NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

GREGORY CUNEO, individually and as a class representative on behalf of others similarly situated	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION / CAMDEN COUNTY
Plaintiff,	: DOCKET NO. CAM-L-506-16
v.	
ASSOCIATED MANAGEMENT LTD, et al.	: *Civil Action*
Defendants.	: **MEMORANDUM DECISION**

Decided: October 30, 2018

Lewis G. Adler, Esquire of Woodbury, NJ and Paul DePetris, Esquire of Cherry Hill, NJ, Counsel for Plaintiff, Gregory Cuneo

William M. Tambussi, Esquire, Karen A. McGuinness, Esquire and Jonathan L. Triantos, Esquire of Brown & Connery, LLP, Counsel for Defendant, Associated Management, Ltd. t/a Albo Appliance

STEVEN J. POLANSKY, P.J.Cv.

INTRODUCTION

Defendant, Associated Management Ltd. t/a Albo Appliance, files the current motion seeking to lift a stay of litigation, seeking to vacate a prior judgment in favor of plaintiff on Section 16 of the Truth in Consumer Contract, Warranty and Notice Act (TCCWNA) and further seeking to dismiss plaintiff's Second Amended Complaint with prejudice pursuant to Rule 4:6-2.

A stay of litigation was previously entered pending decisions in Spade v. Select Comfort Corp., 232 N.J. 504 (2018), Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017) and the consolidated Appellate Division cases of Duke v. All Am. Ford, Inc., No. A-000795-15-T3 and Barbarino v. Paramus Ford, Inc., No. A-000796-15-T3. Subsequent to entry of the stay, the New Jersey Supreme Court rendered its decisions in Dugan v. TGI Fridays, Inc. on October 4, 2017 and in

Spade v. Select Comfort Corp. on April 16, 2018. The Appellate Court's unreported joint decision in Duke v. All Am. Ford, Inc. and Barbarino v. Paramus Ford, Inc. was issued on July 27, 2018.

Plaintiff filed his Second Amended Complaint on July 17, 2018. Plaintiff asserts that he paid $69.95 each for service contracts on three separate items, a washer, a dryer and a gas range. Plaintiff further asserts that he was not shown the service contract, was not given an opportunity to negotiate the terms of the service contract, and never received a copy of the service contract until this litigation was commenced.

After purchasing these three items, plaintiff claims that he experienced a problem with the Maytag washing machine. He contacted Albo for assistance but was directed by Albo to contact the manufacturer, Maytag, directly. It is asserted that Maytag sent three separate service technicians to his residence, all of whom were unable to repair the washer. Plaintiff subsequently revoked acceptance and filed suit against Maytag. Plaintiff ultimately received a full refund of the purchase price along with counsel fees from Maytag following litigation.

The current complaint contains seven (7) counts. These counts are as follows:

Count 1 – Plaintiff seeks relief for equitable fraud. This count was previously dismissed by Order of July 6, 2018.

Count 2 – Plaintiff seeks a refund pursuant to N.J.S.A. 2A:32-1.

Count 3 – Plaintiff seeks declaratory judgment.

Count 4 – Plaintiff seeks treble damages for violation of the Consumer Fraud Act.

Count 5 – Plaintiff seeks a full refund for violation of the Consumer Fraud Act relying upon N.J.S.A. 2A:32-1.

Count 6 – Plaintiff asserts a Section 15 TCCWNA Violation for an Affirmative Misstatement of and Failure to State Service Contract Act Consumer Rights and Seller Responsibilities.

Count 7 – Plaintiff asserts a Section 16 TCCWNA Violation based upon an Illegal Savings Clause in the Service Contract.

Defendant seeks to vacate a prior decision granting partial summary judgment to plaintiff based upon a violation of Section 16 of the TCCWNA entered May 3, 2017. Defendant argues that the Court, as part of its ruling on that motion, specifically ruled that plaintiff suffered no monetary loss or other harm. Defendant argues that based upon the decision in Spade v. Select Comfort Corp., 232 N.J. 504 (2018), plaintiff cannot establish he is an "aggrieved consumer" because he suffered no monetary loss or harm as a result of the non-compliance. Defendant further asserts that based upon the decision in Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017), plaintiff's admission that he never received, reviewed or relied upon the service contract prior to this litigation precludes a TCCWNA claim. Defendant further argues that no ascertainable loss is alleged under the Consumer Fraud Act since no out-of-pocket loss occurred.

Defendant also argues that plaintiff has not sufficiently pled any causal connection between the alleged unlawful language in the service contract and either plaintiff's decision to purchase the contract or any loss as a result thereof. Defendant asserts that N.J.S.A. 2A:32-1 does not permit an award of a full refund where there is no fraud in the actual execution or consideration of the contract. It further asserts that proof of common law fraud, as opposed to consumer fraud, is required to trigger this remedy. It argues that fraud in the consideration involves deception about a party's intent to perform the stated contract terms.

Defendant also argues that the claim for relief under the Declaratory Judgment Act, N.J.S.A. 2A:16-50 et. seq., is improper and seeks an advisory opinion. Specifically, it notes that plaintiff seeks a declaration that the service contract misstates defendant's obligations under the Service Contract Act (SCA), N.J.S.A. 56:12-87. It asserts that no private cause of action exists under the SCA. It also argues that no claims were asserted for service on the dryer or gas range,

and further argues that the claim involving the washer was fully compensated by the manufacturer, Maytag.

Plaintiff first asserts that the motion should be converted into a summary judgment motion since it relies on a certification of a representative of defendant and a court transcript from a previous motion in this case. Plaintiff does not oppose that portion of the motion seeking to set aside the earlier partial summary judgment based upon Section 16 of the TCCWNA, since a Second Amended Complaint has now been filed.

Plaintiff argues that the case is not ripe for summary judgment since discovery was previously stayed. Plaintiff asserts that he still requires discovery about the proposed class, and needs defendant's responses to a second set of discovery demands to determine what documents exist to support the causes of action asserted.

Plaintiff argues that they have pled a viable Consumer Fraud Act (CFA) case since plaintiff purchased three separate service contracts from defendant at a price of $69.95 each. He asserts that the service contracts were not provided to plaintiff until after the suit was filed, and argues that plaintiff was not shown the service contract nor given the opportunity to negotiate the terms of the contract. Plaintiff asserts this is a per se violation of the SCA. He further asserts a violation of the SCA is a per se violation of the CFA. Relying upon Cox v. Sears Roebuck & Co., 138 N.J. 2 (1994), he avers that there is strict liability under the Consumer Fraud Act for regulatory violations. Plaintiff distinguishes Dugan v. TGI Fridays, Inc., since plaintiff received an exemplar of the service contract in discovery responses served by defendant.

Plaintiff argues that the purchase price of the appliance itself can constitute an out-of-pocket loss proving an ascertainable loss under the CFA, relying upon Thiedemann v. Mercedes-

Benz USA, LLC, 183 N.J. 234 (2005) and Furst v. Einstein Momjy, Inc., 182 N.J. 1 (2004). Plaintiff argues that N.J.S.A. 56:8-2.11 requires a refund of all monies if a violation of the Consumer Fraud Act is established. Plaintiff relies upon a Law Division decision in Artistic Lawn & Landscape Co., Inc. v. Smith, 381 N.J. Super. 75 (Law Div. 2005), where the Court ordered a $500.00 refund on a home improvement contract. Finally, plaintiff asserts that he has suffered an ascertainable loss measured by the cost of each service contract.

Plaintiff points to a new claim added in the Second Amended Complaint under N.J.S.A. 2A:32-1 which he asserts provides for relief to any person who has been defrauded. He asserts this is similar to a rescission claim, but alleges that where there are misrepresentations of a presently-existing fact or past fact about defendant's obligations under the contract, a cause of action is properly stated. He explains that by preparing and issuing a contract while charged with knowledge of the provisions of the SCA, defendant deliberately made false misrepresentations about defendant's obligations.

While plaintiff acknowledges that the Section 16 TCCWNA partial summary judgment was obtained on an earlier complaint and therefore does not oppose the request to set aside that judgment, plaintiff continues to assert Section 15 and 16 claims under the TCCWNA. Plaintiff acknowledges that he never received the contracts until this litigation was instituted at page 35 of his brief. Plaintiff however does not allege that any claim was ever made on the service contracts with respect to the dryer or gas range. He asserts that the contract's exculpatory clauses improperly seek to bar plaintiff from relief under N.J.S.A. 2A:32-1 and N.J.S.A. 56:8-2.11. He further argues that the $100.00 civil penalty under the TCCWNA makes plaintiff an "aggrieved consumer."

Finally, plaintiff asserts that he has a viable claim under the Declaratory Judgment Act which should be available to any person with an interest under a written contract. He argues that under the Declaratory Judgment Act, no ascertainable loss is required. Plaintiff further argues that a declaration could lead to the cancellation of any improper or undelivered contracts and result in a refund of money for such contracts.

DISCUSSION

The test for determining the adequacy of the pleading is whether a cause of action is suggested by the facts. Velantzas v. Colgate-Palmolive Corp., 109 N.J. 189 (1998). The court must search in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is conducted. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989). The Rule requires that plaintiffs must receive every reasonable inference of fact. Printing Mart, 116 N.J. at 746 (quoting DiCristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Every reasonable inference is therefore accorded to the plaintiff. Banco Popular North America v. Gandi, 184 N.J. 161, 165-166 (2005).

The decisions in Dugan and Spade are significant for purposes of this Court's evaluation. The Dugan case involved a claimant who was charged different prices for beverages during the course of a visit at a TGI Fridays restaurant location. The second plaintiff in the Bozzi[1] action alleged they were charged different prices for drinks while at a Carrabba's Restaurant. The Dugan decision focused on what is required to classify a consumer as an "aggrieved consumer" for purposes of N.J.S.A. 56:12-17. Dugan v. TGI Fridays, Inc., 231 N.J. 24, 69 (2017). The

[1] This case was part of the decision in Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017).

plaintiffs there also argued that the $100.00 civil penalty was sufficient to make them an "aggrieved consumer." Id. at 72. The Supreme Court rejected these arguments, explaining that a claimant who does not, at a minimum, receive a required writing, or in that case a menu, cannot as a matter of law establish that they are an "aggrieved consumer" under TCCWNA. Id. at 71-73.

Spade v. Select Comfort Corp., involved two certified questions from the Third Circuit Court of Appeals to the New Jersey Supreme Court. The first question was whether a violation of the Furniture Delivery Regulations by itself constitutes a violation of a clearly established right under TCCWNA, which the Court answered yes. 232 N.J. 504, 508 (2018). The second question referred was whether a consumer that receives a contract which violates the Furniture Delivery Regulations but suffers no adverse consequences from the non-compliance can qualify as an "aggrieved consumer". Id. The Court interpreted the words "aggrieved consumer" to distinguish a consumer who had merely been exposed to unlawful conduct or language in a contract from one who has suffered harm as a result of such a violation. Id. at 522. The Court explained that "in the absence of evidence that the consumer suffered adverse consequences as a result of the defendant's regulatory violation, a consumer is not an "aggrieved consumer" for purposes of TCCWNA". Id. at 524.

Defendant asserts, and plaintiff agrees, that the cases upon which the stay had been based have been decided. All parties agree that the stay should be lifted and the matter should be permitted to proceed. The court notes that the last stay entered by Judge Dominguez on April 13, 2018 expired by its own terms on July 12, 2018. Therefore this request will be granted.

The Consumer Fraud Act "provides a private cause of action to consumers who are victimized by fraudulent practices in the marketplace." Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 576 (2011). "It was enacted 'to combat "sharp practices and dealings" that victimized

consumers by luring them into purchases through fraudulent or deceptive means.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 121 (2014) (quoting Cox v. Sears Roebuck & Co., 138 N.J. 2, 16 (1994)). The CFA prescribes a cause of action on behalf of "[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.

A CFA claim brought by a consumer "requires proof of 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.'" Manahawkin, 217 N.J. at 121 (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009)). "A plaintiff who proves all three elements may be awarded treble damages, attorneys' fees, filing fees and reasonable costs of suit." Ibid. (quoting N.J.S.A. 56:8-19).

Pursuant to N.J.S.A. 56:8-2, an "unlawful practice" includes:

> 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 . . . .

"An 'unlawful practice' contravening the CFA may arise from (1) an affirmative act; (2) a knowing omission; or (3) a violation of an administrative regulation." Dugan v. TGI Fridays, Inc., 231 N.J. 24, 51 (2017).

In contrast to common law fraud, the causation element of N.J.S.A. 56:8-19 is not "the equivalent of reliance." Id. at 53 (quoting Lee v. Carter-Reed Co., 203 N.J. 496, 522 (2010)). Instead, in a private action, "the CFA requires a showing of 'a causal relationship between the

unlawful conduct and the ascertainable loss.'" Ibid. (quoting Bosland, 197 N.J. at 557). The statutory phrase "as a result of" connotes a "causal nexus requirement." Bosland, 197 N.J. at 557-58 (quoting N.J.S.A. 56:8-19). However, contractual privity is not required to bring a CFA claim. Perth Amboy Iron Works, Inc. v. Am. Home Assurance Co., 226 N.J. Super. 200, 210-11 (App. Div. 1988).

Our courts "have generally found causation to be established for CFA purposes when a plaintiff has demonstrated a direct correlation between the unlawful practice and the loss; they have rejected proofs of causation that were speculative or attenuated." Heyert v. Taddese, 431 N.J. Super. 388, 421 (App. Div. 2013). A complete lack of any relationship between the defendant's unlawful conduct and the plaintiff's loss compels a finding of a lack of causation under the CFA. Marrone v. Greer & Polman Constr., Inc., 405 N.J. Super. 288, 296 (App. Div. 2009). In cases in which the alleged misrepresentation was made to a prior purchaser and not to the plaintiff asserting the CFA claim, courts have held there was a fatal lack of proof of a causal connection between the misrepresentation and the alleged loss. See Dean v. Barrett Homes, Inc., 406 N.J. Super. 453, 462 (App. Div. 2009); Marrone, 405 N.J. Super. at 295-297; O'Loughlin v. Nat'l Cmty. Bank, 338 N.J. Super. 592, 606-07 (App. Div. 2001); Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 641 (App. Div. 1987).

TCCWNA provides that:

> No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or enter into any written consumer contract or give or display any written consumer warranty, notice or sign after the effective date of this act which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed.

N.J.S.A. 56:12-15.

TCCWNA imposes a range of remedies against a defendant who violates the statute. Any person who violates the provisions of TCCWNA is liable to an "aggrieved consumer" for a civil penalty of not less than $100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs. N.J.S.A. 56:12-17. This legislation "did not recognize any new consumer rights but merely imposed an obligation on sellers to acknowledge clearly established consumer rights and provided remedies for posting or inserting provisions contrary to law." Shelton v. Restaurant.com, Inc., 214 N.J. 419, 432 (2013) (citing N.J.S.A. 56:12-15 to -16).

First, in order to obtain a remedy under TCCWNA, a plaintiff must be an "aggrieved consumer" who satisfies the elements of TCCWNA. N.J.S.A. 56:12-17. TCCWNA defines "consumer" as "any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes." N.J.S.A. 56:12-15. Second, in order to be found liable under TCCWNA, a defendant must have violated a "clearly established legal right" or "responsibility." N.J.S.A. 56:12-15; see also Dugan v. TGI Fridays, Inc., 231 N.J. 24, 69 (2017). The Dugan court concluded that a claimant who does not, at a minimum, prove that he or she received a menu cannot satisfy the elements of TCCWNA. Id. at 72.

The Service Contract Act was enacted in 2014 to be effective July 16, 2014. Service contracts are defined to include an agreement "to perform, or to provide indemnification for the performance of, the maintenance, repair, replacement or service of property for the operation or structural failure of the property due to a defect in materials or workmanship or due to normal wear and tear...." N.J.S.A. 56:12-87. A copy of the service contract must be provided to the customer at the time of sale or within a reasonable period of time thereafter. N.J.S.A. 56:12-

94(b). A violation of the Service Contract Act is considered an unlawful practice under the CFA. N.J.S.A. 56:12-96(a).

Plaintiff asserts he is entitled to a refund based upon N.J.S.A. 56:8-2.11 and N.J.S.A. 2A:32-1. Plaintiff cites to Artistic Lawn & Landscaping Company, Inc. v. Smith, 381 N.J. Super. 75 (Law Div. 2005) in support of his position. Defendant cites to unreported decisions reaching the opposite conclusion.

N.J.S.A. 56:8-2.11 was enacted as part of the provisions of the Food Labeling Act under L.1979, Chapter 347. Chapter 347 deals with the unlawful practice of misrepresenting the identity of food at eating establishments. This statute was part of a stand-alone enactment intended as a supplement to the CFA. The decision in Artistic Lawn & Landscape Co., Inc. v. Smith contains no analysis regarding the history of Chapter 347 and the enactment of N.J.S.A. 56:8-2.11.

The court notes that in Artistic Lawn, the merchant contracted to deliver a nine-zone sprinkler system but instead substituted a non-conforming five-zone system without the approval of the customer. 381 N.J. Super. 75, 78-79 (Law Div. 2005). This court concludes that the provision in N.J.S.A. 56:8-2.11 providing for a refund of all monies acquired by means of any practice "declared herein to be unlawful" references violations of the Food Labeling Act in Chapter 347, and does not have general applicability to other sections of the Consumer Fraud Act. Courts have cautioned that the Consumer Fraud Act is not intended to provide a windfall to a claimant. For example, even where a contract violates the Consumer Fraud Act or TCCNWA, the merchant is still entitled to a quantum merit recovery for goods and services provided. Marascio v. Campanella, 298 N.J. Super. 491, 503 (App. Div. 1997). See also Romano v. Galaxy Toyota, 399 N.J. Super 410, 483 (App. Div.) certif. denied 196 N.J. 344 (2008) (holding that the

ascertainable loss was not the purchase price, but rather the difference between the purchase price and the actual value of the vehicle).

The cases upon which plaintiff relies in support of the argument that he is entitled to a full refund do not support that position. The decision in Thiedemann v. Mercedes-Benz USA was based upon a specific provision of the Lemon Law, N.J.S.A. 56:12-32, which applies only to motor vehicles which contain defects which cannot be repaired by the manufacturer. For purposes of analyzing this CFA, the court there did not consider the full value of the vehicle to constitute the ascertainable loss. 183 N.J. 234, 248-249 (2005).

The decision in Furst v. Einstein Moomjy, Inc. did, under the circumstances presented there, conclude that where defective goods are delivered and the merchant refuses to provide conforming goods, the ascertainable loss is the replacement value of the goods. 182 N.J. 1, 10 (2001). The issues presented here, however. do not involve a defective product that was delivered. Issues involving the washing machine have previously been litigated. Based upon the court's analysis, damages are limited to the cost of the service contract for the washing machine or the refund that could have been requested.

The court further finds that plaintiff fails to set forth a claim for a refund under N.J.S.A. 2A:32-1. First, the statute requires a showing of fraud in the execution of or consideration for a contract. Here, the alleged conduct is not in the execution of or consideration for the contract, but rather in a direct failure to provide a copy of the contract or the alleged non-conforming provisions in the contract violating the TCCWNA. Second, technical violations of TCCWNA, the CFA or the SCA are insufficient to establish legal or equitable fraud required to satisfy a claim under N.J.S.A. 2A:32-1.

Five elements must be pled for a claim alleging common law fraud: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997) (citing Jewish Ctr. of Sussex Cty. v. Whale, 86 N.J. 619, 624 (1981)). The fraud must be "established by clear and convincing evidence." Weil v. Express Container Corp., 360 N.J. Super. 599, 613 (App. Div. 2003) (citing Albright v. Burns, 206 N.J. Super. 625, 636 (App. Div. 1986)). Importantly, to recover, a plaintiff must show they were injured and that the fraud caused them damage. Landriani v. Lake Mohawk Country Club, 26 N.J. Super. 157, 161 (App. Div. 1953).

A claim for fraud must satisfy the heightened pleading requirements of Rule 4:5-8(a). State, Dep't of Treasury v. Qwest Communications, Int'l, Inc., 387 N.J. Super. 469, 484 (App. Div. 2006). To satisfy the heightened pleading standard, the appellate division has found a pleading must provide a defendant with sufficient facts to deny or disprove the alleged misconduct. See R. 4:5-8(a); Evangelista v. Pub. Serv. Coordinated Transp., 7 N.J. Super. 164, 169 (App. Div. 1950). Consequently, the complaint must plead the first, fourth and fifth elements of fraud with particularity; while the second and third elements may be alleged generally.

Technical violations of the CFA, TCCWNA or SCA are insufficient to establish the fraud required under N.J.S.A. 2A:32-1. The allegations here are insufficient as a matter of law to satisfy the pleading requirements for fraud required to obtain relief under this statute.

Plaintiff also seeks declaratory judgment pursuant to the New Jersey Declaratory Judgment Act. The Declaratory Judgment Act is intended to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. N.J.S.A. 2A:16-51. A Court

may refuse to entertain a declaratory judgment action where a judgment would not terminate the uncertainty or controversy giving rise to the proceedings. N.J.S.A. 2A:16-61; Elizabethtown Water Co. v. Bontempo, 67 N.J. Super. 8 (App. Div. 1961). The existence of a more effective remedy may justify the Court's refusal to hear a declaratory judgment action. Elizabethtown Water Co., 67 N.J. Super. at 12. The jurisdiction of the Court should not be invoked in the absence of an actual controversy. Indep. Realty Co. v. Twp. of North Bergen, 376 N.J. Super. 295, 301 (App. Div. 2005); Finkel v. Township Comm. of Twp. of Hopewell, 434 N.J. Super. 303, 318 (App. Div. 2013). The Declaratory Judgment Act does not create any substantive right to relief. Courts should be cautious not to provide an advisory opinion where there is no actual dispute. Civil Serv. Comm'n v. Senate of New Jersey, 165 N.J. Super. 144, 148 (App. Div.), certif. denied, 81 N.J. 266 (1979); Friedland v. State, 149 N.J. Super. 483 (Law. Div. 1977).

With the exception of the service contract for the washing machine, plaintiff does not allege that he suffered any harm, let alone injury or damage, as a result of the purchase of either the product or the service contract. Defendant properly points out that to the extent plaintiff can show an injury, an adequate remedy at law exists eliminating any need for declaratory judgment. The court finds no basis to permit the declaratory judgment action to proceed to seek an advisory opinion. The parties do not have an ongoing dispute for which interpretation of the contract would guide their continuing relationship. The service contracts have expired. To the extent the claims for which plaintiff seeks declaratory judgment are not subsumed by plaintiff's claims under TCCWNA, the CFA or the SCA, the complaint seeks nothing more than an improper advisory opinion.

CONCLUSION

Accordingly, plaintiff's claims in Count 2 for relief pursuant to N.J.S.A. 2A:32-1 will be dismissed.[2] The technical violations alleged involving TCCWNA, the SCA and CFA are insufficient as a matter of law to establish in this case the fraud required as a predicate to a claim under N.J.S.A. 2A:32-1.

The claims set forth in Count 3 seeking declaratory judgment are dismissed for the reasons set forth above with prejudice.

The motion seeking to dismiss Count 4 under the CFA based upon violations of the SCA is granted in part and denied in part. The motion is granted as to the claims relating to the dryer and gas range. Plaintiff, based upon his own allegations, received the full benefit of those service contracts. With respect to the washer which was returned to the manufacturer following litigation with the manufacturer, a prima facie case has been set forth since plaintiff may have sought a refund had the contract been provided to plaintiff. The ascertainable loss would be the amount refundable at the point in time when the washing machine was returned to the manufacturer.

N.J.S.A. 2A:32-1 is a separate and distinct statute which is not part of the CFA. The remedy set forth in N.J.S.A. 56:8-2.11 is limited to violations of the Food Labeling Act. For the reasons set forth to dismiss Count 2 of the Complaint, Count 5 of the Complaint will also be dismissed.

Counts 6 and 7 of the Complaint assert violations of Section 15 and 16 of TCCWNA. Since plaintiff alleges he did not receive a copy of the service contract, plaintiff as a matter of law cannot establish reliance upon either an affirmative misstatement or an illegal savings clause.

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[2] The Second Amended Complaint has not reasserted the allegations of Count 1 which were previously dismissed by Order of July 6, 2018.

The decision in Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017), precludes such a claim under the circumstances alleged. Therefore, Counts 6 and 7 of the Complaint will be dismissed with prejudice.