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AMY QUACKENBUSH, individually and on behalf of all others similarly situated	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION / CAMDEN COUNTY
Plaintiff,	:	
v.	:	DOCKET NO. CAM-L-4228-19
WINDOW NATION, INC. d/b/a WINDOW NATION and JOHN DOES 1-10,	:	Civil Action
Defendants.	:	**OPINION**

Decided: February 20, 2020

Lewis G. Adler, Esquire, Counsel for Plaintiff, Amy Quackenbush, individually and on behalf of all others similarly situated.

Paul DePetris, Esquire, Law Office of Paul DePetris, Co-Counsel for Plaintiff, Amy Quackenbush, individually and on behalf of all others similarly situated.

Benjamin W. Spang, Esquire, Dilworth Paxson, LLP, Counsel for Defendant, Window Nation, Inc. d/b/a Window Nation.

STEVEN J. POLANSKY, P.J.Cv.

INTRODUCTION

Defendant Window Nation, Inc.[1] has filed a motion to dismiss counts 1 through 12 of the complaint pursuant to Rule 4:602(e). Defendant does not seek dismissal of count 13 of the complaint.

[1] The motion states that counsel represents Window Nation, LLC, incorrectly designated as Window Nation, Inc. The contract uses the name Window Nation on the letterhead and provides that notices are to be sent to Window Nation, Inc.

BACKGROUND

Defendant Window Nation entered into a contract with plaintiff Amy Quackenbush for the installation and replacement of windows at property located in Hightstown, New Jersey on October 6, 2017. The total contract price for work to be performed was $11,290.00. A change order was issued October 20, 2017 which did not alter the contract price.

Plaintiff alleges that the workmanship during installation was poor, and that one of the windows was cracked during installation. She asserts water damage and damage to paint and sheetrock, to the siding on the home, to window treatments and window seat pillows, as well as to the windows themselves occurred during installation. It is further asserted that during attempts to repair this damage, defendant made some conditions worse, used paint which did not match existing paint and did a poor job caulking. Finally, plaintiff alleges that defendant had the insurer for a subcontractor inspect the damage. That insurer denied the claim purportedly based on the assertion that the windows installed were no longer sold by Window Nation and were of poor quality.

The complaint filed by plaintiff asserts thirteen (13) separate counts for relief which can be summarized as follows:

> **Count 1** - Count 1 alleges a per se violation of the Consumer Fraud Act (CFA) on behalf of plaintiff and the purported class on the basis that the contract falsely stated an insurance certificate was attached, and seeks the recovery of treble damages.
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> **Count 2** - Count 2 alleges a per se violation of the CFA as a result of the contract falsely stating that an insurance certificate was attached and seeks "statutory refund remedies".
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> **Count 3** -Count 3 alleges a per se violation of the CFA based upon the contract falsely stating that an insurance certificate was attached to the contract, and seeks equitable relief prohibiting such conduct.

Count 4 -Count 4 alleges a per se violation of the CFA as a result of the failure to disclose that subcontractors would perform services, and seeks treble damages.

Count 5 - Count 5 alleges a per se violation of the CFA as a result of the failure to disclose that subcontractors would perform services, and seeks a statutory refund remedy.

Count 6 - Count 6 alleges a per se violation of the CFA as a result of the failure to disclose that subcontractors would perform services, and seeks equitable relief.

Count 7 - Count 7 alleges a Section 2 CFA violation and seeks treble damages.

Count 8 - Count 8 alleges a Section 2 CFA violation and seeks refund remedies.

Count 9 - Count 9 alleges a Section 2 CFA violation and seeks equitable relief.

Count 10 - Count 10 asserts fraud in the execution or consideration of the contract and seeks to either cancel the contract or a refund of the purchase price.

Count 11 - Count 11 asserts a violation of Section 15 of the Truth and Consumer Contract Warranty and Notice Act (TCCWNA) and seeks payment of a civil penalty.

Count 12 - Count 12 alleges a violation of Section 16 of TCCWNA and seeks recovery of a civil penalty.

Count 13 - Count 13 alleges a breach of contract, promissory estoppel and seeks declaratory judgment. The motion does not seek to dismiss this count of the complaint.

Plaintiff's complaint asserts four (4) subclasses of New Jersey citizens alleged to be similarly situated to plaintiff and suffering similar harm. Paragraphs 195 and 196 of the complaint identify these classes as follows:

> 195. Plaintiffs propose subclasses for classes of New Jersey citizens purchasing home improvement services from defendants and receiving home improvement contracts for those services from defendants for a period of six (6) years beginning from the filing of the

> complaint which falsely claimed that: (1) the certificate of insurance required by the CRA was attached to the contract and who had disputes with defendants regarding damage suffered to their houses from services that defendants provided under those contracts; (2) Maryland law applied to the contract and who had disputes with defendants about the contract or services performed thereunder; (3) Maryland law applied to the contract and who had disputes with defendants about the contract in which plaintiffs claimed that New Jersey law applied to the contract or services performed thereunder, while defendants claimed that Maryland law applied thereto.
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> 196. Plaintiffs also propose a fourth subclass of New Jersey citizens purchasing home improvement services from defendants and receiving home improvement contracts for those services from defendants for a period of six (6) years beginning from the filing of the complaint which failed to disclose, in violation of HIP [Home Improvement Practices Regulations], that defendants would use subcontractors to perform the services and where defendants did in fact use subcontractors to do so and where plaintiffs had disputes with defendants about the performed of the services.

The contract at issue is attached to Exhibit 1 to the complaint. On page 1, the contract contains the toll free number for the New Jersey Department of Law and Public Safety, Division of Consumer Affairs regarding the Contractors' Registration Act.

Page 5 of the contract contains the following provisions which are relevant to the claims being asserted herein:

> 16. Severability: If any provisions, paragraphs, or subparagraph of this Agreement is adjudged by any court to be void or unenforceable in whole or in part, this adjudication shall not affect the validity of the remainder of this Agreement. Each provision of this Agreement is severable from every other provision, and constitutes a separate and distinct covenant.
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> 17. Choice of Law; Jurisdiction: This Agreement shall be construed in accordance with the laws of the State of Maryland. Any legal action to be instituted hereunder shall be filed in the appropriate court where the property is located.

18. Interpretation: No provision of this Agreement is to be interpreted for or against any party because that party or such party's legal representative drafted such provision.

19. Insurance: Window Nation, Inc. will maintain any and all mandated insurance coverage, included but not limited to property damage insurance. Pursuant to N.J.S.A. 56:8-151, a copy of the Certificate of Commercial General Liability Insurance is attached as Exhibit A. The Seller shall comply with the workers compensation laws of the State of New Jersey.

20. Disputes regarding whether a party under this Agreement has failed to make payments required pursuant to New Jersey's "Prompt Payment Law." (NJSA 2A:30A-1 and 2) may be submitted to a process of alternate dispute resolution.

DISCUSSION

Defendant first argues that no provision of the CFA requires that a subcontractor be identified to the customer under the home improvement practices regulations. They point to N.J.A.C. 13:45A-16.2(13)(i), which only requires disclosure if the contract is sold or assigned. They cite to Branigan v. Level on the Level, Inc., 326 N.J. Super. 24, 29 (App. Div. 1999) which specifically held that no such obligation exists under the CFA and related administrative regulations.

Defendant further argues that the failure to attach an insurance certificate has not resulted in any ascertainable loss. They aver that there is no assertion of reliance. They further assert that plaintiff is not entitled to a refund since no monies were obtained by unlawful means. Defendant also argues that the complaint does not place defendant on notice that plaintiff seeks equitable relief. The court notes however that paragraph 139 of the complaint specifically asked in part that the relief granted include a judgment or order declaring defendant's conduct illegal. Additionally, paragraphs 245, 266 and 287 of the complaint specifically describe the equitable relief sought.

With respect to counts 7, 9 and 10, defendant asserts that these claims are reliant on the CFA claims and do not assert any separate independent claim. They further assert that no claim exists under TCCWNA since nothing in the contract provisions violates any clearly established right. Finally, they assert that plaintiff has failed to adequately define the proposed class and that there are no common issues which predominate, but rather individual issues, thereby precluding class certification.

Plaintiff in opposition argues that no published case law supports the argument that a contractor need not disclose the use of subcontractors citing to an unreported decision, but ignoring the decision in Branigan v. Level on the Level, Inc., 326 N.J. Super. 24, 29 (App. Div. 1999). Plaintiff in support of its argument further relies upon the dissent in Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor, 125 N.J. 567 (1991).

Plaintiff asserts they are seeking a statutory refund and are not required to prove an ascertainable loss. They argue they need only show the merchant acquired the money sought by means of any practice violating the CFA. They allege they are entitled to a refund regardless of whether an ascertainable loss occurred, citing to the Law Division decision in Artistic Lawn & Landscape Co., Inc. v. Smith, 381 N.J. Super. 75 (Law Div. 2005).

Plaintiff further asserts that the failure to provide proof of insurance is a per se violation of the CFA in violation of N.J.S.A. 56:8-142 and 58:8-151. Plaintiff denies that it is merely seeking general damages, but rather asserts two separate CFA violations are alleged. Plaintiff further cites to N.J.S.A. 56:8-2.2 and asserts there was a scheme not to sell the item or service advertised. They claim there is a causal relationship alleged between the misconduct and the purported ascertainable loss.

With respect to the TCCWNA claims, plaintiff cites the various provisions of the statute and asserts that by falsely stating that Maryland law applies to the contract, the contract violates TCCWNA. Plaintiff does not however point to any case law which would preclude a contracting party from setting forth in the contract that the law of a different jurisdiction would apply to interpretation of the contract. Finally, plaintiff argues that issues involving whether it is appropriate to certify a class are premature at this stage of the litigation, citing Riley v. New Rapids Carpet Center, 61 N.J. 218 (1972).

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).

As amended in 1971, the CFA "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) (citation omitted). "The first two are found in the language of N.J.S.A. 56:8-2, and the third is based on regulations enacted under N.J.S.A. 56:8-4." Cox, 138 N.J. at 17.

In contrast to common law fraud, the causation element of N.J.S.A. 56:8-19 is not "the equivalent of reliance." Dugan, 231 N.J. 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).

The decisions in Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017) and Spade v. Select Comfort Corp., 232 N.J. 504 (2018) are important for analyzing whether plaintiff pleads an ascertainable loss. 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. 231 N.J. at 69. The plaintiffs there argued that the $100.00 civil penalty was sufficient to make them an "aggrieved consumer." Id. at 72. The Supreme Court rejected these arguments, and further held that a claimant who does not receive a required writing 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. at 508. 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.

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 writing with incorrect information cannot satisfy the elements of TCCWNA. Id. at 72.

Plaintiff asserts she 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 this position.

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 the 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 do not involve a defective product that was delivered. Here we are dealing with a claim that the installation was performed improperly, and an allegation that plaintiff did not receive a copy of a certificate of insurance.

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 the failure to provide a copy of the certificate of insurance or in the manner in which the contract was performed. Second, technical violations of TCCWNA or the CFA are insufficient to establish legal or equitable fraud required to satisfy a claim under N.J.S.A. 2A:32-1. The complaint does not contain allegations of legal or equitable fraud.

Defendant moves to dismiss plaintiff's class allegations for lacking commonality and predominance. Plaintiff responds asserting that a court must be slow to hold that a suit may not proceed as a class action, and that it would be rare that a decision to deny a class action should be made on the face of the complaint, citing Riley v. New Rapids Carpet Ctr., 61 N.J. 218, 225 (1972). R. 4:32-2(a) grants the court the authority to determine whether to certify a class action at an early practicable time.

Class actions are governed by R. 4:32-1 and R. 4:32-2. Lee v. Carter-Reed Co., LLC., 203 N.J. 496, 505 (2010). This is a procedure that allows larger groups of claimants with smaller claims to act as one. Id. at 517; see also In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 435 (1983). It permits "claimants to band together." In re Cadillac, 93 N.J. at 424. Essentially, "the class action is a device that allows 'an otherwise vulnerable class' of diverse individuals with small claims access to the courthouse." Lee, 203 N.J at 517 (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 120 (2007). The rule is required to be liberally construed, and the class action permitted, unless there is a clear showing that it is inappropriate or improper. Id. at 518. Further, when there is a common nucleus of facts linking the defendants with a class member, the class claims may proceed against multiple defendants. United Cons. Fin. Serv. v. Carbo, 410 N.J. Super. 280, 295-96 (App. Div. 2009).

The Appellate Division in Branigan v. Level on the Level, Inc., 326 N.J. Super. 24 (App. Div. 1999) clearly held that no obligation exists under the Consumer Fraud Act to identify

subcontractors in a contract such as that involved in this case. There, plaintiff alleged that defendant was hired to perform extensive home renovations. The Appellate Division specifically held that "there is no requirement the 'seller' set forth its contracts with subcontractors". Id. at 29. There is no allegation here that defendant sold or otherwise assigned its contract with plaintiff. Plaintiff complains rather about defendant's use of subcontractors in performing the installation of the windows. This does not constitute a violation of the Consumer Fraud Act.

When parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphold the contractual choice. North Bergen Rex Transportation, Inc. v. Trailer Leasing Co., 158 N.J. 561, 568 (1999); Instructional Systems, Inc. v. Computer Curriculum Corp., 130 N.J. 324, 341 (1992); The North Bergen court explained that New Jersey law will be applied despite the terms of the contract only where the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or where application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue. 158 N.J. at 568-69.

Under the contract, notifications to Window Nation include notice of cancelation to Window Nation at its Maryland office. This shows some relationship between the contract and the State of Maryland, and therefore a basis upon which defendant sought to have Maryland law apply to the interpretation of the contract. The choice of law provision under paragraph 17 of the contract does not require the application of Maryland law to all issues. Rather, it provides that the contract itself shall be construed in accordance with the laws of the State of Maryland. It specifically permits an action to be instituted in the appropriate court where the property itself is located. The contract further cites to New Jersey statute with respect to any issues involving

payment under the agreement, and cites New Jersey's prompt payment law. The insurance provision which is a direct issue in this case specifically cites to a New Jersey statute and also provides that the seller will comply with New Jersey workers compensation laws.

The contract does not contain any provision which could be interpreted as seeking to have the plaintiff waive her rights under New Jersey law. Rather, the contract specifically cites to N.J.S.A. 56:8-151 which is part of the CFA. The court finds absolutely nothing in the contract which is a misstatement of New Jersey law. The court further finds nothing in the Consumer Fraud Act which would preclude defendant from having a provision in the contract requiring that the contract itself be construed pursuant to Maryland law.

DECISION

The motion to dismiss count 1 of the complaint will be denied. The failure to attach the insurance certificate, particularly where the contract specifically says it is attached, is sufficient at the pleading stage to potentially establish a technical violation of the CFA. The court notes that while N.J.S.A. 56:8-142(d) only requires providing proof of insurance for a home elevation contractor which defendant is not, neither party has addressed the inter relationship with N.J.S.A.. 56:8-151(a)(2). The interpretation of these provisions however need not be addressed at this stage on a Rule 4:6-2 motion. Likewise, the court makes no decision at this time whether plaintiff will be able to establish an ascertainable loss from which treble damages may be awarded. Such a determination at this stage would be premature.

Count 2 of the complaint will be dismissed. The court finds that in a contract such as this where full performance has occurred and there is no assertion that the product provided did not satisfy the product described in the contract, no statutory refund remedy exists. Since the court

finds no basis for the refund remedy asserted, plaintiff will not be granted leave to amend this count of the complaint.

The motion to dismiss count 3 of the complaint will be denied for the same reasons expressed with respect to count 1. The court notes that the claim for equitable relief as defined in paragraph 139 of the complaint includes a claim for a refund as well as for a declaration that the conduct violates the CFA. Paragraph 245 of the complaint in count 3 only seeks equitable relief precluding the use of contracts that do not comply with New Jersey law.

Counts 4, 5 and 6 of the complaint will be dismissed with prejudice. For the reasons explained earlier in this opinion, the court does not find any requirement exists under the CFA to disclose that subcontractors will be utilized to perform services under the agreement. The complaint contains no allegation that the contract itself was assigned. Additionally, the dismissal of count 5 is also supported by the same reasons expressed with respect to count 2.

With respect to counts 7 and 9 of the complaint, the complaint is unclear as to the specific violation alleged with respect to the Consumer Fraud Act, and how this differs from the allegations in counts 1 and 3. There are allegations that the contract lacks a toll free number, although that number is reflected on the first page of the contract, and plaintiff acknowledged at argument that the phone number appears on the contract. Paragraph 115 of the complaint again is based upon the assertion that the installation work was performed by subcontractors rather than employees of defendant. This claim has been rejected legally with respect to counts 4, 5 and 6. Accordingly, the court will dismiss counts 7 and 9 of the complaint with leave granted to plaintiff to file an amended complaint asserting a more detailed basis for the claims in counts 7 and 9 within twenty (20) days of the date of this Order. The leave granted to amend the complaint with respect to count 9 is limited to equitable relief declaring the conduct as related to

the certificate of insurance illegal. The amendment to count 9 may not include any claim for a refund.

Count 8 of the complaint will be dismissed without leave to amend for the same reasons counts 2 and 5 are being dismissed in that no remedy exists for a refund under the circumstances pled.

Count 10 of the complaint will be dismissed. Plaintiff has not pled the requisite fraud which would trigger the provisions of N.J.S.A. 2A:32-1. Allegations of consumer fraud are insufficient. Plaintiff is granted leave to file an amended complaint curing the deficiencies with respect to count 10 within twenty (20) days.

Counts 11 and 12 of the complaint will be dismissed with prejudice. The court has concluded that nothing in the contract reflects a misstatement of the law. The forum selection clause is valid and not a misstatement of the law. Therefore, inclusion of the same cannot constitute a misstatement of the law. The provision stating that a copy of the insurance certificate is attached is not a misstatement of law.

Finally, the court must address the request to dismiss the class action allegations. The second and third proposed subclass involve the assertion that the contract contained a provision requiring that it be interpreted in accordance with Maryland law. Since the court has concluded as a matter of law that there was nothing improper with respect to this provision of the contract, proposed subclasses two and three set forth in paragraph 195 will be dismissed with prejudice. The fourth subclass set forth in paragraph 196 of the complaint involves the assertion that defendant used subcontractors to perform certain services under the contract. Since the court has concluded that such claims do not allege a violation of the Consumer Fraud Act, the class allegations with respect to this fourth subclass will be dismissed with prejudice.

The remaining subclass under paragraph 195 of the complaint is a class of New Jersey citizens purchasing home improvement services from defendant where the contract wrongly stated the certificate of insurance was attached to the contract, and who had disputes with defendant regarding damage suffered to their homes from services provided under the contract. The court agrees with plaintiff that it is premature to determine whether class certification is appropriate with respect to this proposed class under Rule 4:32-2(a). See In re Cadillac, 93 N.J. at 423. It is possible that facts may be developed that defendant routinely failed to provide certificates of insurance to customers, or discovery may disclose that this was an unusual instance where that did not occur. Presently, at this preliminary stage, it would be premature for the court to determine that there are no facts which would permit certification of such a class. Therefore, the request to dismiss the first subclass or to assert the allegations with respect to the first subclass will be denied as premature.

The parties agree that a plaintiff in a CFA action may not pursue an action solely seeking injunctive relief. Here, there are claims other than those seeking injunctive relief which remain in the case. The court cannot state at this early stage of the litigation that there are no circumstances which would allow plaintiff to establish an ascertainable loss. The cases relied upon by the parties deal with matters that were at the summary judgment stage, not the pleading stage.

Plaintiff may file an amended complaint within twenty (20) days to address the claims which have been dismissed in counts 7, 9 and 10 of the complaint with leave to amend. Defendant shall file an answer to all remaining claims within twenty (20) days of this Order.