SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2238-22

JOSHUA A. ASMAD-ESCOBAR, on behalf of himself and those similarly situated,

Plaintiff-Appellant,

v.

PHOENIX FINANCIAL SERVICES LLC, and CASCADE CAPITAL FUNDING, LLC,

Defendants-Respondents.

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Argued April 16, 2024 – Decided June 5, 2024

Before Judges Puglisi and Bergman.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3551-21.

Philip D. Stern argued the cause for appellant (Kim Law Firm, LLC, attorneys; Philip D. Stern and Youngmoon Kim, on the briefs).

Aaron R. Easley argued the cause for respondent Phoenix Financial Services, LLC (Sessions, Israel &

Shartle, attorneys; Aaron R. Easley and Jay I. Brody, on the brief).

Sean Michael O'Brien argued the cause for respondent Cascade Capital Funding LLC (Lippes Mathias, attorneys, join in the brief of respondent Phoenix Financial Services, LLC).

PER CURIAM

Plaintiff Joshua A. Asmad-Escobar, on behalf of himself and those similarly situated, appeals from the Law Division's orders dated March 8, 2023, dismissing his complaint against defendant Phoenix Financial Services, LLC; the March 17, 2023 administrative order dismissing his complaint against defendant Cascade Capital Funding LLC for lack of prosecution; and the March 28, 2023 order dismissing his complaint against defendant Cascade. We affirm.

Plaintiff incurred a personal debt which the lender transmitted to defendants, who are debt collectors. Defendants both engaged third-party letter vendors to create and mail plaintiff three collection letters. The letters included plaintiff's name and address, the creditor's name and the balance amount of the debt.

On September 9, 2021, plaintiff filed a purported class action complaint claiming defendants violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692 to 1692p, and seeking "damages against [d]efendants arising

from [d]efendants' unlawful disclosure of sensitive and confidential personal identifying and financial information, when attempting to collect debts from New Jersey Consumers." Plaintiff also alleged violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -229, invasion of privacy and negligence. Defendants removed the case to federal court, which remanded it back to state court, and then defendants each filed a motion to dismiss for failure to state a claim pursuant to Rule 4:6-2(e).

After hearing argument, Judge Kimberly Espinales-Maloney granted Phoenix's motion and dismissed the complaint by order and written opinion on March 8, 2023. The judge found the "seminal issue at hand is whether a debt collector's use of a letter vendor to send debt collection letters to alleged debtors violates the FDCPA." She noted both state and federal courts have dismissed similar complaints as not violative of the FDCPA. Because the issue was "unsettled," the judge looked to the intent of the statute, which was "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

The judge found plaintiff's allegation Phoenix used a letter vendor to create a debt collection letter was not enough to show the conduct was "abusive, deceptive, or unfair," which was "the type of conduct that Congress was interested in preventing" when it enacted the FDCPA. The judge's conclusion was further supported by the fact that plaintiff's complaint did not allege any harm.

The judge dismissed plaintiff's CFA claim because plaintiff "vaguely assert[ed] the disclosure of his information caused him to suffer a loss," which was "not enough to satisfy the ascertainable loss requirement of the CFA because it [was] not quantifiable."

The judge also dismissed plaintiff's negligence claim, finding "no reason to impose a duty of care on debt collectors who use letter vendors" and noting plaintiff failed to present any authority to support his position. Because plaintiff's claim under the FDCPA failed, the court found Phoenix did not breach any duty it had to obey the law.

Finally, the judge dismissed plaintiff's claim of invasion of privacy because Phoenix "simply conveyed [p]laintiff's information to a letter vendor for the purpose of creating a letter."

Before Cascade's motion to dismiss was heard, the court administratively dismissed the complaint for lack of prosecution on March 17, 2023. It is unclear from the record before us whether the case was reinstated or if the judge was unaware of the administrative dismissal, but on March 28, 2023, the court issued a written decision and order granting Cascade's motion and dismissing plaintiff's complaint without prejudice. The order stated the motion was granted for the reasons set forth in its opinion dated March 8, 2023, addressing Phoenix's motion to dismiss. This appeal follows.

We review de novo a motion to dismiss for failure to state a claim pursuant to Rule 4:6-2(e). Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)).

In considering a Rule 4:6-2(e) motion, "[a] reviewing court must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107). "The essential test [for determining the adequacy of a pleading] is simply 'whether a cause of action is "suggested" by the facts.'" Green v. Morgan Props., 215 N.J. 431, 451-52 (2013) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739,

746 (1989)). "At this preliminary stage of the litigation the [c]ourt is not concerned with the ability of [the] plaintiffs to prove the allegation contained in the complaint." Printing Mart-Morristown, 116 N.J. at 746.

"[I]f the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Dimitrakopoulos, 237 N.J. at 107. "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

On appeal, plaintiff largely reprises the same arguments raised before the trial court: his claims should not be dismissed. We disagree and affirm, addressing each of plaintiff's claims in turn.

We first address plaintiff's FDCPA claim. In order to prevail on this claim, a plaintiff must prove: "(1) [he] is a consumer, (2) the [party seeking payment] is a debt collector, (3) the . . . challenged practice involves an attempt to collect a 'debt' as the [FDCPA] defines it, and (4) the [collector] has violated a provision of the FDCPA in attempting to collect their debt." Midland Funding LLC v. Thiel, 446 N.J. Super. 537, 549 (App. Div. 2016) (alterations in original) (quoting Douglass v. Convergent Outsourcing, 765 F.3d 299, 303 (3d Cir.

2014)). In her decision, the trial judge correctly examined legislative intent to determine whether the alleged conduct violated the FDCPA.

In examining the plain meaning of a statute, "the Legislature's intent is paramount and, generally, the statutory language is the best indicator of that intent." Hodges v. Sasil Corp., 189 N.J. 210, 223 (2007) (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)). "Statutory words are ascribed their ordinary meaning and are read in context with related provisions, giving sense to the legislation as a whole." Ibid. The court's duty is clear: "construe and apply the statute as enacted." Ibid. (quoting In re Closing of Jamesburg High Sch., 83 N.J. 540, 548 (1980)).

Plaintiff's complaint is premised on a conclusory allegation that defendants' use of a letter vendor to create a debt collection letter was, in and of itself, abusive, deceptive or unfair. We concur with the trial judge's findings that the use of a letter vendor was not abusive, deceptive, or unfair and was not the type of conduct that Congress was interested in preventing when it enacted the FDCPA. When viewing plaintiff's complaint and providing him every reasonable inference of fact, because plaintiff was unable to "genuinely allege" any facts about Phoenix's conduct that violated the FDCPA, we determine the trial court properly dismissed his complaint.

We next address plaintiff's CFA claim. "To prevail on a CFA claim, a plaintiff must establish 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.'" Zaman v. Felton, 219 N.J. 199, 222 (2014) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009)). Allegations that are containing only "mere[] statements of a legal conclusion" cannot survive a motion to dismiss for failure to state a claim; a complaint must be supported by "specific facts that would allow a fact-finder to draw that conclusion." Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 114 (App. Div. 2009).

Here, plaintiff asserted in his complaint that "as a result of [d]efendants' unlawful actions, [p]laintiff . . . suffered ascertainable loss from [d]efendants' CFA violations, entitling [him] to treble damages under the CFA." This legal conclusion is unsupported by any facts in his complaint establishing an ascertainable loss, even after a liberal and indulgent view of the pleading, and therefore the trial court correctly dismissed it for failure to state a claim.

We turn next to plaintiff's claim of invasion of privacy. "As a tort, invasion of privacy encompasses 'four distinct kinds of invasion of four different interests of the plaintiff.'" Villanova v. Innovative Investigations, Inc., 420 N.J.

Super. 353, 360 (App. Div. 2011) (quoting Rumbauskas v. Cantor, 138 N.J. 173, 179 (1994)). The four kinds of invasion include:

> (1) . . . intrusion on plaintiff's physical solitude or seclusion, as by invading his or her home, illegally searching, eavesdropping, or prying into his personal affairs[]; (2) . . . making public private information about plaintiff[]; (3) placing plaintiff in a false light in the public eye . . . ; and (4) appropriation, for the defendant's benefit, of the plaintiff's name or likeness.
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> [Ibid. (quoting Rumbauskas, 138 N.J. at 180).]

Plaintiff's claim falls under the second instance.

"The invasion of privacy by unreasonable publication of private facts occurs when it is shown that 'the matters revealed were actually private, that dissemination of such facts would be offensive to a reasonable person, and that there is no legitimate interest of the public in being apprised of the facts publicized.'" Romaine v. Kallinger, 109 N.J. 282, 297 (1988) (quoting Bisbee v. John C. Conover Agency, 186 N.J. Super 335, 340 (App. Div. 1982) and citing Restatement (Second) of Torts § 652D).

Here, plaintiff alleged defendants invaded his privacy by "unreasonable publication of private facts" containing his financial information and, as a result, defendants damaged plaintiff "by exposing [his] private information to persons who lacked any right or entitlement to know [his] private financial information."

We agree with the trial court's determination the complaint failed to state a claim because there was nothing unreasonable or offensive about Phoenix's conveyance of plaintiff's information to a letter vendor for the legitimate purpose of creating a collections letter.

As to plaintiff's claim of negligence, he must establish by "competent proof" the following elements: "(1) a duty of care; (2) a breach of that duty; (3) proximate cause; and (4) actual damages." Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 584 (2008)).

Here, plaintiff alleged defendants owed him "a duty to maintain the confidentiality of his private and financial information" but did not support this claim with any legal authority. Accordingly, the trial court found no reason to impose a duty of care on a debt collector that uses a letter vendor because this contention lacked a legal basis. In addition, as previously addressed herein, no actual damages have been shown by plaintiff. Because we determine defendant had no duty to plaintiff nor did plaintiff show any actual damages, two necessary elements of any negligence claim, the dismissal of this clam was appropriate at the pleadings stage.

Finally, we turn to the administrative dismissal of plaintiff's complaint pursuant to Rule 1:13-7(a), which requires the court, on sixty days' notice to

plaintiff, to dismiss an action that has been pending for four months without a required proceeding having been taken. "Rule 1:13-7 is an administrative rule designed to clear the docket of cases in which plaintiff has failed to perform certain acts." Pressler & Verniero, Current N.J. Court Rules, cmt. 1.1 on R. 1:13-7 (2024). Administrative dismissals pursuant to this rule are intended to "clear the docket of cases that cannot, for various reasons, be prosecuted to completion." Mason v. Nabisco Brands, Inc., 233 N.J. Super. 263, 267 (App. Div. 1989).

We decline to address this issue for two reasons. First, plaintiff challenges the dismissal of his complaint against Cascade for the first time on appeal. Ordinarily, we will decline consideration of an issue not properly raised before the trial court, unless the jurisdiction of the court is implicated or the matter concerns an issue of great public importance. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Neither situation exists here and, therefore, we decline to consider plaintiff's contention on this point. In addition, there is no reason for us to revisit the administrative dismissal because the court decided Cascade's motion to dismiss on the merits.

To the extent we have not expressly addressed any issues raised by plaintiff, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.