PREPARED BY THE COURT

EPTISAM PELLEGRINO, on behalf of herself and others similarly situated, Plaintiff, vs. NICK'S TOWING SERVICE, INC., NICHOLAS TESTA and SUSAN TESTA, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-1606-17 CIVIL ACTION OPINION

Argued: **May 26, 2017**
Decided: **June 5, 2017**

Honorable Robert C. Wilson, J.S.C.

Matthew S. Oorbeek, Esq. and Andrew R. Wolf, Esq., appearing for the Plaintiff Eptisam Pellegrino, (from the law offices of The Wolf Law Firm LLC).

Jeremy B. Stein, Esq., Paul S. Doherty III, Esq. and Christine M. Caputo, Esq. appearing for the Defendants Nick's Towing Service, Inc., Nicholas Testa and Susan Testa, (from the law offices of Hartmann Doherty Rosa Berman & Bulbulia, LLC).

FACTUAL BACKGROUND

This litigation arises from the towing of Pellegrino's 2013 Mercedes-Benz C300 from a public street in East Rutherford, New Jersey after an accident that occurred on November 28, 2015 as indicated by the Motor Vehicle Crash Report. On or about December 1, 2015, Pellegrino called the Defendants to inquire about the tow and storage charges. The invoice provided to her broke down the $448.36 charge into eight items:

FLATBED/TOWING	$125.00
YARD CHARGE	$40.00
CRASH/COLLISION WRAP	$60.00

CREDIT CARD SURCHARGE	$13.06
ADMINISTRATIVE CHARGE	$40.00
SWEEP ROADWAY/CLEAN UP	$30.00
STORAGE FEE	$120.00
SALES TAX	$20.30

Pellegrino paid $448.36 with her credit card for charges related to the towing services performed without disputing any of the charges. She even thanked the Defendants for their services, sending an e-mail stating, "I authorize Nick's Towing to charge my credit card $448.36 … Thank you so much!" After she paid the towing and storage charges, the Defendants mailed Pellegrino an invoice reflecting the fees that she paid.

Pellegrino some fifteen months later filed a Complaint on behalf of herself and others similarly situated[1] on or about March 3, 2017 challenging the charges on the invoice under the Predatory Towing Protection Act, N.J.S.A. §§ 56:13-7 *et seq*. ("PTPA"). She also claims violations of the Consumer Fraud Act ("CFA") and the Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"). The Defendants filed this instant Motion.

MOTION TO DISMISS STANDARD

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

[1] The Court notes that the named plaintiff of a class action receives a premium for bringing the class action.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1513 (2016) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULE OF LAW AND DECISION

1. Pellegrino Failed to Attempt to Resolve This Dispute with the Defendants Directly Before Filing This Action.

The regulations under the PTPA explicitly require consumers who dispute the charges charged by a towing company for a non-consensual towing service to use good faith efforts to resolve the dispute with the towing company:

> If a towing company charges a consumer a fee for a private property or other non-consensual towing service that is disputed by the consumer, the parties shall use good faith efforts to resolve the dispute. If the parties are unable to resolve the dispute and the Director determines the fee to be unreasonable under N.J.A.C. 13:45A-31.5, the Director [of the New Jersey Division of Consumer Affairs] may order the towing company to reimburse the consumer for an amount equal to the difference between the charged fee and a reasonable fee, plus interest.

N.J.A.C. § 13:45A-31.4(f).

This mandate to administratively resolve disputes regarding towing charges, without resorting to litigation, is also reflected in the PTPA's incorporation of the New Jersey statute governing municipalities' regulation of towing companies. N.J.S.A. §§ 40:48-1.49-.54 provides that municipalities are authorized to regulate by ordinance the fees charged for vehicle towing (and in the case of non-consensual towing, municipalities are required to adopt such ordinances). N.J.S.A. § 40:48-2.49(a); § 40:48-2.54(a). The PTPA incorporates this statute and provides that fees charged for towing may not exceed the maximum fees set by the relevant municipality. N.J.S.A. § 56:13-14(b); N.J.A.C. § 13:45A-31.5(b).

The statute also provides that municipal ordinances regulating towing "shall include … [t]he designation of a municipal officer or agency to enforce the provisions of the ordinance in accordance with due process of law" N.J.S.A. § 40:48-2.49(c). Specifically with respect to non-consensual towing, it requires that the municipality "shall implement a procedure to receive complaints and resolve disputes arising from the towing and storage of motor vehicles." N.J.S.A. § 40:48-2.54(b). Thus, the regulatory scheme with respect to towing services, as incorporated into the PTPA, is that municipalities are to set the rates and enforce them. When disputes arise, consumers are to resolve the dispute directly with the towing company, and if they cannot, then the statute provides two options: either the Division of Consumer Affairs can order reimbursement or the consumer can avail themselves of the dispute resolution mechanism that municipalities are required to establish.

In the instant matter, Pellegrino received the itemized invoice from the Defendants, paid for the charges and thanked the Defendants for their services on or about December 1, 2016. She never disputed the charges in the invoice prior to this action. Pellegrino also never filed any complaint with, or even merely approached, the Division of Consumer Affairs, as required by N.J.A.C. § 13:45A-31.4(f). She never availed herself of the enforcement mechanisms available to

her in the Borough of East Rutherford. See, e.g., Borough of East Rutherford Ordinance §§ 274-7(B) and 274-9 (providing for enforcement of towing fee limits by the Borough's Towing Director and Police Department and setting out a schedule of civil penalties for violations by towing companies). Instead, Pellegrino filed this putative class action without any attempt to resolve the dispute with the Defendants, administratively or otherwise. However, nothing in the statutory language preempts Pellegrino from bringing this action at this time.

2. Pellegrino's Case Cannot Maintain a Class Certification as the Common Questions of Law or Fact Do Not Predominate Over the Individual Issues.

Because this case is a putative class action, the New Jersey Court Rules provide that the Court should decide "at an early practicable time" whether the case may be maintained as a class action. R. 4:32-2(a); see also Myska v. New Jersey Mfrs. Ins. Co., No. BER-L-5136-13, 2014 N.J. Super. Unpub. LEXIS 650, at *9 (Mar. 21, 2014) (deciding issue of class certification and striking class allegations at motion to dismiss stage); aff'd 440 N.J. Super. 458 (2015) ("[D]ismissal is dependent on the nature of the claims and the propriety of their presentation as a class action, in accordance with the provisions of R. 4:32-1. We flatly reject plaintiffs' urging to impose a bright-line rule prohibiting examination of the propriety of class certification until discovery is undertaken."). The party seeking class certification must meet the criteria of R. 4:32-1(b), which requires that the Court find "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." R. 4:32-1(b)(3).

In determining whether a plaintiff has satisfied this predominance requirement, the trial court should "conduct a pragmatic assessment of various factors," including an inquiry as to 1) "the significance of the common questions," which "involves a qualitative assessment of the

common and individual questions rather than a mere mathematical quantification of whether there are more of one than the other"; 2) "whether the benefit of resolving common and presumably some individual questions through a class action outweighs doing so through individual actions"; and 3) "whether a class action presents a common nucleus of operative facts." Dugan v. TGI Fridays, Inc., 445 N.J. Super. 59, 72 (App. Div. 2016) (quoting Lee v. Carter-Reed Co., L.L.C., 203 N.J. 496, 519-20 (2010).

In Dugan, the plaintiff failed to establish the predominance requirement of R. 4:32-1(b)(3). The trial court erroneously assumed that any patron at a TGIF company-owned restaurant who purchased beverages sustained an out-of-pocket loss as a result of TGIF's failure to list prices for these items on the menu. Dugan, 445 N.J. Super. at 74. A person cannot establish that he or she sustained an ascertainable loss caused by TGIF's alleged unlawful conduct unless the person reviewed the beverage menu prior to ordering. Id. Furthermore, the plaintiff claims she was misled by the price of her beverage due to the end of "happy hour", but that may not be the case for other patrons who made similar purchases. Id. at 76. As such, the Appellate Division held that the individual issues outweighed the class issues.

The United States Court of Appeals for the Third Circuit has held that when courts speak of "damages" in a class action, "they are often referring to two distinct concepts: the 'fact of damage' and the measure/amount of damages. The fact of damage, often synonymous with 'injury' or 'impact', is frequently an element of liability requiring plaintiffs to prove they have suffered some harm traceable to the defendant's conduct" Harnish v. Widener Univ. Sch. of Law, 833 F.3d 298, 305 (3d Cir. 2016); see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 187-89 (3d Cir. 2001). In Harnish, the plaintiff alleged that all class members paid more than the value of their Widener education based upon their prospects of obtaining full-time legal employment after graduation. Harnish, 833 F.3d at 307. The Court of Appeals for the Third

Circuit ultimately held that plaintiff failed to support sufficient evidence that each class member suffered the same damages, thereby affirming the New Jersey District Court's denial of class certification. Id. at 313.

Here, if Pellegrino was able to prove she suffered an ascertainable loss, for example, that she did not receive a service in exchange for paying the Yard Charge of $40.00, a review is required of each individual class member's circumstances to determine if that class member did or did not receive a service in exchange and did or did not actually suffer an ascertainable loss. Dugan, 445 N.J. Super. at 74. Just like the putative class action in Dugan, this class certification must be reversed as each class member's ascertainable loss will require a case-by-case analysis. Id. at 74-79. The common questions of law or fact in this matter will not predominate over the individual issues, such as determining whether each class member received a service in exchange for payment, and if not, whether each class member suffered an ascertainable loss. Harnish, 833 F.3d at 313. Class actions were intended to join similarly situated individuals where joinder is impracticable and where there are common questions of law or fact among the class members. R. 4:32-1(a). Where each claim is "dependent on a specific individual experience and not common to the claims of the other plaintiffs," class certification is precluded. Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 481 (App. Div. 2015). As such, the class certification in this matter is reversed.

For the foregoing reasons, the Defendants' Motion to Dismiss is **DENIED**, however Pellegrino may only pursue this action individually and not on behalf of others similarly situated.

It is so ordered.