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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0743-20**

**AAKASH DALAL,**

Plaintiff-Appellant,

v.

**KEEFE COMMISSARY  
NETWORK, LLC,**

Defendant-Respondent.

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Argued December 20, 2022 – Decided January 17, 2023

Before Judges Geiger and Fisher.

On appeal from the Superior Court of New Jersey, Law  
Division, Middlesex County, Docket No. L-1953-19.

Aakash Dalal, appellant, argued the cause pro se.

Eric A. Savage argued the cause for respondent (Littler  
Mendelson, PC, attorneys; Eric A. Savage, on the  
brief).

**PER CURIAM**

While incarcerated, plaintiff Aakash Dalal purchased items at the Bergen County Jail's commissary operated by defendant Keefe Commissary Network, LLC. Believing the prices charged were unconscionable, plaintiff sued Keefe under, among other things, the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. We affirm the summary judgment entered in Keefe's favor because Bergen County's involvement in the setting of prices entitled Keefe, as the motion judge held, to derivative immunity.

Plaintiff was incarcerated at the jail between March 2012 and August 2017, during which he purchased numerous items from the jail's commissary. In asserting his claims here against Keefe, plaintiff argues the prices were unconscionable and caused him to suffer an ascertainable loss of approximately \$16,500. His complaint alleges a violation of N.J.S.A. 56:8-2, an unlawful taking in violation of Article I, paragraph 20 of the New Jersey Constitution, and Keefe's unjust enrichment as a result.

Keefe was the lowest responsible bidder on the publicly bid contract. Its bid listed the sale prices of specified items it would supply if awarded the contract. The Bergen County Sheriff's Department maintained control over the prices charged inmates by approving the prices.

Plaintiff alleges the jail provided insufficient toilet paper, soap, and necessities, forcing inmates to buy those items at the commissary to make up the difference, which incentivized the Sheriff's Department to approve higher prices because it received part of the purchase price. Notably, plaintiff did not name the County of Bergen or the Sheriff's Department, which operated the jail, as defendants.

Keefe played no part in deciding the quantity of the items distributed to inmates or the distribution of those items. Keefe's only role was to supply the products sold at the commissary, which were sold at approved prices. It did not supply employees to operate the commissary.

After a thirteen-month discovery period, Keefe successfully moved for summary judgment dismissing the complaint with prejudice. This appeal followed.

Plaintiff raises the following points on appeal:

**I. THE TRIAL COURT ERRONEOUS[LY] HELD THAT [KEEFE] WAS ENTITLED TO DERIVATIVE IMMUNITY FOR [CONSUMER FRAUD] AND UNJUST ENRICHMENT CLAIMS.**

**A. Derivative immunity is not a valid defense against CFA claims.**

1. Defendant is not entitled to derivative immunity, as the [CFA] has no immunity provisions in the first instance.

2. The [Tort Claims Act's] immunity provisions cannot be superimposed onto the CFA.

B. Derivative immunity is not a defense to unjust enrichment claims.

II. [KEEFE] WAIVED THE AFFIRMATIVE DEFENSE OF DERIVATIVE IMMUNITY BY FAILING TO PLEAD IT IN ITS ANSWER AND IS BARRED BY THE DOCTRINES OF EQUITABLE ESTOPPEL AND LACHES FROM RAISING IT FOR THE FIRST TIME ON A MOTION FOR SUMMARY JUDGMENT.

We find insufficient merit in these arguments to warrant extended discussion in a written opinion, R. 2:11-3(e)(1)(E).

We apply the same standard as the trial court in our review of appeals from summary judgment determinations. Lee v. Brown, 232 N.J. 114, 126 (2018). "Summary judgment is appropriate 'when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law.'" Ibid. (quoting Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016)). In applying that standard, we "view the facts in the light most favorable to the non-moving party . . . ." Bauer v. Nesbitt, 198 N.J. 601, 604 n.1 (2009) (citing R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

In responding to Keefe's summary judgment motion, plaintiff did not dispute that the commissary items prices were fixed through the process by which Keefe became the commissary's operator. That is, there is no dispute that Keefe was the successful bidder for a contract with Bergen County to provide commissary services for its jail inmates. The sheriff's office determined what goods could be offered, and the bidding instructions required that Keefe and other bidders include in their proposals a suggested retail price list of all items. The sheriff's office "reserve[d] the right to approve the prices" charged.

Under these undisputed circumstances, Keefe was entitled to derivative immunity. In Vanchieri v. N.J. Sports & Expo. Auth., 104 N.J. 80, 84-85 (1986), the Court considered the tort liability of a private entity – Wackenhut Company – retained by the New Jersey Sports and Exposition Authority to provide security at Giant Stadium. In considering Wackenhut's liability for an injury to a patron caused by unruly patrons, the Court recognized that Wackenhut did not fall within the definition of "public entity" in the Tort Claims Act, but the Court nonetheless held that independent contractors, "under well-recognized principles, share to a limited extent the immunity of public entities with whom they contract." Id. at 85. The Court explained that "[w]hen a public entity provides plans and specifications to an independent contractor, the public

contractor will not be held liable for work performed in accordance with those plans and specifications." Id. at 86. The Court based this holding on two public policies: (1) "[i]f contractors never shared government immunity, their cost of doing business would be higher and those higher costs would be passed on to the government entities" that hire them; and (2) "[i]t would be fundamentally unfair" to hold a contractor liable for adhering to the specifications provided by a public entity. Ibid.

This policy of extending notions of sovereign immunity in tort matters to an independent contractor for taking actions in accordance with a public entity's directions, applies with equal force when considering a consumer fraud claim, like that asserted here, where the prices charged by an independent contractor – alleged to be unconscionable – are imposed with the approval of a public entity. It likewise applies to plaintiff's unjust enrichment claim. In this circumstance, as the motion judge correctly held, Keefe was entitled to the benefit of derivative immunity. That determination militated strongly in favor of a dismissal of plaintiff's claims.

In his second point, plaintiff argues the derivative-immunity defense was waived because it was not asserted in Keefe's responsive pleading and not raised until Keefe moved for summary judgment. Even though Rule 4:5-4 does not so

state, it is well understood that the failure to plead an affirmative defense will often lead to its waiver. Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986). Courts may, however, relax this consequence or excuse the waiver, see Douglas v. Harris, 35 N.J. 270, 281 (1961), particularly when the defense is apparent on the face of the pleadings or responsive pleading, as here, see Prickett v. Allard, 126 N.J. Super. 438, 440 (App. Div.), aff'd o.b., 66 N.J. 6 (1974). Plaintiff's complaint and Keefe's answer recognize the overarching involvement and influence of Bergen County and the Sheriff on Keefe's performance of its public contract, so the assertion of the derivative-immunity defense could have come as no surprise to plaintiff.

A waiver resulting from a failure to plead may also be excused if the affirmative defense is based on public policy considerations, see Heimbach v. Mueller, 229 N.J. Super. 17, 26 (App. Div. 1988), or when "enforcement [of the waiver] would be inconsistent with substantial justice," Douglas, 35 N.J. at 281. In the final analysis, plaintiff has not shown any prejudice or a deprivation of a right to fully respond to the summary judgment motion, even if the assertion of derivative immunity was not asserted by Keefe until moving for summary judgment. See Rivera v. Gerner, 89 N.J. 526, 535-37 (1982).


Because Keefe is immune from liability, the unconscionability of the prices paid by plaintiff was not a material fact in dispute precluding summary judgment. Therefore, further discovery related to the prices charged at the commissary or Keefe's financial condition were not necessary.

Plaintiff's merits brief did not address the dismissal of his claim that Keefe violated the takings clause of the New Jersey Constitution and the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2. An issue not raised in an initial appellate brief is not properly before the court. Bernoskie v. Zariski, 344 N.J. Super. 160, 166 n.2 (App. Div. 2001) (citing Twp. of Warren v. Suffness, 225 N.J. Super. 399, 412 (App. Div. 1988)). He argued it for the first time in his reply brief. "We generally decline to consider arguments raised for the first time in a reply brief." Bacon v. State Dept. of Educ., 443 N.J. Super. 24, 38 (App. Div. 2015) (citing L.J. Zucca, Inc. v. Allen Bros. Wholesale Distribs., Inc., 434 N.J. Super. 60, 87 (App. Div. 2014)). By failing to raise this argument in his initial brief, appellant has waived this contention. Ibid. In any event, plaintiff's takings clause claim lacks sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Applying these principles, we discern no basis to disturb the summary judgment dismissal granted to Keefe.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION