SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0035-21

ROTIMI AZU OWOH,[1]

Plaintiff-Appellant,

v.

JASON SENA, HUBERT CUTOLO, and CUTOLO BARROS, LLC,

Defendants-Respondents,

and

TOM BOLAND, LEONARD BARBER, RAVENS CREST CONDO ASSOCIATION, and EXECUTIVE PROPERTY MANAGEMENT,

Defendants.

———————————————————

Argued December 20, 2022 – Decided January 27, 2023

Before Judges Rose and Paganelli.

[1] Improperly pled as Azu Rotimi Owoh.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-0778-20.

Rotimi Azu Owoh, appellant, argued the cause pro se.

Gregg S. Sodini argued the cause for respondents (Cutolo Barros, LLC, attorneys; Gregg S. Sodini, on the brief).

PER CURIAM

Plaintiff Azu Owoh Rotimi appeals pro se from Law Division orders entered on: (1) November 9, 2020, granting of summary judgment to defendants Jason Sena, Esq., Hubert Cutolo, Esq., and Cutolo Barros, LLC (Cutolo defendants); (2) November 20, 2020, denying plaintiff's motion to compel discovery; and (3) December 29, 2020, denying plaintiff's motion for reconsideration of the November 9 and 20, 2020 orders. Because we conclude that summary judgment was correctly granted, we affirm the orders under review.

I.

Rotimi owned a condominium unit within the Ravens Crest East Condominium Association (Association). On May 11, 2016, the Cutolo defendants, on behalf of the Association, recorded a Claim of Lien for "maintenance fees, a renovation project/special assessment, late fees and accelerated maintenance." Rotimi filed a lawsuit in United States District Court,

against the Cutolo defendants, and asserted that the lien was filed in violation of the Federal Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692 - 1692(p) and the Bankruptcy Code. Rotimi took the position that the lien was an "effort to collect a disputed debt that had been discharged in bankruptcy in February or March 2015." On March 6, 2018, the United States District Court for the District of New Jersey granted the Cutolo defendants summary judgment and on October 23, 2019, the United States Court of Appeals for the Third Circuit affirmed.

Moreover, the Cutolo defendants, on behalf of the Association, filed two State of New Jersey court actions. First, in their lawsuit for money damages for unpaid maintenance fees, the Association was granted summary judgment. Second, in a lien foreclosure lawsuit, the Association was awarded attorney's fees.

On April 19, 2019, Rotimi filed a Chapter 13 bankruptcy petition. On May 7, 2019, the Cutolo defendants filed a proof of claim on behalf of the Association. Rotimi did not object to the proof of claim. In June 2020, the bankruptcy court approved the plan over the Association's objection.

Meanwhile, in March 2020, Rotimi filed the complaint in the present matter, alleging violations of the New Jersey Consumer Fraud Act (CFA),

N.J.S.A. 56:8-1 to -20; the FDCPA and common law fraud.[2] Rotimi alleged the Cutolo defendants were "debt collectors" retained to "collect delinquent accounts" for the Association.

Rotimi asserted:

> The focus and gist of this complaint relate primarily to the second [C]hapter 13 bankruptcy petition that was filed by plaintiff on or around April 19, 2019. Hence, the claims in this complaint stem[] primarily from the communications that plaintiff received from the defendants and their agents AFTER the second bankruptcy petition was filed on 4-19-2019 by plaintiff.

On July 19, 2020, the motion judge dismissed Rotimi's complaint for failure to state a claim upon which relief can be granted, without prejudice, subject to Rotimi filing a motion to amend. On September 4, 2020, the judge granted in part and denied in part Rotimi's ensuing motion.

On September 30, 2020, the Cutolo defendants filed a motion for summary judgment. Pending the disposition of the motion, Rotimi filed a motion to compel discovery. The judge granted summary judgment in an oral opinion on November 6 and entered the accompanying order on November 9. The judge

[2] The complaint also named Tom Boland, Leonard Barber, Ravens Crest Condo Association and Executive Property Management as defendants. On June 28, 2021, Rotimi and these defendants entered into a global settlement. Therefore, they are not part of this appeal.

denied the discovery motion on November 20. Rotimi moved for reconsideration of both orders. Following oral argument on December 18, the judge reserved decision. On December 21, the judge issued an oral opinion, denying both motions and issued the accompanying orders on December 29.

II.

Rotimi argues that: (1) summary judgment is inappropriate because there is a material factual dispute over the amount owed; (2) discovery, including the depositions of the Cutolo defendants, is necessary; and (3) the judge impermissibly relied upon a certification explaining a "clerical error" for differing amounts due rather than permitting a jury the opportunity to evaluate the amount due.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (App. Div. 2016). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995) (citing R. 4:46-

2(c)). A reviewing court owes no special deference to the "trial court's interpretation of the law and the legal consequences that flow from established facts . . . ." Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

"The summary judgment rule set forth in Rule 4:46-2 'serve[s] two competing jurisprudential philosophies': first, 'the desire to afford every litigant who has a bona fide cause of action or defense the opportunity to fully expose his case,' and second, to guard 'against groundless claims and frivolous defenses,' thus saving the resources of the parties and the court." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (alteration in original) (quoting Brill, 142 N.J. at 541-42). "In light of the important interests at stake when a party seeks summary judgment, the motion court must carefully evaluate the record in light of the governing law and determine the facts in the light most favorable to the non-moving party." Id. at 479 (citing R. 4:46-2(c)). The motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried. Bhagat v. Bhagat, 217 N.J. 22, 40 (2014). "[N]either the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Id. at 38.

"Where . . . a prima facie right to a summary judgment exists . . . the party opposing the motion for summary judgment [must] demonstrate by competent evidential material that a genuine issue of fact exists . . . ." Robbins v. Jersey City, 23 N.J. 229, 241 (1957). "Rule 4:46-2(c)'s 'genuine issue [of] material fact' standard mandates that the opposing party do more than 'point[] to any fact in dispute' in order to defeat summary judgment." Globe Motor Co., 225 N.J. at 479 (alteration in original). "Under that standard, once the moving party presents sufficient evidence in support of the motion, the opposing party must 'demonstrate by competent evidential material that a genuine issue of fact exists[.]'" Id. 479-80 (quoting Robbins, 23 N.J. at 241). "Bald assertions are not capable of either supporting or defeating summary judgment." Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97-8 (App. Div. 2014).

Further, "[s]ummary judgment pursuant to Rule 4:46 normally is not appropriate before the party resisting such a motion has had an opportunity to complete the discovery relevant and material to defense of the motion." In Re Ocean Cty. Com'r of Registration for a Recheck of the Voting Machs., 379 N.J. Super. 461, 478 (App. Div. 2005) (citing Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 193 (1988)). However, a "party 'resisting' summary judgment must 'demonstrate with some specificity the discovery sought, and its

materiality.'" Ellis v. Hilton United Methodist Church, 455 N.J. Super. 33, 41 (App. Div. 2018) (quoting In Re Ocean Cty. Com'r of Registration, 379 N.J. Super. at 479). Materiality means "the likelihood that further discovery will supply the missing elements of the cause of action." Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (quoting Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977)). Moreover, "[a] plaintiff can 'bolster a . . . cause of action through discovery, but not [] file a conclusory complaint to find out if one exists.'" Darakjian v. Hanna, 366 N.J. Super. 238, 248-49 (App. Div. 2004) (second alteration in original); see also Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003); Camden Cty. Energy Recovery Assoc. v. N.J. Dep't Of Envtl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999).

A.

Rotimi's amended complaint alleges violations of the CFA which provides, in pertinent part:

> The act, use or employment by any person of any commercial practice that is unconscionable or abusive, 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 . . . is declared to be an unlawful practice.
>
> [N.J.S.A. 56:8-2.]

"Sale" is defined to "include any sale, rental or distribution, offer for sale, rental or distribution or attempt directly to sell, rent or distribute." N.J.S.A. 56:8-1(e). "Advertisement" is defined to

> include the attempt directly or indirectly by publication, dissemination, solicitation, indorsement or circulation or in any other way to induce directly or indirectly any person to enter or not enter into any obligation or acquire any title or interest in any merchandise or to increase the consumption thereof or to make any loan.
>
> [N.J.S.A. 56:8-1(a).]

Further, the term "merchandise" "shall include any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c).

Rotimi fails to establish that the CFA affords him a cause of action against the Cutolo defendants for their legal representation of the Association. The "statutory objective of the CFA is to protect consumers . . . ." Papergrahics Int'l, Inc. v. Correa, 389 N.J. Super. 8, 12 (App. Div. 2006). There is no evidence that Rotimi is a "consumer" or that there was a "consumer transaction" between him and the Cutolo defendants. Ibid.; see DepoLink Court Reporting & Litig.

Support Servs. v. Rochman, 430 N.J. Super. 325, 339 (App. Div. 2013) ("[T]he CFA is inapplicable to defendant's claim against the collection agency because any misrepresentations by the collection agency, even if made, were not in connection with the sale of merchandise to defendant."). There is no "material fact challenged" as to these issues. R. 4:6-2(c).

Further, even assuming the existence of a consumer transaction between Rotimi and the Cutolo defendants, "[c]ertain transactions that involve services provided by 'learned professionals' have been deemed to fall outside the scope of the CFA." Finderne Mgmt. Co. v. Barrett, 402 N.J. Super. 546, 566 (App. Div. 2008) (citing Macedo v. Dello Russo, 178 N.J. 340, 346 (2004)). There is no evidence that the Cutolo defendants were "acting outside their professional capacity." Id. at 567 (citing Gilmore v. Berg, 761 F. Supp. 358, 375-76 (D.N.J. 1991)).

In view of the foregoing principles, therefore, Rotimi's arguments regarding disputes as to the amount owed or the judge's reliance on a certification regarding clerical error are irrelevant because the CFA is inapplicable. Moreover, there is no "discovery" that would reveal that Rotimi was a "consumer" or that there was a "consumer transaction" between the parties. In other words, there is no discovery that would "supply the missing

elements" to a "cause of action" under the CFA. Wellington, 359 N.J. Super. at 496. Based on our de novo review of the record, we discern no basis to disturb the judge's decision granting summary judgment to the Cutolo defendants as to Rotimi's CFA claims.

B.

"The purpose of the FDCPA is to protect consumers from 'abusive debt collection practices by debt collectors . . . and to promote consistent [s]tate action to protect consumers against' such practices." Midland Funding LLC v. Thiel, 446 N.J. Super. 537, 549 (App. Div. 2016) (quoting 15 U.S.C.A. §1692(e)). The FDCPA permits a private cause of action under §1692(k). Law firms, in their capacity as debt collectors, can under certain circumstances be named as defendants in FDCPA complaints. See Heintz v. Jenkins, 514 U.S. 291, 299 (1995) ("[T]he Act applies to attorneys who 'regularly' engage in consumer-debt-collection activity . . ."); Hodges v. Sasil Corp., 189 N.J. 210, 228 (2007) ("[A] law firm that regularly engages in summary dispossess actions for nonpayment of rent is a 'debt collector' subject to the FDCPA.").

"To prevail on a FDCPA claim, a plaintiff must prove that[:] (1) she is a consumer; (2) the defendant is a debt collector; (3) the defendant's challenged practice involves an attempt to collect a 'debt' as the Act defines it; and (4) the

defendant has violated a provision of the FDCPA in attempting to collect the debt." Douglass v. Convergent Outsourcing, 765 F.3d 299, 303 (3d Cir. 2014). Violations can occur under 15 U.S.C. §1692(c) (communication in connection with debt collection); 15 U.S.C. §1692(d) (harassment or abuse); 15 U.S.C. §1692(e) (false or misleading representation); and 15 U.S.C. §1692(f) (unfair practices).

Rotimi's FDCPA claims assert that the Cutolo defendants, in the bankruptcy matter, "stat[ed] amount[s] of debts that were either [not] owed or were greater than the amount actually owed by the plaintiff at the time." However, Rotimi never objected to the proof of claim and the bankruptcy plan was confirmed.

Apparently, Rotimi seeks damages, under the FDCPA, based on the proof of claim filed by the Cutolo defendants in the bankruptcy action. However, "when a proof of claim is filed prior to confirmation, and the debtor does not object prior to confirmation, the debtor may not file a post-confirmation collateral action that calls into question the proof of claim." Adair v. Sherman, 230 F.3d 890, 894-95 (7th Cir. 2000). "Allowing collateral attacks . . . give[s] debtors an incentive to refrain from objecting in the bankruptcy proceeding . . . thereby destroy[ing] the finality that bankruptcy confirmation is intended to

provide." Id. at 895. "In short, the bankruptcy process provides protection against fraudulent proofs of claims." Ibid.

Further, "the FDCPA is an improper vehicle for challenging the amount of a debt established by the bankruptcy court." Ibid. The "FDCPA action is not an action to establish a debt but an action contesting the method of collection of that debt." Id. at 896. Therefore, Rotimi's failure to object to the Cutolo defendants' proof of claim in the bankruptcy proceeding bars his assertion that there is a "material dispute of fact" regarding the "amounts actually owed" in this matter. R. 4:46-2(c).

Moreover, "[a] proof of claim executed and filed in accordance with the Bankruptcy Rules constitutes prima facie evidence of the validity of the amount of the claim." Adair, 230 F.3d at 894 (quoting In re Ross, 162 B.R. 785, 788 (Bankr. N.D. Ill. 1993)). "As a general rule, the failure to raise an objection at the confirmation hearing or to appeal from the order of confirmation should preclude attack on the plan or any provision therein as illegal in a subsequent proceeding." Ibid. (quoting In re Chappell, 984 F.2d 775, 782 (7th Cir. 1993)). Accordingly, here, Rotimi cannot claim the Cutolo defendants violated the FDCPA. His arguments regarding the amount actually owed or the judge's reliance on a certification are therefore unavailing.

Further, to the extent that Rotimi challenges purported communications or misrepresentations, other than the proof of claim, his amended pleading failed to assert which provision of the FDCPA was violated. Moreover, he failed to provide any evidence of a violation. "To defeat a motion for summary judgment, the opponent must 'come forward with evidence that creates a genuine issue of material fact.'" Sullivan v. Port Auth. of N.Y. & N.J., 449 N.J. Super. 276, 282-283 (App. Div. 2017) (citing Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014)). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Id. at 283 (alteration in original) (quoting Puder v. Buechel, 183 N.J. 428, 440-41 (2005)). Nor was Rotimi entitled to discovery to save his conclusory complaint. See Darakjian, 366 N.J. Super. at 248-49 (recognizing a plaintiff may not "file a conclusory complaint [and use discovery] to find out if [such a claim] exists."). Rotimi's arguments regarding the need for discovery are unavailing.

In sum, Rotimi failed to: (1) oppose the bankruptcy proof of claim; (2) produce evidence of a FDCPA violation; and (3) file an amended complaint that asserted meaningful allegations of FDCPA violations. Therefore, the Cutolo defendants are entitled to summary judgment as a "matter of law" on plaintiff's FDCPA claims. R. 4:46-2(c).

C.

"The five elements of common law fraud are: (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). Rule 4:5-8 requires that "[i]n all allegations of . . . fraud . . . particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable."

Simply put, in the present matter, Rotimi failed to plead with particularity, or provide evidence of, common law fraud elements. Bhagat, 217 N.J. at 38. We therefore conclude, as did the motion judge, the Cutolo defendants were entitled to summary judgment on Rotimi's common law fraud claims.

We affirm the judge's grant of summary judgment on Rotimi's FDCPA, CFA, and common law fraud claims.

III.

Little need be said about Rotimi's contentions that the motion judge erroneously denied his reconsideration motion. Appellate courts "will not disturb the trial court's reconsideration decision 'unless it represents a clear abuse of discretion.'" Kornbleuth v. Westover, 241 N.J. 289, 301 (2020)

(quoting Hous. Auth. Of Morristown v. Little, 135 N.J. 274, 283 (1994)). Reconsideration should only be granted in those cases in which the court had based its decision "upon a palpably incorrect or irrational basis," or did not "consider, or failed to appreciate the significance of probative, competent, evidence." Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

Moreover, a party "is not entitled to reconsideration on the basis of evidence it had available and overlooked in its initial argument." Morey v. Wildwood Crest, 18 N.J. Tax 335, 339 (App. Div. 1999). "To validate such a practice would encourage attorneys to hold back evidence and move for reconsideration on 'a regular basis in order to get a second bite of the apple' if their adversary prevailed on the initial motion." Fusco v. Board of Educ. of City of Newark, 349 N.J. Super. 455, 463 (App. Div. 2002) (alteration in original).

Rotimi claims that the judge erroneously denied his motion for reconsideration because he "pointed out . . . errors during oral argument on the motion for reconsideration." He avers that: (1) it was unfair and improper to grant summary judgment with no discovery at all; (2) it was unfair and improper to grant summary judgment based on the certification; (3) it was factually incorrect to find the Cutolo defendants were not engaged in an effort to collect

a consumer debt; (4) it was factually incorrect to find there was no consumer transaction; and (5) the role of the jury was usurped.

However, the judge, applied the correct standards for motions for reconsideration. In denying the motion for reconsideration regarding discovery, the judge determined that Rotimi was provided with the information albeit it in a different format than requested. The judge, citing D'Atria, 242 N.J. Super. at 401, denied reconsideration because Rotimi failed to establish that he acted in an "arbitrary, capricious or unreasonable manner" or "failed to consider probative evidence."

Moreover, in denying the motion for reconsideration regarding summary judgment, the judge again relied upon the standards enunciated in D'Atria but also noted that Rotimi's attempt to introduce new evidence, in his possession at the time of the original motion, was inappropriate. See, Fusco, 349 N.J. Super. at 463; Morey, 18 N.J. Tax at 339. Having considered Rotimi's contentions in view of the governing law, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated by the motion judge.

Affirmed.