NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3387-13T3

WILLIAM DESIMONE, as executor of the estate of EVELYN DESIMONE, deceased, individually in such capacity and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

SPRINGPOINT SENIOR LIVING, INC., SPRINGPOINT AT MONROE VILLAGE, INC., SPRINGPOINT AT STONEBRIDGE AT MONTGOMERY, INC., SPRINGPOINT AT CRESTWOOD, INC., SPRINGPOINT AT MEADOW LAKES, INC., SPRINGPOINT AT MONROE, INC., SPRINGPOINT AT NAVESINK HARBOR, INC., and GARY T. PUMA,

Defendants-Respondents.

Submitted April 21, 2015 – Decided May 27, 2015

Before Judges Reisner, Koblitz, and Higbee.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4958-13.

Cohen, Placitella & Roth, P.C., and Mayer Law Group L.L.C., attorneys for appellant (Christopher M. Placitella, Michael Coren, and Carl Mayer, on the briefs).

Clark Michie L.L.P., and Morgan Lewis & Bockius, L.L.P., attorneys for respondents (Bruce W. Clark, Christopher J. Michie, John

McGahren, Stephanie R. Feingold, and Michelle S. Silverman, on the brief).

PER CURIAM

Plaintiff William DeSimone, as executor of his mother's estate, filed a complaint against Springpoint Senior Living, Inc., its five subsidiaries (one for each of the five continuing care retirement communities (CCRCs) Springpoint operates in New Jersey), and its chief executive officer, Gary Puma (collectively, Springpoint). The suit was brought both in an individual capacity and as a class action complaint. The complaint alleged causes of action under the Continuing Care Retirement Community Regulation and Financial Disclosure Act (CCRC Act), N.J.S.A. 52:27D-330 to -360, the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -195, as well as breach of the covenant of good faith and fair dealing, fraud, and negligent misrepresentation.[1] Plaintiff appeals from a February 18, 2014 order dismissing the complaint for failure to state a claim and dismissing a motion to amend the complaint as moot. We reverse.

We review de novo a trial court's order dismissing a complaint for failure to state a claim pursuant to Rule 4:6-2(e). See Teamsters Local 97 v. State, 434 N.J. Super. 393, 413

[1] The trial court notes in its opinion that plaintiff withdrew the claim for violation of the Truth-In-Consumer Contract, Warranty, and Notice Act, N.J.S.A. 56:12-14 to -18.

(App. Div. 2014). Our review assumes that the facts pled in the complaint are true. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Viewed through that lens, these are the most pertinent facts.

Springpoint, through its subsidiary companies, owns and operates five CCRCs in New Jersey, including Monroe Village, where Ms. DeSimone came to reside. A CCRC is a retirement community that offers several levels of care for its residents, ranging from independent living, in which residents are largely self-sufficient, to assisted living, in which residents require some assistance, to skilled nursing, in which residents require extended nursing care.

The DeSimone family contacted Monroe Village in 2008, inquiring about moving Ms. DeSimone into an independent living unit. A Springpoint resident must pay certain monthly charges in addition to a one-time entrance fee, which is payable under the "traditional plan" or the "refundable plan." The traditional plan offers a lower entrance fee, but is not refundable after a sixty-day rescission period. The refundable plan has a higher entrance fee, but the applicant is eligible for a refund of up to 90%. The DeSimone family opted for the refundable plan.

Ms. DeSimone and her daughter, Elizabeth Savitsky, who held power of attorney for her mother, were given a copy of the written disclosure statement as statutorily mandated. N.J.S.A. 52:27D-336. The disclosure stated:

> The 90% Refundable plan requires the payment of a higher Entrance Fee and allows for up to 90% of the Entrance Fee to be refunded. Payment of the refund shall be made upon the execution of a new residence agreement for the Living Accommodation and expiration of the rescission period of the incoming resident unless a current community resident transfers to the Resident's Living Accommodation upon its vacancy, in which case payment of the refund shall be upon payment of a new entrance fee and expiration of the rescission period of an incoming resident occupying the current resident's previous living accommodation.
>
> . . . .
>
> The refundability of the Entrance Fee is described in detail in Section VI of the attached Residence [and] Care Agreements.

The Residence and Care Agreement (the agreement) was attached to the disclosure statement. The agreement cover sheet included the caption "90% REFUNDABLE," and stated that the agreement was a legally binding contract, and recommended that the prospective resident consult with an attorney to review the contract before executing it. Section VI of the agreement stated:

> IN THE EVENT OF THE RESIDENT'S DEMISE AFTER OCCUPANCY AND EXPIRATION OF THE RESCISSION

> PERIOD, PROVIDER SHALL PROVIDE TO . . . THE RESIDENT'S LEGAL REPRESENTATIVE, A REFUND OF THE ENTRANCE FEE WITHOUT INTEREST EQUAL TO THE LESSER OF THE ORIGINAL ENTRANCE FEE OR THE SUBSEQUENT RESIDENT'S ENTRANCE FEE LESS: [certain enumerated fees and costs].
>
> (emphasis added.)

The "lesser of" term is at the center of the parties' dispute.

Savitsky had several months to review the agreement before signing it on her mother's behalf in December 2008. Plaintiff maintains that Savitsky relied on both Springpoint's misrepresentations and the disclosure statement with respect to the refundable option, and did not know about the "lesser of" term.

The complaint made the following allegations. Springpoint engaged in misleading advertising, in that Springpoint's advertising and sales personnel represented that 90% of the entrance fee would be refunded, reduced only by the costs of care if the resident required assisted living or skilled nursing. Advertising materials omitted the "lesser of" term, and did not inform potential customers that the refund would be significantly lower if the subsequent resident to occupy his or her unit were given a discounted entrance fee. Plaintiff's proposed amended complaint asserted that, in addition to the disclosure statement and sales representations, Savitsky relied

on a Springpoint pamphlet that described the refundable plan but omitted the "lesser of" term.

The initial complaint made further allegations. Prior to signing the agreement, Savitsky spoke with Monroe Village's Director of Marketing, Shannon Grieb, about the refundable plan. Grieb stated that 90% of the entrance fee would be returned if Ms. DeSimone moved out or passed away, less any nursing care deductions. Grieb also stated that the entrance fee was for health care and was not a real estate transaction.

Plaintiff contended that representations that the entrance fee was not a real estate transaction misrepresented that the refund was insulated from real estate market forces. Springpoint should have disclosed that it could, and later did, offer entrance fees at discounted rates. Plaintiff asserted that Springpoint began to have financial troubles in 2007, and as a result, began to offer discounted entrance fees, to the detriment of residents who had already purchased the refundable plan.[2]

In late January 2009, Ms. DeSimone suffered a fall that left her incapable of living independently. Nevertheless, she paid her $159,000 entrance fee under the refundable option on

[2] Springpoint agreed that decreased occupancy put financial pressure on its Monroe Village facility, causing it to offer discounts.

January 30, 2009, and moved into Monroe Village's skilled nursing care center on February 27, 2009, while also taking possession of her independent living unit. Unfortunately, Ms. DeSimone was never able to move out of the skilled nursing facility and into her unit. Approximately one month later, the unit was vacated and became available for a subsequent resident. Ms. DeSimone passed away on April 10, 2010.

At the beginning of July 2010, plaintiff received a $80,136.00 refund check from Springpoint. The subsequent resident of Ms. DeSimone's unit had paid an entrance fee of $127,000; that figure, rather than Ms. DeSimone's entrance fee of $159,000, was used as the starting point for the refund. The complaint asserted that Springpoint representatives stated that the subsequent resident's entrance fee had been discounted because of the need to attract residents to Monroe Village.

The motion court dismissed plaintiff's complaint for "failure to state a claim upon which relief can be granted[,]" pursuant to Rule 4:6-2(e). Our review of the court's motion decision is de novo, as is our review of its legal conclusions. D'Agostino v. Maldonado, 216 N.J. 168, 182-83 (2013); Teamsters, supra, 434 N.J. Super. at 413.

> "[O]ur inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." The essential

> test is simply "whether a cause of action is 'suggested' by the facts."
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> In exercising this important function, "a reviewing court searches 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."
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> Moreover, "the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint[,]" rather, "plaintiffs are entitled to every reasonable inference of fact." As we have stressed, "[t]he examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach."
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> [Green v. Morgan Properties, 215 N.J. 431, 451-52 (2013) (citations omitted) (emphasis and first alteration added).]

"In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (citation omitted). The relevant documents here, particularly the relevant portions of the disclosure statement and the agreement were a part of the complaint, and provided in full as exhibits to the motion court.

The court found that plaintiff had failed to plead that the DeSimone family had actually seen the allegedly misleading

advertising, and further found that they could not have seen the advertising included in the complaint because it was not used until after Ms. DeSimone passed away. The court determined that plaintiff failed to plead a prima facie case for the CFA claim. See Chattin v. Cape May Greene Inc., 243 N.J. Super. 590, 607 (App. Div. 1990), certif. denied, 127 N.J. 325 (1991) (stating that the consumer fraud charge was properly not submitted to the jury when there was no evidence that plaintiff "had seen, read or relied" on defendant's brochure).

The CFA prohibits:

> The act, use or employment by any person of 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 any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . . .
>
> [N.J.S.A. 56:8-2.]

A private right of action may be brought pursuant to the CFA by:

> [a]ny person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method,

> act, or practice declared unlawful under this act . . . .
>
> [N.J.S.A. 56:8-19.]

In order "to state a claim under the CFA, a plaintiff must allege each of three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003). Unlawful conduct under the CFA "fall[s] into three general categories: affirmative acts, knowing omissions, and regulation violations." Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994).

Pursuant to Rule 4:9-1, a motion to amend a pleading after a responsive pleading is served may be granted by leave of court "which shall be freely given in the interest of justice." Motions for leave to amend a pleading should be granted liberally. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). The court is to analyze whether the non-movant will be prejudiced by the amendment, and "whether granting the amendment would nonetheless be futile." Ibid.

Springpoint argued, and the motion court agreed, that amendment would be futile. An amendment is futile when "the amended claim will nonetheless fail, and hence, allowing the

amendment would be a useless endeavor." Ibid. The proposed amended complaint asserted that Savitsky relied on a Springpoint pamphlet that described the refundable plan but omitted a description of the "lesser of" term, including that discounts might be given to subsequent residents. This assertion supports plaintiff's CFA claim by pleading a causal nexus and it contradicts Springpoint's claim that she could not have relied on an allegedly misleading brochure. Therefore, amendment of the complaint would not be futile.

The CCRC Act has the stated purpose of fulfilling the "need for full disclosure concerning the terms of agreements made between prospective residents and the continuing care providers. . . ." N.J.S.A. 52:27D-331. The Legislature intended to require "full disclosure of the contractual obligations and ownership of the facilities" and "full disclosure of . . . the costs to the residents of residing in the facilities." Assembly Senior Citizens Committee, Statement to A. 2432 and A. 2102, p.1 (June 19, 1986). The CCRC Act is also concerned with the disclosure of each facility's financial status, and establishing a minimum standard for that status to ensure the financial solvency of the facilities. Ibid. This is because "tragic consequences can result to senior citizens when a continuing

care provider becomes insolvent or unable to provide responsible care[.]" N.J.S.A. 52:27D-331.

Plaintiff alleged that Springpoint violated a provision of the CCRC Act, N.J.S.A. 52:27D-336, by omitting the "lesser of" term from the disclosure statement. N.J.S.A. 52:27D-336 requires CCRCs to provide disclosure statements to prospective residents and residents who enter into contracts with the CCRCs prior to the execution of the contract. The disclosure statement must be "written in plain English" and understandable to a layperson. N.J.S.A. 52:27D-336. The disclosure statement "shall contain" the designated information "unless the information is contained in the contract[.]" Ibid. The information that must be disclosed includes a description of all the fees charged to a resident, including an entrance fee. N.J.S.A. 52:27D-336(g). The CCRC shall "make knowledgeable personnel available to prospective residents to answer questions about any information contained in the disclosure statement or contract." N.J.S.A. 52:27D-336(l).

The CCRC Act creates a private cause of action, pursuant to N.J.S.A. 52:26D-347:

> a. A provider or person acting on behalf of the provider is liable to the person who contracts for the continuing care for damages, including repayment of all fees paid to the provider, facility or person who violates this act plus interest thereon at

> the legal rate, court costs and reasonable attorney's fees, if the provider or person acting on behalf of the provider:
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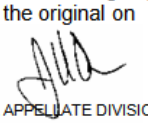
> . . . .
>
> > (3) Enters into a contract for continuing care at a facility with a person who has relied on a disclosure statement which omits a material fact required to be stated therein pursuant to this act[.]

In interpreting a statute, we first look at its plain language and, if the language is clear and unambiguous, we apply that plain meaning. In re Young, 202 N.J. 50, 63 (2009). The CCRC Act could fairly be read to not allow the disclosure statement and knowledgeable personnel to mislead seniors by failing to reveal hidden costs only ascertainable by a lawyer reviewing the contract.

If Springpoint's staff or brochures distributed to the DeSimone family misrepresented the terms of the contract by omitting the "lesser of" terms, or failing to disclose that the entrance fee was subject to market trends, and that the entrance fees were already being reduced by Springpoint due to market forces, plaintiff may be able to prove its various causes of action, including a violation of the CFA. We therefore reverse and remand to restore the complaint and allow plaintiff to amend it.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION