2016 WL 4717997
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Debra S. Smerling, Plaintiff-Respondent/Cross-Appellant,
and
Magda Claude and Sheila Smerling, Plaintiffs,
v.
Harrah's Entertainment, Inc., Harrah's Operating Company, Inc., d/b/a Harrah's Atlantic City, and Harrah's Atlantic City, Inc., Defendants-Appellants/Cross-Respondents.

Argued December 15, 2015
|
Decided September 9, 2016

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-8733-04.

Attorneys and Law Firms

Alan E. Kraus argued the cause for appellants/cross-respondents (Latham & Watkins, LLP, attorneys; Mr. Kraus, on the briefs).

Andrew R. Wolf argued the cause for respondent/cross-appellant (The Wolf Law Firm, LLC, attorneys; Mr. Wolf, Henry P. Wolfe and Matthew S. Oorbeek, on the briefs).

Before Judges Espinosa, Rothstadt and Currier.

Opinion

PER CURIAM

***1** This is the second time this matter, concerning promotional offers made by defendant,[1] has come to us on appeal. The promotional offer at issue here was a Birthday Cash offer that plaintiff Debra Smerling[2] received from defendant Harrah's Casino, titled "$15 BIRTHDAY CASH!" The advertisement offered a coupon that stated:

> $15 BIRTHDAY CASH! Offer valid August 1 or August 10, 2003 only. Must present coupon at Total Rewards Center. Hours of operation for Total Rewards Center:
>
> Sun—Fri: 8am—12 Midnight
>
> Sat: 8am—2am
>
> Valid at Harrah's Atlantic City only.
>
> Debra Smerling Valid 08/01/03 or 08/10/03

After receiving the solicitation in the mail, plaintiff decided to celebrate her birthday in Atlantic City and visited Harrah's Casino on Saturday, August 9, 2003. When she attempted to claim her "birthday cash" sometime between midnight and 12:30 a.m. on Sunday, August 10, 2003, at the Total Rewards Center, the manager on duty told her she could not claim the money until 6 a.m. on August 10. Debra never redeemed her $15 coupon.

Plaintiff filed a three-count class action complaint against defendant, alleging violations of the Consumer Fraud Act (CFA), *N.J.S.A.* 56:8-1 to - 20, and the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA or the Act), *N.J.S.A.* 56:12-14 to -18, and asserting a breach of contract claim. The complaint also sought injunctive relief and declaratory judgment.

The motion judge dismissed the two counts that alleged statutory causes of action pursuant to Rule 4:6-2(e), having determined that the New Jersey Casino Control Commission had exclusive jurisdiction over the conduct of licensed casinos. *Smerling v. Harrah's Entm't, Inc.*, 389 *N.J. Super.* 181, 185 (App. Div. 2006). We reversed and directed that the statutory claims be reinstated. *Id.* at 193. Plaintiff did not seek to reinstate the breach of contract claim, which had been dismissed with prejudice by consent prior to our decision.

On remand, the trial court granted plaintiff's motion for class certification pursuant to Rule 4:32-1(b)(2). The court certified all persons to whom a "Birthday Cash" advertisement had been mailed at any time on or after December 2, 1998, as a damages class pursuant to Rule 4:32-1(b)(3) "only for alleged violations of the [TCCWNA]." The same group of persons was certified as an injunctive class for alleged violations of the CFA and

for alleged violations of the TCCWNA as to those who did not redeem the Birthday Cash offer. The trial court later redefined the damages class "to include only those who redeemed the [Birthday] Cash coupon according to [defendants'] records (except [plaintiff] who is included in the class)."

***2** The trial court noted that approximately 320,000 people received Birthday Cash coupons. Of those 320,000 recipients, 80,000 successfully redeemed the coupons[3] and there was no evidence that the other recipients did anything in response to the promotion. As a result, it was undisputed that plaintiff Debra Smerling was the only person who was thwarted in her attempt to redeem the Birthday Cash coupon.

By order dated May 28, 2009, the trial court granted plaintiff summary judgment on her statutory claims. The court declined to certify a CFA damages class because no other Birthday Cash coupon recipient suffered an ascertainable loss.

By order dated March 19, 2010, judgment was entered in the amount of $100 per person for each member of "the certified Birthday Cash TCCWNA damages Class," i.e., persons who received and successfully redeemed the Birthday Cash coupon. Judgment was also entered for "injunctive and declaratory relief as requested in the complaint."

By August 2010, the parties entered into a stipulation, settling plaintiff's individual CFA claim for $750. She was granted an incentive award of $2,000 for her efforts on behalf of the class. The trial court also awarded counsel fees and expenses to class counsel of $375,348.36, stating the award was made "[p]ursuant to the fee-shifting provisions of the [CFA] and the [TCCWNA]."

In June 2012, the trial court stayed its judgment pending the Supreme Court's resolution of *Shelton v. Restaurant.com, Inc.*, 214 *N.J.* 419 (2013). In December 2013, after the Court's decision was filed, the trial court denied the parties' motions for reconsideration and lifted the stay of its judgment. Plaintiff moved to modify the previous fee award to retroactively reflect counsel's rates in effect at that time and for a supplemental award of attorneys' fees and costs for work performed after the last time entry in the June 2012 order. The trial court declined to adjust the rates for work performed at a time when a lower rate was in effect and granted the application for a supplemental award. The order stated the supplemental award of $109,754.93 was made "[p]ursuant to the fee-shifting provisions of the [CFA] and the [TCCWNA]."

The final judgment was entered in June 2014. This order also included a supplemental award of $48,491.25 in fees and costs from October 9, 2013 through June 2014. Although the trial court had declined to certify the CFA damages class in May 2009 because no other Birthday Cash coupon recipient suffered an ascertainable loss and plaintiff's CFA claim was settled as of August 2010, the order stated the award made four years later was made pursuant to both the fee-shifting provisions of the CFA and the TCCWNA.

I.

In this appeal, Harrah's argues that the TCCWNA does not apply because plaintiff is not a "consumer" and the promotional offer is not a "consumer contract" under the statute (Point IV). Harrah's also argues that, to violate the TCCWNA, a consumer contract or notice must contain a provision that violates state or federal law on its face and that the Birthday Cash offer did not contain such a provision (Point II); that no class member was an aggrieved consumer under the Act (Point III); that the trial court erred in entering an injunction, certification of the injunctive class and declaratory judgment (Point V) and that the damages ordered were disproportionate, violating its due process rights (Point VI).

***3** In her cross-appeal, plaintiff argues the trial court erred in failing to adjust the counsel fee award to reflect class counsel's current rates at the time the stay was lifted and the final order entered in this action.

II.

We first address defendant's challenge to the application of the TCCWNA to this case. Defendant argues plaintiff does not meet threshold requirements because she is not a "consumer" and the Birthday Cash offer is not a "consumer contract" under that statute.

These arguments require us to interpret *N.J.S.A.* 56:12-15 to discern and give effect to the Legislature's intent.

DiProspero v. Penn, 183 *N.J.* 477, 492 (2005). We first turn to the plain language of the statute, which is "the best indicator" of legislative intent. *In re Plan for the Abolition of the Council on Affordable Hous.*, 214 *N.J.* 444, 467 (2013). "If the plain language leads to a clear and unambiguous result, then [the] interpretive process is over." *Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 192 *N.J.* 189, 195 (2007). When the language does not yield an unambiguous interpretation, we continue the process to discern legislative intent, interpreting statutory language "in accordance with common sense" and may "consider the entire legislative scheme of which a particular provision is but a part." *Morristown Assocs. v. Grant Oil Co.*, 220 *N.J.* 360, 380 (2015). Moreover, we may look to dictionary definitions to determine the common meaning of words. *In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008*, 201 *N.J.* 254, 264 (2010); *Macysyn v. Hensler*, 329 *N.J. Super.* 476, 485 (App. Div. 2000).

N.J.S.A. 56:12-15 states in pertinent part:

> No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or enter into any written consumer contract or give or display any written consumer warranty, notice or sign after the effective date of this act which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed.
>
> [(Emphasis added).]

"[T]he Act, by its terms, only prohibits certain affirmative actions, that is, the offering or signing of a consumer contract, or giving or displaying of consumer warranties, notices, or signs, which violate a substantive provision of law." *Jefferson Loan Co., Inc. v. Session*, 397 *N.J. Super.* 520, 540-41 (App. Div. 2008). The plain language of the statute establishes certain requirements for its application. The entity that is the target of the prohibition must be a "seller, lessor, creditor, lender or bailee [acting] in the course of his business." *N.J.S.A.* 56:12-15. The party to be protected must be a "consumer or prospective consumer." *Ibid.* The targeted conduct has two elements. First, there is the action of the seller, who must "offer" or "enter into any written consumer contract" or "give or display any written consumer warranty, notice or sign." *Ibid.* The second element regards the content of the writing. It must "include[a] provision that violates any clearly established legal right of a consumer or responsibility of a seller." *Ibid. See Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co.*, 207 *N.J.* 428, 457 (2011) (stating the purpose of the Truth Act "is to prevent deceptive practices in consumer contracts by prohibiting the use of illegal terms or warranties in consumer contracts").

A.

***4** The Act is not applicable to this dispute unless plaintiff is a "consumer" under the Act. *See Shelton*, *supra*, 214 *N.J.* at 429. "Consumer" is defined as "any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes." *N.J.S.A.* 56:12-15. In *Shelton*, *supra*, the Court found no further elaboration necessary, stating, "under the TCCWNA, a consumer must be an individual." That individual must "buy[ ], lease[ ], borrow[ ] or bail [ ] any money, property or service." 214 *N.J.* at 429; *see also e.g.*, *Barrows v. Chase Manhattan Mortg. Corp.*, 465 *F. Supp.* 2d 347, 363 (D.N.J. 2006) (finding plaintiff was not a consumer under the Act where she did not buy, lease, borrow or bail any service from the attorney defendants).

Defendants argue that plaintiff cannot be a "consumer" under the TCCWNA because she did not buy, lease, borrow or bail anything. Plaintiff relies upon the findings of the trial court to refute this conclusion.

Observing that the Act is a remedial statute to be construed liberally, the trial court identified the following facts as supporting the conclusion that plaintiff is a consumer:

> Defendant offered $15 cash, if the recipient of the birthday cash promotion traveled to Harrah's at a certain time to collect it. By traveling to Harrah's at that time, to collect the $15, the offer was accepted. Consideration was exchanged by both sides, Harrah's paying $15, and the recipients traveling to Harrah's. And likely spending money at Harrah's.
>
> Effectively, in this Court's view, and under a liberal construction of the definition of consumer, the

> recipient bought the coupon by traveling to Harrah's to redeem it.
>
> [(Emphasis added).]

In the trial court's view, the expenditure of the effort necessary to redeem the Birthday Cash offer is sufficient to qualify her as a consumer under the Truth Act. This expansive interpretation of "buy" would render the Act's conditions for application, i.e., that the individual must "buy[ ], lease [ ], borrow[ ] or bail[ ] any money, property or service," virtually meaningless. Plaintiff has not cited any case that supports the trial court's interpretation that travel to a location to redeem an offer equates with "buy" under the Act and merely urges a liberal construction of "consumer" because the TCCWNA is remedial. However, the remedial nature of the Act is not threatened by applying the plain language of the statute to the threshold determination of whether a party is a consumer under the Act.

Further support for the principle that "buy" requires more is found in the use of the term "consumer contract" in the statute. Although the Act does not define "consumer contract," the Supreme Court found that the definition included in the Plain Language Act, *N.J.S.A.* 56:12-1 to -13, applies:

> "Consumer contract" means a written agreement in which an individual:
>
> ....
>
> e. [p]urchases real or personal property;
>
> ....
>
> for cash or on credit and the ... property ... [is] obtained for personal, family or household purposes. "Consumer contract" includes writings required to complete the consumer transaction.
>
> [*Shelton*, *supra*, 214 *N.J.* at 438 (quoting *N.J.S.A.* 56:12-1).]

As used in this definition, a purchase is "for cash or on credit." The Birthday Cash offer did not require the payment of any cash and plaintiff did not "buy" the offer with cash or on credit. Because plaintiff is not a "consumer" and the offer is not a "consumer contract" under the TCCWNA, that Act did not apply to the claims based upon the Birthday Cash offer. Therefore, we reverse the orders granting declaratory judgment and summary judgment to plaintiff on her TCCWNA claim as well as the award of $100 civil penalty per class member for violation of the TCCWNA. As a result of our conclusion, we need not address the arguments raised by defendant in Points II, III and VI.

III.

***5** Harrah's also argues that the trial court erred in certifying the injunctive class and granting the injunctive and declaratory relief because it did not violate either the CFA or the TCCWNA. Plaintiff counters that this issue is moot because the relief sought was a declaratory and notice class and that relief was realized because notice was provided pursuant to court order. Harrah's maintains that the issue is not moot because a reversal would preclude an argument by plaintiff's counsel for fees based on the entry of the injunction.

Rule 4:52-4 states, "[e]very order granting an injunction ... shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained."

The trial court entered an order, dated March 19, 2010, that, in part, entered judgment for "injunctive and declaratory relief as requested in the complaint." The relevant demands in the complaint were for "injunctive relief prohibiting Defendants from future violations of the" TCCWNA and CFA and for a declaratory judgment that Harrah's violated the TCCWNA and CFA. No further order was entered defining the terms of an injunction. We therefore conclude the judgment entered here did not provide the specificity required by Rule 4:52-4.

There are also substantive requirements for the entry of an injunction.

> A permanent injunction requires proof that the applicant's legal right to such relief has been established and that the injunction is necessary to prevent a continuing, irreparable injury. Such an injunction must be no more extensive than is

> reasonably required to protect the interest of the party in whose favor it is granted.
>
> [*Verna v. Links at Valleybrook Neighborhood Ass'n*, 371 *N.J. Super.* 77, 89 (App. Div. 2004) (citations omitted).]

The apparent predicate for the grant of injunctive relief here was the trial court's finding that the Birthday Cash offer violated both the TCCWNA and the CFA. Our conclusion that there was no violation of the TCCWNA eliminates that finding as a basis for injunctive relief. The finding as to the CFA is equally unavailing. Assuming such a violation existed, the only person identified as suffering an ascertainable loss was plaintiff, and her claim was settled. All the other members of the class were, by definition, persons who had redeemed the Birthday Cash offer and suffered no loss. Therefore, there is inadequate proof that the vaguely described injunctive relief granted here was "necessary to prevent a continuing, irreparable injury" and "no more extensive than [ ] reasonably required to protect the interest of the party in whose favor it is granted." *Ibid.* Accordingly, we reverse the order granting injunctive and declaratory relief and the issue regarding the certification of the injunctive class is now moot.

IV.

Finally, we address plaintiff's cross-appeal. The trial court entered judgment in plaintiff's favor in June 2012, and awarded counsel fees and expenses to class counsel of $375,348.36. The court then stayed the judgment pending the Supreme Court's decision in *Shelton*. In December 2013, after that decision was rendered, the trial court awarded class counsel additional fees and expenses of $109,754.93 for work performed through October 2013. The trial court denied plaintiff's motion to re-calculate the June 2012 counsel fee award to apply the rate in effect in 2013. Plaintiff argues that the court erred in denying this request.

An abuse of discretion standard applies to the review of counsel fee awards. *R.M. v. Supreme Court of N.J.*, 190 *N.J.* 1, 10-11 (2006). In denying the application for recalculation, the trial court observed that the work that was the subject of the fee application had commenced in 2004 and that plaintiff had already received the benefit of a fee increase because the counsel fee award was based on counsel's rate for 2011. We discern no abuse of discretion in the court's denial of plaintiff's request and, therefore, affirm the trial court's denial of plaintiff's motion for re-calculation of the June 2012 fee award.

***6** However, a remand on the counsel fee award is required in light of our decision, reversing the orders granting: declaratory judgment and summary judgment to plaintiff on her TCCWNA claim, the award of $100 civil penalty per class member and injunctive and declaratory relief. Because there was no viable TCCWNA claim here, there is no basis for an award of counsel fees related to that claim. As we have noted, the counsel fee awards granted in June 2012, December 2013 and June 2014 were all made "[p]ursuant to the fee-shifting provisions of the [CFA] and the [TCCWNA]," without any analysis, despite the fact that the CFA claims were substantially, if not totally, resolved well before their entry. A remand is necessary for the trial judge to determine what portion of the fees and costs relate to the CFA claims and to eliminate any award relating to the TCCWNA claims.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in A.3d, 2016 WL 4717997

Footnotes

1 We refer to defendants Harrah's Entertainment, Inc., Harrah's Operating Company, Inc., and Harrah's Atlantic City, Inc., collectively as Harrah's or defendant.

2 Originally, there were three plaintiffs in the complaint. The claims of Sheila Smerling, based upon a different promotion, were dismissed on summary judgment and she has not appealed from that order. The third plaintiff, Magda Claude, is no longer a plaintiff and is also not a party to this appeal. To avoid confusion, we use the singular plaintiff in the opinion.

3 Some people received multiple coupons over the years and redeemed multiple coupons.

End of Document