories. Broadly defined, the categories are claims involving affirmative acts, claims asserting knowing omissions, and claims based on regulatory violations." Bosland, supra, 197 N.J. at 556 (citing Cox v. Sears, Roebuck & Co., 138 N.J. 2, 17-18 (1994)) (citation omitted). "To some extent, the proofs required will vary depending upon the category into which any particular claim falls." Ibid. "[I]f a claimed CFA violation is the result of a defendant's affirmative act, 'intent is not an essential element.'" Ibid. (quoting Cox, supra, 138 N.J. at 17-18). "Likewise, intent is not an element if the claim is based on a defendant's alleged violation of a regulation, because 'the regulations impose strict liability for such violations.'" Ibid. (quoting Cox, supra, 138 N.J. at 18). Similarly, administrative regulations adopted under the CFA, or additional specific statutory provisions may declare practices unlawful, thereby defining violations that can satisfy the first element

of a CFA claim. See Czar, Inc. v. Heath, 198 N.J. 195, 203 (2009) (noting that a statute prohibiting certain conduct in the home improvement industry expressly provides that violations are unlawful practices under the CFA).

From the foregoing discussion of the CFA, we are satisfied that Dugan's complaint, hospitably read, adequately alleges all three categories of putative CFA violations. She contends that TGIF intentionally misleads consumers through stealth price adjustments to beer, knowingly omits beverage price information from its menus, and violates N.J.S.A. 56:8-2.5. Whether she can prove any, or all, of that is not before us.

Regardless of the theory under which a CFA claim proceeds, the consumer must "demonstrate that he or she has suffered an 'ascertainable loss.'" Bosland, supra, 197 N.J. at 555 (quoting Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 472-73 (1988)); N.J.S.A. 56:8-19. An ascertainable loss is "a definite, certain and measurable loss, rather than one that is merely theoretical." Id. at 558 (citing Thiedemann v. Mercedes-Benz USA, L.L.C., 183 N.J. 234, 248 (2005)). Additionally, the CFA "requires a consumer to prove that the loss is attributable to the conduct that the CFA seeks to punish by including a limitation expressed as a causal link." Id. at 555 (citing Meshinsky, supra, 110 N.J. at 474).

TGIF argues that Dugan merely alleges a subjective disagreement with price, and that this does not constitute an ascertainable loss. Dugan replies that the secret switch in beer price from bar to table demonstrates conduct much more malignant than a mere dispute over the appropriate price of a brew. She further argues that for beverages without listed prices, she had a legitimate expectation of an objectively reasonable price, and the difference between what she paid and such a reasonable price constitutes an ascertainable loss. Dugan clearly has the better argument, and we find that it is fully explicable from her complaint. At the very least, if proven, Dugan would logically have lost the benefit of a $2.00 beer and paid $1.59 more for the privilege of moving from the bar to a nearby table. This is an objective out-of-pocket loss. The out-of-pocket loss measure, typically applied when misrepresentation induces a consumer to pay a higher price than is reasonable, "provides recovery for the difference between the price paid and the actual value of the property acquired." Romano v. Galaxy Toyota, 399 N.J. Super. 470, 483 (App. Div.), certif. denied, 196 N.J. 344 (2008).

As for causality, it is true that Dugan's complaint did not expressly allege (1) that she looked at the menu, discerned the absence of prices, and assumed a reasonable price lower than

what she was eventually charged, or (2) that she purchased a beer at the bar, actually noticed that it cost two dollars, and then decided to buy another at a table on the assumption the price would be the same. This failure might condemn her cause on a summary judgment, but in the milieu of a motion to dismiss for failure to state a claim, Dugan's complaint must be parsed generously. We are satisfied that it sufficiently alleges the link between the alleged unconscionable commercial practices and her purported injury.

E.

TGIF's last series of arguments relates to the TCCWNA. It contends that Dugan's second count is not cognizable because (1) it is bereft of a valid CFA component, (2) she is not a consumer as that term is defined in the TCCWNA, and (3) Dugan "cannot identify a provision that violates a clearly established right of a consumer." We have already addressed the viability (for Rule 4:6-2(e) purposes) of Dugan's CFA claim, thereby disposing of TGIF's first argument.

TGIF also argues that Dugan is not a consumer within the embrace of the TCCWNA because Dugan's purchase of beverages was not a "property or service" within the meaning of N.J.S.A. 56:12-15 ("Consumer means any individual who buys, leases, borrows, or bails any money, property or service which is

primarily for personal, family or household purposes."). Instead, TGIF contends that Dugan bought a "consumable good or comestible," which by an undisclosed legerdemain is not a "property or service." We consider this argument to be without merit. R. 2:11-3(e)(1)(E).

Lastly, TGIF calls into question whether its omission of prices for beverages in its menu qualifies as an affirmative act under the TCCWNA. See Jefferson Loan Co., Inc. v. Session, 397 N.J. Super. 520, 540-41 (App. Div. 2008). We have held that the TCCWNA "prohibits a seller from entering into a contract with a consumer that includes any provision that violates a federal or state law." See Bosland v. Warnock Dodge, Inc., 396 N.J. Super. 267, 278 (App. Div. 2007), aff'd on other grounds, 197 N.J. 543 (2009). The statute provides in pertinent part:

> No seller . . . shall . . . offer to any consumer or prospective consumer or enter into any written consumer contract . . . which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, . . . established by State or Federal law at the time the offer is made or the consumer contract is signed . . . .
>
> [N.J.S.A. 56:12-15.]

This provision of the TCCWNA establishes liability whenever a seller offers a consumer a contract, the terms of which violate

any legal right of a consumer. Jefferson Loan Co., Inc., supra, 397 N.J. Super. at 541.

In this case, the affirmative act that may trigger the TCCWNA is the offer encompassed by TGIF's menu. We conclude that Dugan has alleged sufficient facts to establish that the offer violated the CFA. Those allegations are therefore sufficient to establish a potential violation of the TCCWNA. See Bosland, 396 N.J. Super. at 279. We do not read Jefferson Loan Co., Inc. to the contrary, which involved the inapposite failure to send a "notice of explanation" to the consumer. Id. at 540. This is distinguishable from the allegations here, where Dugan's complaint claims that TGIF's menu —— provided to customers in the usual course of business —— failed to disclose the prices of beverages.

F.

Finally, we decline to evaluate whether this lawsuit meets the requirements for class certification for either a plaintiff or a defendant class, as those questions must initially be decided in the Law Division following a proper motion for class certification under Rule 4:32. See NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 445 (App. Div. 2011).

Affirmed.