SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2292-21

ISABEL DEMEDEIROS,

Plaintiff-Respondent,

v.

LUIS J. BRILHANTE,
ALVIN MONROY, and
ROBERT REDCROSS,

Defendants,

and

BMW OF MORRISTOWN, and
OPEN ROAD AUTOMOTIVE
GROUP,

Defendants-Appellants.

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Submitted December 5, 2022 — Decided December 13, 2022

Before Judges Mawla and Smith.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3842-19.

Methfessel & Werbel, attorneys for appellants (Paul J. Endler, Jr., of counsel and on the briefs; Anthony J. Mancuso, on the briefs).

The Law Offices of Bruce E. Baldinger, LLC, attorneys for respondent (Bruce E. Baldinger, on the briefs).

PER CURIAM

We granted defendants BMW of Morristown and Open Road Automotive Group (collectively Open Road) leave to appeal from a February 10, 2022 order granting plaintiff Isabel De Medeiros' motion for summary judgment and final judgment pursuant to the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -227. We affirm.

The following facts emerged following the close of discovery in this case. Plaintiff's grandson, Luis Brilhante, asked her to help him purchase a vehicle. When plaintiff suggested more affordable options, Brilhante rejected her advice and purchased a BMW from his high school friend Alvin Monroy, an Open Road salesperson, in plaintiff's name and without her knowledge. An Open Road sales manager, Robert Redcross, oversaw the transaction. Plaintiff's personal information and signature appeared on documents related to the transaction, but she did not sign the documents.

Plaintiff learned Brilhante acquired the vehicle in her name when she began receiving insurance bills and noticed recurring withdrawals from her bank

account to pay the vehicle loan. Brilhante failed to pay the loan and insurance, and incurred tolls and parking fines in plaintiff's name. The vehicle was repossessed, and due to the insurance, fines, and violations, plaintiff's driving privileges were suspended. Open Road terminated Monroy and Redcross.

Plaintiff filed a complaint against Brilhante, alleging fraud, conversion, and theft of personal identifying information (PII). She subsequently amended the complaint to add Open Road, Monroy, and Redcross. The amended complaint added counts for violation of the CFA and the Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 to -18.

In 2021, plaintiff moved for summary judgment, arguing Open Road engaged in an unconscionable business practice in violation of the CFA by transacting the sale of the vehicle in her name, using forged signatures. She also alleged Open Road violated the CFA by participating "in the wrongful use of" her PII, in violation of N.J.S.A. 2C:21-17 to -17.6. She argued Open Road was vicariously liable based on respondeat superior for Monroy and Redcross's actions. Monroy and Redcross were: Open Road employees; they conducted the fraudulent transaction within the scope of their employment; and Open Road profited from the sale of the vehicle.

Plaintiff's damages were $22,606.86, comprised of the deficiency owed to BMW Finance, EZ Pass violations, and parking infractions. She requested the court award treble damages and counsel fees, pursuant to the CFA.

Open Road's opposition asserted the court could not grant summary judgment because there were disputes in material facts and plaintiff "failed to schedule the deposition of any representative of either Open Road or BMW in an attempt to establish her claims." Among the factual disputes alleged by Open Road was whether it acted negligently and what knowledge it had about Monroy and Redcross's actions. Open Road claimed these were matters to be decided by a jury.

Open Road also argued summary judgment was improper because Monroy and Redcross's actions were criminal, and therefore not within their scope of employment. Open Road did not dispute "that selling cars was within the scope of Redcross and Monroy's employment." However, it argued that committing fraud was not, and plaintiff could not assert such a claim "with no depositions of any BMW or Open Road employee . . . establishing BMW and Open Road had any involvement or even knowledge of said fraudulent acts."

Following oral argument, the Honorable Keith E. Lynott issued a written opinion. He concluded plaintiff proved Monroy and Redcross were "acting in

their capacities as sales[person] and sales manager of the [d]efendant, completed a sale and purchase, with associated financing, of a vehicle to [Brilhante,] . . . but in [plaintiff's] name." The judge noted it was undisputed plaintiff was not present for the transaction and did not authorize or sign the sales documents. Monroy and Redcross "thus enabled Brilhante to complete a fraudulent purchase with forged documents. There is no evidence presented to the contrary . . . ." And there was no doubt Monroy and Redcross's conduct "constituted an unconscionable business practice[,]" because the use of plaintiff's PII "and signature to complete the sale and purchase of a consumer good is totally at odds with good faith and honest dealing in the consumer marketplace that the CFA seeks to bring about."

Further, there was no dispute regarding plaintiff's loss and the causal connection between the unlawful conduct and the loss. Monroy and Redcross's sale of the vehicle to Brilhante resulted in its repossession and plaintiff's responsibility for the loan balance, tolls, and fines. Citing the Restatement (Second) of Agency § 228(1), the judge held Open Road could be liable for its employee's actions if: (a) the conduct "is of the kind [they are] employed to perform;" (b) the conduct "occurs substantially within the authorized time and space limits;" and, (c) the conduct "is actuated, at least in part, by a purpose to

serve the employer."[1] Further, "Restatement § 229 establishes that unauthorized conduct is within the scope of employment if it is of the same general nature of the conduct that is authorized or incidental to such authorized conduct."

The judge concluded the record proved Monroy and Redcross "were performing work of the kind [which] they were employed to perform–namely, effecting the sales of vehicles with associated financing and completion of all necessary documentation." Citing Monroy and Redcross's acknowledgment of Open Road's "Unethical and Inappropriate Business Practice Policy" form, the judge concluded they were subject to Open Road's control because the policy "explicitly recognize[s] the consequences to the employer of precisely the conduct in which . . . Monroy and Redcross engaged." The policy listed a litany of unethical conduct, including "[a]ccepting or writing credit applications known to be false" and "[f]orging customer's signatures on any documents." The policy noted the "dealership [could] be exposed to potentially serious liability in such circumstances . . . ."

The judge found Monroy and Redcross "processed Brilhante's purchase while present on their employer's premises and during business hours. They

[1] Subparagraph (d) of § 228(1), which considers "if force is intentionally used by the servant against another, the use of force is not expectable by the master[,]" is inapplicable here.

used their employer's facilities to complete the transaction." As a result, "their conduct was actuated, at least in part, by a purpose to serve the employer . . . entitling Open Road to book the sale of the vehicle and receive the proceeds."

The judge rejected Open Road's argument, which stated "[p]laintiff . . . failed to shoulder her burden of proof by failing to procure testimony from Monroy or Redcross," and concluded "on this record it was incumbent on . . . [Open Road], not . . . [p]laintiff, to procure testimony from these individuals or other corporate employees with relevant knowledge, to give rise to a genuine dispute of material fact . . . and thereby defeat . . . summary judgment."

Open Road raises the following points on appeal:

> Point I
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> Without a single defendant deposition being noticed, the trial court improperly concluded no issues of material fact existed under [Rule] 4:46-2.
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> Point II
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> The trial court incorrectly held that Monroy and Redcross were acting within their scope of employment . . . by committing an alleged fraud.
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> Point III[]
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> By affirming plaintiff's unproven claims would severely lower the summary judgment standard established in [Rule] 4:46.

I.

"Our review of a summary judgment ruling is de novo." Conley v. Guerrero, 228 N.J. 339, 346 (2017) (citing Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)). Summary judgment should be granted where "there is no genuine issue of material fact and 'the moving party is entitled to a judgment or order as a matter of law.'" Ibid. (quoting Templo Fuente, 224 N.J. at 199). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

Pursuant to these principles, we reject Open Road's contentions, and affirm substantially for the reasons expressed by Judge Lynott. We are satisfied the undisputed facts in the record demonstrate a violation of the CFA and Open Road's liability as Monroy and Redcross's employer. We add the following comments.

A party opposing a motion for summary judgment on the grounds that discovery is incomplete must "demonstrate with some degree of particularity the likelihood . . . further discovery will supply the missing elements of the cause

of action." Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015) (quoting Wellington v. Est. of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003)). We are unconvinced discovery would reveal a dispute in material facts that would thwart granting plaintiff summary judgment. Open Road employees sold a vehicle to Brilhante using plaintiff's credentials, without her knowledge or permission. The unspecified discovery Open Road claims is missing would not overcome the clear showing of a CFA violation or dissuade us from concluding Open Road was responsible for its employees' unconscionable business practice.

Affirmed.