

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3615-12T3

ON TARGET STAFFING, L.L.C.,
ROY JAMES, President, On
Target Staffing, L.L.C.,
and ROY JAMES, Individually,

Plaintiffs-Appellants,

v.

PNC, NATIONAL ASSOCIATION
and CARLY A. VICHROSKI,
Branch Manager (PNC, N.A.,
Princeton Branch),

Defendants-Respondents,

and

PNC BANK, N.A.,

Third-Party Plaintiff,

v.

WOODFOREST NATIONAL BANK
and BANK ONE, N.A.,

Third-Party Defendants.

Submitted May 13, 2014 – Decided July 25, 2014

Before Judges Fisher, Espinosa and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No.
L-5087-09.

Peter Petrou, attorney for appellants.

Schenck, Price, Smith & King, L.L.P.,
attorneys for respondents (Roy J. Evans, on
the brief).

PER CURIAM

Plaintiffs On Target Staffing, LLC (Target) and Roy James (James), Target's principal owner, claim defendants PNC bank (PNC) and Carly A. Vichroski, a branch manager of the bank, violated the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -184. The trial court granted PNC and Vichroski's motion for partial summary judgment and dismissed the second count of the complaint, the only count that alleged a CFA violation. The court also denied plaintiffs' subsequent motions for reconsideration. Plaintiffs appeal the order granting partial summary judgment and dismissing the second count, as well as the orders denying reconsideration. We affirm.

I

Target prepares payroll checks for temporary employees hired by its client companies. After the checks are prepared, they are forwarded in bulk to Target's other offices around the country and distributed to local temporary employees. Target then sends an invoice to the client for the checks it prepared

and distributed to the client's temporary workers. To fund the payroll checks, Target either borrows money or dips into its own funds. At one time, Target held various accounts in PNC, including disbursement and payroll checking accounts.

Empire Staffing, a temporary employment agency based in Texas, was providing temporary employees to two companies that were involved in various renovation projects arising out of the damage caused by Hurricane Katrina. On October 25, 2006, Empire Staffing and Target entered into a contract in which Target agreed to provide payroll checks for the temporary employees Empire Staffing recruited for the two companies.

Initially, there were no problems; Target provided payroll checks to Empire Staffing, which disbursed the checks to the temporary employees, and the two companies were honoring Target's invoices. Empire Staffing also arranged for the temporary employees to cash their checks at a convenience store¹ in Houston, Texas. Within weeks, however, the companies stopped paying Target's invoices, but not before Target advanced considerable amounts of its own money to fund the payroll checks.

¹ In their brief plaintiffs comment it is common practice within the temporary staffing industry to find an entity where temporary employees can cash their checks.

Target then discovered Empire Staffing, the two companies, and the convenience store were engaged in a scheme to defraud it. Although the payees on the checks Target forwarded to Empire Staffing for disbursement actually existed, they had not performed any work for the two companies and in fact were oblivious to the scheme. Empire Staffing simply forwarded the payees' names to Target to place on payroll checks. Once Empire Staffing and its cohorts received the checks Target prepared, they forged the payees' signatures on the backs of the checks and cashed them. Approximately 423 checks totaling \$372,389.55 were forged and cashed.

After the checks were cashed at the convenience store, the store deposited half the checks into its account at the Woodforest National Bank in Houston and the other half into its account in a Houston branch of Bank One. These depository banks then sought reimbursement from PNC, the drawee bank. Unaware the endorsements on the back of the checks were forged, PNC honored all of the checks the depository bank presented to it and debited Target's checking account \$372,389.55.

Plaintiffs claim they notified PNC of the forged endorsements in December 2006; however, by then the checks had been cashed. Plaintiffs contend that when it urged PNC to investigate the fraud claim and replenish PNC's account, PNC

closed Target's account, circulated a memo within the bank accusing James of check-kiting², and then terminated his account, as well.

In the second count of the complaint, plaintiffs claim defendants had represented to them that they would review check endorsements to make sure all signatures were authentic, but then defendants failed to do so. Plaintiffs contend defendants made such representation to induce them to become customers of the bank, and that their failure to follow through with their promise to verify all signatures was an unconscionable commercial practice in violation of the CFA. See N.J.S.A. 56:8-2. No other counts in the complaint allege a violation of the CFA.

In their brief, plaintiffs do not assert defendants violated the CFA for the reason alleged in the second count. On appeal, plaintiffs contend defendants violated the CFA because they: (1) failed to restore to Target's account the money PNC transferred to the depository banks to cover the fraudulently

² The bank later concluded James had not engaged in any kiting.

endorsed checks³; (2) failed to promptly investigate the forgeries; and (3) closed plaintiffs' accounts at PNC.

Although the third contention – that PNC violated the CFA by closing plaintiffs' accounts – was not mentioned in the second count, plaintiffs raised and the trial court considered this issue in opposition to defendants' motion for summary judgment. The other two contentions, however, were not raised before or considered by the trial court; therefore, we will not consider them now. See State v. Galicia, 210 N.J. 364, 383 (2012) ("Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below.") (citing Deerfield Estates, Inc. v. E. Brunswick, 60 N.J. 115, 120 (1972)); State v. Walker, 385 N.J. Super. 388, 410 (App. Div.), certif. denied, 187 N.J. 83 (2006).

In reviewing a summary judgment decision, we apply the same standard as the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). Viewing the evidence "in a light most favorable to the non-moving party," we determine "if there is a genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 38, 41 (2012) (citing Brill v.

³ In the first count of the complaint, plaintiffs alleged PNC wrongfully failed to credit Target's account with the sum of \$372,389.55. This count settled.

Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)). We review questions of law de novo, State v. Gandhi, 201 N.J. 161, 176 (2010), and need not accept the trial court's conclusions of law. Davis v. Devereux Found., 209 N.J. 269, 286 (2012).

"In order to state a private claim under the CFA, a consumer must allege three elements: unlawful conduct; an ascertainable loss; and a causal relationship between the unlawful conduct and the ascertainable loss." Heyert v. Taddese, 431 N.J. Super. 388, 412 (App. Div. 2013); see also Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009); N.J.S.A. 56:8-19.


Here, we find that defendants did not engage in any unlawful conduct when the bank terminated the accounts plaintiffs held with PNC. "'The relation between a depositor and a bank is one of creditor and debtor, and their rights and liabilities depend upon the contract between them.'" Lor-Mar/Toto, Inc. v. 1st Constitution Bank, 376 N.J. Super. 520, 536 (App. Div. 2005) (quoting Forbes v. First Camden Nat'l. Bank & Trust Co., 25 N.J. Super. 17, 20-21 (App. Div. 1953)). The agreement between the bank and plaintiffs stated that either the bank or plaintiffs could close an account at any time and for any reason. Therefore, as under the parties' contract defendants were permitted to terminate any account for any

reason, defendants cannot be said to have engaged in any unlawful conduct, a necessary element to establishing a violation of the CFA, when the bank terminated plaintiffs' accounts.

As there was no genuine issue as to any material fact challenged and plaintiffs cannot show defendants violated the CFA when PNC cancelled plaintiffs' accounts, defendants are entitled to partial summary judgment, dismissing the second count as a matter of law. See R. 4:46-2(c).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION