SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1996-21

JENNIFER WOO-PADVA,
on behalf of herself and those
similarly situated,

Plaintiff-Appellant,

v.

MIDLAND FUNDING, LLC,

Defendant-Respondent.

———————————————————

Argued May 30, 2023 – Decided September 21, 2023

Before Judges Gilson, Rose, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3625-17.

Scott C. Borison (Borison Firm LLC) of the Maryland bar, admitted pro hac vice, argued the cause for appellant (Kim Law Firm LLC, and Scott C. Borison, attorneys; Yongmoon Kim, Mark Jensen, M. Hasan Siddiqui, and Scott C. Borison, on the briefs).

Han Sheng Beh argued the cause for respondent (Hinshaw & Culbertson LLP, attorneys; Han Sheng Beh, on the brief).

Lisa R. Considine argued the cause for amicus curiae Consumers League of New Jersey and National Association of Consumer Advocates (DiSabato & Considine LLC, attorneys; Lisa R. Considine, of counsel and on the brief).

PER CURIAM

Plaintiff Jennifer Woo-Padva paid in full a credit-card debt she initially owed to HSBC Bank (HSCB) after defendant Midland Funding LLC (Midland) had purchased her defaulted account. In a purported class-action complaint, she claimed Midland had violated the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -227, and was unjustly enriched by collecting on that debt because Midland was not then licensed pursuant to the New Jersey Consumer Finance Licensing Act (CFLA), N.J.S.A. 17:11C-1 to -49. Plaintiff appeals from an August 4, 2020 order granting Midland's motion to strike the class allegations in the complaint; a June 2, 2021 order denying her motion for leave to amend her class-action allegations; and a January 21, 2022 order denying her summary-judgment motion and granting defendant's cross-motion for summary judgment. Reviewing the summary-judgment motions de novo, we affirm the January 21, 2022 order. Because we affirm the summary-judgment order, we do not address plaintiff's appeal of the August 4, 2020 and June 2, 2021 orders.

I.

We discern the material facts from the summary-judgment record, viewing them in a light most favorable to the non-moving party. See Memudu v. Gonzalez, 475 N.J. Super. 15, 18-19 (App. Div. 2023).

On June 12, 2008, plaintiff opened a credit-card account with HSBC. She defaulted on that account, and it was "charged-off" on February 28, 2010, with a balance of $4,208.33.[1] On December 14, 2010, defendant purchased that "charged-off" account.[2] The account was placed with a law firm, Pressler & Pressler, LLP (Pressler), "for servicing." Pressler identifies itself in letters to plaintiff as a "debt collector." After receiving letters from Pressler, plaintiff contacted Pressler and set up a payment plan to pay off the HSBC debt in monthly installments over two years. Plaintiff understood defendant had

[1] "Creditors must 'charge-off' debt in default after a specified period of time. Once it is designated as 'charged-off,' debt is 'no longer treated as assets for capital requirements under federal banking regulations.'" Federal Trade Commission, The Structure and Practices of the Debt Buying Industry 11 n.57 (2013), available at http://ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[2] In her merits brief, plaintiff refers to defendant as "an assignee of the credit contract." Plaintiff, however, has not established defendant, as the purchaser of a "charged-off" account, was the equivalent of an assignee of an active credit contract or had the same rights as HSBC with respect to the account before it charged off the account.

purchased the account from HSBC. She made her first payment in June 2011 and her last payment in August 2013. Her last payment was posted on September 5, 2013. Pressler collected a total of $4,208.33 for the HSBC account, satisfying plaintiff's payment obligation. In its September 3, 2013 letter, Pressler confirmed the balance on the HSBC account owned by defendant had been paid in full. Since plaintiff made the last payment, no other entity has sought payment from her for the HSBC account.

New Jersey requires debt collectors to be bonded, and defendant has maintained a bond with the State since April 2, 2009. Defendant did not obtain a consumer lending license in New Jersey before January 6, 2015.

On May 24, 2017, plaintiff filed a proposed class-action complaint, alleging defendant was a "collection agency" that had "filed numerous lawsuits . . . to collect the consumer debts allegedly owed by New Jersey consumers on defaulted credit accounts at a time when [it] was not properly licensed" under the CFLA. Plaintiff based her complaint in part on allegations that "dunning letters" defendant sent her through its agents had caused her to make payments on the HSBC debt.

Plaintiff also based her complaint on allegations regarding defendant's purchase of a Chase Bank (Chase) account on which she had defaulted.

According to plaintiff, defendant filed a lawsuit against her based on that debt, causing her to make payments on it and enter into a consent judgment. We affirmed the dismissal of plaintiff's claims regarding the Chase account based on res judicata and the entire controversy doctrine. See Woo-Padva v. Midland Funding, LLC, No. A-3575-17 (App. Div. Aug. 5, 2019).

In the first count of her three-count complaint, plaintiff sought a judgment declaring void the judgments defendant had obtained in its collection actions and enjoining defendant from enforcing those judgments based on plaintiff's assertion defendant did not have the legal right to file collection lawsuits when it was not licensed under the CFLA. In the second count, she asserted defendant had committed deceptive and unconscionable business practices in violation of the CFA, N.J.S.A. 56:8-2, by filing collection complaints when it lacked the proper license to do so, representing it was properly licensed, and demanding and accepting payments on judgments it had obtained. Plaintiff described "the amounts . . . paid towards the debts" as "an ascertainable loss." In the third count, plaintiff asserted defendant had been unjustly enriched by funds it received from plaintiff and putative class members as a result of its "illegally obtained judgments." Plaintiff demanded the disgorgement or restitution of those funds.

Plaintiff defined the proposed class as "[a]ll New Jersey resident consumers against whom [d]efendants filed a civil collection complaint at a time when the [d]efendants [were] not properly licensed to do so under the [CFLA]" and defined a proposed subclass as "[a]ll members of the [c]lass who paid money to the [d]efendants in the six[-]year period preceding the filing of this complaint." In her first amended complaint, plaintiff redefined the proposed class as "[a]ll natural persons with addresses in the State of New Jersey who are listed as the borrower or purchaser in an account assigned to [defendant] at any time prior to January 6, 2015" and the proposed subclass as "[a]ll members of the [c]lass who paid any money or from whom [defendant] collected any money on the assigned account."

Defendant moved to dismiss the complaint pursuant to Rule 4:6-2. The motion judge granted the application, holding plaintiff's claims were barred by res judicata and the entire controversy doctrine based on the consent judgment in the Chase collection matter. We affirmed the dismissal of the Chase claims but reversed as to the HSBC claims because the HSBC "debt was not the subject of any action and involved a totally different claim" from the claim at issue in the Chase collection matter and, thus, neither res judicata nor the entire controversy doctrine barred the HSBC claims. See Woo-Padva, slip op. at 3.

Defendant moved to strike the class allegations in plaintiff's amended complaint. On August 4, 2020, the judge granted the motion in an order and written opinion and dismissed the class allegations with prejudice. The judge held plaintiff could not represent "a class which included those individuals with judgments rendered against them" given the affirmed dismissal of the Chase claims and because plaintiff, who had "made voluntary payments to [defendant] and satisfied her debt," was "situated differently from the class she seeks to represent." The judge also found plaintiff's class allegations failed because the claims of the putative class members would have to be analyzed individually, thereby defeating the purpose of trying the case as a class action, and the class included claims barred by the six-year statute of limitations that applied to the CFA claims.

More than nine months later, plaintiff moved for leave to file a second amended complaint, seeking in part to redefine the proposed class and subclass. In a June 2, 2021 order and opinion, the judge denied the motion "as to the class action claims" as untimely, prejudicial, and futile because plaintiff's proposed amendment was "in direct contravention" with the August 4, 2020 order and opinion striking the class allegations.

Plaintiff moved and defendant cross-moved for summary judgment. After hearing argument, the judge denied plaintiff's motion and granted defendant's cross-motion in a January 21, 2022 order and opinion, thereby entering summary judgment in favor of defendant and dismissing plaintiff's first amended complaint. The judge found defendant was not a consumer lender and did not require a license pursuant to the CFLA; plaintiff's claims were not covered by the CFA because defendant had not offered to sell plaintiff any services or merchandise; and plaintiff had not suffered an ascertainable loss pursuant to the CFA.

This appeal followed. Plaintiff challenges the judge's finding that the CFLA's licensing requirement and the CFA did not apply under the circumstances of this case.[3] Plaintiff also argues the judge erred in striking the

[3] Plaintiff does not make any arguments concerning her unjust-enrichment claim. Because plaintiff failed to address that claim, we deem it abandoned. See Thomas Makuch, LLC v. Twp. of Jackson, 476 N.J. Super. 169, 183 (App. Div. 2023); N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) (finding "[a]n issue that is not briefed is deemed waived upon appeal").

class allegations and denying plaintiff leave to file a second amended complaint.[4]

II.

We review a grant or denial of summary judgment de novo, applying the same standard as the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). That standard requires us to "determine whether '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.'" Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (quoting R. 4:46-2(c)). "Summary judgment should be granted . . . 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). We do not defer to the trial court's legal analysis or statutory interpretation. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018); Perez v. Zagami, LLC, 218 N.J. 202, 209 (2014).

[4] In addition to the parties, Consumers League of New Jersey and National Association of Consumer Advocates submitted an amicus curiae brief in support of plaintiff's position.

In the first count of the first amended complaint, plaintiff sought a declaratory judgment that defendant did not have the legal capacity to collect on the HSBC account because it was not licensed under the CFLA and that the account was void. The Legislature, however, did not provide a private right of action under the CFLA – and plaintiff does not contend otherwise. Instead, the Legislature determined that a "consumer lender" who violated the licensing provision of the CFLA would "be guilty of a crime of the fourth degree," N.J.S.A. 17:11C-33, and authorized the Commissioner of Banking and Insurance to punish those who violate any provision of the CFLA by, for example, refusing to issue a license or imposing penalties in accordance with the CFLA, N.J.S.A. 17:11C-18.

Plaintiff cannot circumvent the lack of a private right of action by seeking relief under the Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-50 to 62. See In re Resol. of State Comm'n of Investigation, 108 N.J. 35, 46 (1987) (dismissing cause of action seeking a judgment declaring a party had violated a statute because plaintiffs did not have a private right of action under the statute); Excel Pharmacy Servs., LLC v. Liberty Mut. Ins., 825 F. App'x 65, 70 (3d Cir. 2020) ("But it is well settled that parties cannot bring a declaratory judgment action under a statute when there is no private right of action under that

statute."). Accordingly, we affirm the grant of summary judgment in favor of defendant as to plaintiff's declaratory-judgment count, albeit for a different reason than the one articulated by the motion judge. See T.B. v. Novia, 472 N.J. Super. 80, 93 (App. Div. 2022) (affirming the summary judgment orders for reasons other than those expressed by the trial court).

To prevail on a CFA claim, a plaintiff must establish unlawful conduct, an ascertainable loss, and a causal relationship between the two. D'Agostino v. Maldonado, 216 N.J. 168, 184 (2013). Because plaintiff did not demonstrate defendant had engaged in unlawful conduct under the CFA or that she had suffered an ascertainable loss, we affirm the grant of summary judgment on plaintiff's CFA claim.

The purpose of the CFA is "to prevent deception, fraud, or falsity, whether by acts of commission or omission, in connection with the sale or advertisement of merchandise and real estate." Shaw v. Shand, 460 N.J. Super. 592, 607 (App. Div. 2019) (quoting Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 376-77 (1977)); see also Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 270 (1978) (finding "the legislative concern" addressed by the CFA "was over sharp practices and dealings in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive

or other similar kind of selling or advertising practices"). With that purpose in mind, the Legislature made unlawful under the CFA:

> 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, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged . . . .
>
> [N.J.S.A. 56:8-2 (emphasis added).]

The CFA defines "merchandise" as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale" and "sale" as "any sale, rental or distribution, offer for sale, rental or distribution or attempt directly or indirectly to sell, rent or distribute." N.J.S.A. 56:8-1(c), (e). Our Supreme Court has held the CFA applies to "the provision of credit." Lemelledo v. Benefit Mgmt. Corp., 150 N.J. 255, 265 (1997); see also Chulsky v. Hudson Law Offices, P.C., 777 F. Supp. 2d 823, 838 (D.N.J. 2011) (describing Lemelledo as standing for the proposition that the CFA "applies to the sale of credit").

A plaintiff may establish the unlawful-conduct element of a CFA claim by an affirmative act, which requires no showing of intent, or by an omission, which requires a showing "the defendant acted with knowledge, and intent is an essential element of the fraud." Cox v. Sears Roebuck & Co., 138 N.J. 2, 17-18 (1994); see also N.J.S.A. 56:8-2. "Under the CFA, '[t]he misrepresentation has to be one which is material to the transaction . . . made to induce the buyer to make the purchase.'" DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 338 (App. Div. 2013) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607 (1997)); see also Ji v. Palmer, 333 N.J. Super. 451, 462 (App. Div. 2000).

Plaintiff alleged defendant had committed an unlawful act under the CFA by "[m]isrepresenting in its dunning letters that it had the legal right to collect on the account when it lacked the proper license to do so" and by taking further steps to collect on the account based on that purported misrepresentation. But as we held in DepoLink, those actions are not unlawful under the CFA.

> Here, the 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. The alleged prohibited conduct occurred later on, when the collection agency was attempting to collect the debt from defendant. The collection agency's contacts with defendant were not an

> offer to sell merchandise, nor did defendant buy anything from the collection agency. Debt collection activities on behalf of a third party who may have sold merchandise are not unconscionable activities "in connection with the sale" of merchandise. See, e.g., Chulsky[, 777 F. Supp. 2d at] 847 (holding that the CFA does not cover the debt collection activities of a third party that purchases consumer debt); Joe Hand Promotions, Inc. v. Mills, 567 F. Supp. 2d 719, 723-24 (D.N.J. 2008) (finding that a letter demanding payment of a settlement did not fall within the CFA because plaintiff was not induced to purchase merchandise or real estate).
>
> [430 N.J. Super at 339.]

Plaintiff does not contend defendant sold credit or anything else to her, and she finds no fault with the entity, HSBC, that actually sold her the credit-card account at issue. She concedes defendant was "in the business of purchasing consumer debt" and that defendant merely had purchased her "charged-off" HSBC account. She does not base her CFA claim on a misrepresentation made to induce her into purchasing credit, cf. Gennari, 148 N.J. at 607, but on an alleged misrepresentation made after she had obtained the credit-card account from HSBC and after she had incurred the debt at issue. Plaintiff was not "lured into a purchase" by any action or representation by defendant. See Daaleman, 77 N.J. at 271. Accordingly, her CFA claim fails as a matter of law.

In her reply brief, plaintiff urges us to reject our holding in DepoLink, contending it somehow conflicts with the Court's holding in Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 577 (2011). We perceive no conflict given the factual differences in the cases; plaintiff's reliance on Gonzalez is misplaced. Gonzalez involved a mortgage foreclosure and "post-judgment agreements" that had "recast the terms of the original loan" and had included, according to plaintiff, "illicit financing charges and miscalculations of monies due." Id. at 563. The Court held the post-judgment loan modifications were "in form and substance an extension of credit," id. at 563, and that the plaintiff could base a CFA claim on the defendant's alleged actions in connection with that new transaction. Those facts are not present in this case. As plaintiff has conceded, defendant purchased from HSBC her charged-off credit-card account and then attempted to collect on it. Plaintiff did not allege, much less establish, that defendant had renegotiated and modified the terms of her account or extended her any credit.

Plaintiff's reliance on Jefferson Loan Co. v. Session, 397 N.J. Super. 520 (App. Div. 2008), is similarly misplaced. In Jefferson, the plaintiff finance

company purchased an existing retail installment sales contract[5] from the automobile dealer the day the defendant purchased the car and before she defaulted on it. Id. at 525-27. The plaintiff finance company also had "offer[ed] credit life and credit disability insurance through the dealers, insuring the life and health of the borrowers, as well as property insurance of the financed automobiles." Id. at 525-26. Jefferson did not involve the purchase of a defaulted, charged-off account, which is what is at issue in this case.

"An ascertainable loss under the CFA is one that is 'quantifiable or measurable,' not 'hypothetical or illusory.'" Johnson v. McClellan, 468 N.J.

---

[5] N.J.S.A. 17:16C-1(b) defines "Retail installment contract" as:

> any contract, other than a retail charge account or an instrument reflecting a sale pursuant thereto, entered into in this State between a retail seller and a retail buyer evidencing an agreement to pay the retail purchase price of goods or services, which are primarily for personal, family or household purposes, or any part thereof, in two or more installments over a period of time. This term includes a security agreement, chattel mortgage, conditional sales contract, or other similar instrument and any contract for the bailment or leasing of goods by which the bailee or lessee agrees to pay as compensation a sum substantially equivalent to or in excess of the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of such goods upon full compliance with the terms of such retail installment contract.

Super. 562, 587 (App. Div. 2021) (quoting D'Agostino, 216 N.J. at 185). A plaintiff can demonstrate ascertainable loss by showing an "out-of-pocket loss or the loss of the value of his or her interest in property[,]" or by demonstrating "that he or she has been deprived of the 'benefit of the bargain' because of a CFA violation." Ibid. (quoting D'Agostino, 216 N.J. at 190-92).

Plaintiff has not demonstrated an ascertainable loss. She paid a debt she admittedly owed. She received a letter confirming the balance on the HSBC account had been paid in full. Since her last payment, no entity has sought payment from her for the HSBC account. Her speculation that HSBC, which charged off and sold the account, could some day seek payment from her is too hypothetical and illusory to support a finding of ascertainable loss.

Raising an issue plaintiff had not addressed in either of her appellate briefs and making a factual assertion she had not made in any pleading or in her deposition testimony, plaintiff's counsel claimed during oral argument before us that plaintiff had established a genuine issue of material fact as to whether she paid more than the amount due on the HSBC debt. The record does not support that claim.

In support of his claim, plaintiff's counsel relied on defendant's payment-history screens concerning the HSBC account. According to plaintiff,

the balance of the HSBC account when it was charged off was $4,208.33, her first payment was made in June 2011, and her last payment was made in August 2013 and was posted on September 5, 2013. The payment-history screens demonstrate that during that time period plaintiff paid $4,208.33 – the amount of the HSBC account balance – and no more.[6] Perceiving no genuine issue of material fact, we affirm the January 21, 2022 order denying plaintiff's summary-judgment motion and granting defendant's cross-motion for summary judgment.

Because we affirm the summary-judgment order, we do not reach plaintiff's appeal of the August 4, 2020 order granting Midland's motion to strike the class allegations in the complaint or the June 2, 2021 order denying her motion for leave to amend her class-action allegations.

Affirmed.

[6] The payment-history screens reference an $85.73 transaction that was posted on September 21, 2013, after plaintiff's last payment was made in August 2013 and posted on September 5, 2013. In a certification submitted in opposition to plaintiff's summary-judgment motion and in support of defendant's cross-motion for summary judgment, a witness on behalf of defendant testified the $85.73 was "a non-cash credit to the account following the receipt of [plaintiff's] last payment," reflecting defendant's "business decision to back out the $85.73 in interest that had accrued on the HSBC account." That testimony is undisputed in the record. During her deposition, plaintiff testified she had paid the HSBC account "in full"; she did not assert in her testimony she had paid more than the account balance.