

PREPARED BY THE COURT

NICOLE BARBARINO f/k/a NICOLE D'ANGELO, on behalf of herself and all others similarly situated,

Plaintiff(s),

v.

PARAMUS FORD, INC., d/b/a ALL AMERICAN FORD,

Defendants.

GREGORY R. DUKE, on behalf of himself and all others similarly situated,

Plaintiff(s),

v.

ALL AMERICAN FORD, INC. d/b/a ALL AMERICAN FORD,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: **BER-L-2856-15**

Civil Action

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: **BER-L-3010-15**

Civil Action

OPINION

THIS MATTER comes before the Court pursuant to a motion brought by Gavin J. Rooney, Esq. and Joseph A. Fischetti Esq., from the law offices of Lowenstein Sandler LLP, attorneys for Defendant, Paramus Ford, Inc. d/b/a All American Ford and All American Ford, Inc. d/b/a All American Ford, seeking a ruling to dismiss Plaintiffs' Complaints Pursuant to R. 4:6-2. Michael R. McDonald, Esq., Jennifer Marino Thibodaux, Esq., and Kaitlyn Stone, Esq. from the law offices of Gibbons P.C. filed a proposed *Amicus Curiae* in Support of Defendant's Motion to Dismiss on behalf of The New Jersey Coalition of Automotive Retailers. Opposition was filed by Kelly M. Purcaro, Esq. and Alex A. Pisarevsky, Esq., from the law offices of Cohn Lifland Pearlman Herrmann & Knopf

LLP, attorney for Plaintiff, Nicole Barbarino f/k/a/ Nicole D'Angelo, on behalf of herself and all others similarly situated and Gregory R. Duke, on behalf of himself and all others similarly situated.

FACTUAL BACKGROUND

This matter was commenced by the above-captioned Plaintiffs on behalf of a putative class who executed and entered into automobile lease agreements, which contained language that allegedly violated the Truth-in-Consumer Contract, Warranty and Notice Act (“TCCWNA”), N.J.S.A. § 56:12-14 et seq.

Defendant All American Ford, Inc. d/b/a All American Ford (hereinafter “All American”)¹, is a Ford dealership located in Hackensack, New Jersey. Defendant Paramus Ford, Inc., d/b/a All American Ford, is a Ford dealership located in Paramus, New Jersey. On August 15, 2014, Plaintiff Nicole Barbarino entered into a lease agreement for a 2014 Ford Edge with Defendant Paramus Ford, Inc. for a period of 36 months. On September 23, 2014, Plaintiff Gregory Duke entered into a lease agreement for a 2015 Ford Explorer with Defendant All American Ford for a period of 36 months. Plaintiffs each signed a Motor Vehicle Retail Order (hereinafter the “Order”) that contained the following provision with respect to various sales taxes related to the transaction:

PAYMENT OF SALES AND USE TAXES. The price for the motor vehicle specified on the face of this Order includes reimbursement for certain Federal Excise taxes, but does not include sales taxes and use taxes (Federal, State, or Local) or other taxes, unless expressly stated. Customer assumes and agrees to pay, *unless prohibited by law*, any such sales, use or occupational taxes imposed on or applicable to the transaction covered by this Order, regardless of which party may have primary tax liability.

¹ Defendant Paramus Ford and Defendant All American are collectively referred to as “All American”. The above-captioned matters are substantively identical actions. Plaintiffs’ complaints are substantially the same and place at issue the same form agreement. The parties are represented by the same counsel, and both matters present the same legal issues for purposes of the pending motions to dismiss.

(Barbarino Compl. ¶ 13 & Ex. A; Duke Comp. ¶ 13 & Ex. A (emphasis added)). Plaintiffs paid the expressly enumerated sales taxes as required by the Orders. Plaintiffs commenced these actions on March 25, 2015. Plaintiffs' complaints each allege a single count against Defendants on the basis that Defendants violated TCCWNA. Defendants, by way of motion, seek a ruling to dismiss Plaintiffs' complaints pursuant to R. 4:6-2.

MOTION TO DISMISS STANDARD

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULE OF LAW AND DECISION

In 1981, the New Jersey Legislature enacted TCCWNA. The impetus of the New Jersey Legislature to enact TCCWNA was predicated on a growing concern that “[f]ar too many consumer contracts, warranties, notices and signs contain provisions which clearly violate the rights of consumers. Even though these provisions are legally invalid and unenforceable, their very inclusion in a contract, warranty, notice or sign deceives a customer into thinking that they are enforceable, and for this reason the customer often fails to enforce his rights”. See Assem. 1660 (Sponsors’ Statement), 199th Leg. (N.J. May 1, 1980) (appended to Rooney Cert., Ex. F).

To address this growing concern, TCCWNA prohibits a “seller, lessor, creditor, lender or bailee...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...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”. See N.J.S.A. § 56:12-15. The Third Circuit explained that TCCWNA does not “establish consumer rights or seller responsibilities. Rather, the statute bolsters rights and responsibilities established by other laws”. See Watkins v. DineEquity, Inc., 591 F. App’x 132, 134 (3d Cir. 2014).

The rights of consumers may vary from state to state. To ensure that consumers are aware of their rights, TCCWNA provides that,

No consumer contract, warranty, notice or sign, as provided for in this act, shall contain any provision by which the consumer waives his rights under this act. Any such provision shall be null and void. No consumer contract, notice or sign shall state that any of its provisions is or may be void, unenforceable or inapplicable *in some jurisdictions* without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey; provided, however, that this shall not apply to warranties.

N.J.S.A. § 56:12-16 (emphasis added). Stated more succinctly, TCCWNA obligates vendors to explain differences in a consumer’s rights or responsibilities that may exist among jurisdictions.

Section 17 of TCCWNA, under which Plaintiffs seek relief, provides, in relevant part, that “[a]ny person who violates the provisions of this act shall be liable to the aggrieved consumer for a civil penalty of not less than \$100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney’s fees and court costs”. N.J.S.A. § 56:12-17.

This matter concerns the sales and use taxes imposed on vehicle lease transactions. Taxes imposed for vehicle leasing transactions are governed by the State of New Jersey pursuant to the Sales and Use Tax Act, N.J.S.A. § 54:32B-1, et seq. A sales tax is imposed on “the receipts from every retail sale of tangible personal property”. See N.J.S.A. § 54:32B-3(a). A “sale” is defined as “[a]ny transfer of title or possession...for a consideration...” See N.J.S.A. § 54:32B-2(f). A retail sale includes the purchase of tangible personal property for lease. See N.J.S.A. § 54:32B-2(e)(3). The legislature places primary responsibility on the lessee of the automobile to pay the entire sales tax at the outset of the lease. See N.J.S.A. § 56:32B-2(aa), 56:32B-7(d); L. 2005, c. 126, 1(2)(aa), 7(d) (appended to Rooney Cert. Ex. C); see also New Jersey Dep’t of Treas., Div. of Taxation, “Notice: Leases and Rentals of Tangible Personal Property” (Sept. 20, 2005) (appended to Rooney Cert., Ex. E).

a. Plaintiff Failed to State a Claim on Which Relief Can be Granted.

The language in Plaintiffs’ Orders does not violate TCCWNA and therefore, Plaintiffs’ complaints fail to state a claim on which relief can be granted. At the time Plaintiffs executed the Orders, Plaintiffs were obligated to pay the sales tax on the leased motor vehicles. Plaintiffs do not allege that they suffered any injury as a result of this provision. Specifically, Plaintiffs do not assert that it is illegal for Defendants to obligate customers, including Plaintiffs, to pay sales, use, or occupational taxes. Furthermore, Plaintiffs do not assert that they paid taxes that they should not

have paid pursuant to New Jersey law governing automobile sales and leases. New Jersey's Sales and Use Tax Act imposes an obligation on customers to pay sales tax applicable to their vehicle lease transactions, and Plaintiffs have not uncovered the existence of any statute in any jurisdiction which alters this basic obligation. Plaintiffs' complaints do not allege that the Orders wrongfully required them to pay any sales, use or occupational tax. Rather, Plaintiffs contend that the Order signed by Plaintiffs violates TCCWNA because the Order included the provision in which Plaintiffs assumed and agreed "to pay, *unless prohibited by law*, any such sales, use or occupational taxes imposed on or applicable to" the lease transactions. Plaintiffs assert that the language of the Order somehow constitutes a technical violation of TCCWNA and therefore, Plaintiffs and the putative classes are each entitled to \$100 windfall payment. See N.J.S.A. § 56:12-17.

The phrase "unless prohibited by law" does not offend TCCWNA because it does not state that the provision's enforceability varies by state. Plaintiffs allege that the phrase "unless prohibited by law" following the enumerated sales tax provision suggests that the preceding provision is or may be void, enforceable, or inapplicable somewhere and does not explicitly state whether the provision is enforceable in New Jersey. To reiterate, Section 16 of TCCWNA prohibits a consumer contract, notice, or sign from stating that any of its "provisions is or may be void, enforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey". See N.J.S.A. § 56:12-16. TCCWNA applies only where an agreement states that a provision is void in "some jurisdictions" without specifying its enforceability or lack thereof in New Jersey. See Id. In Shelton v. Restaurant.com, 214 N.J. 419 (2013), the Supreme Court of New Jersey analyzed TCCWNA and held that "a contract or notice cannot simply state in a general, nonparticularized fashion that some of the provisions of the contract or notice may be void, inapplicable, or unenforceable *in some states*. See Shelton v. Restaurant.com, Inc., 214 N.J. 419, 427-428 (N.J. 2013) (emphasis added). The Supreme

Court acknowledged that TCCWNA applies when a provision's enforceability varies by state and its enforceability in New Jersey is vague. Id. That is obviously not the instant situation.

Subsequent case law in the state of New Jersey has followed the Supreme Court's approach. The phrase "unless prohibited by law" does not explicitly or impliedly state that the provisions may be invalid under New Jersey law. In Bohus v. Restaurant.com, Inc., 784 F.3d 918 (3d Cir. 2015), the Third Circuit considered if certain gift certificates issued by Defendant complied with TCCWNA when the gift certificates contained the following language: "1) the certificate '[e]xpires one (1) year from date of issue, *except in California and where otherwise provided by law[,]*' and 2) the certificate is '[v]oid to the extent prohibited by law'". See Bohus v. Restaurant.com, Inc., 784 F.3d 918, 921 (3d Cir. 2015) (emphasis added). The declarative language in the gift certificates is substantially dissimilar to the phrase at issue in this case, which does not expressly impose different rights or responsibilities on the consumer based upon jurisdiction.

Similarly, in Martinez-Santiago v. Public Storage, 38 F. Supp. 3d 500 (D.N.J. 2014), the District Court for New Jersey analyzed a lease/rental agreement of property and held that the contractual provision stating that "[i]f any provision of this Lease/Rental Agreement shall be invalid or prohibited *under the laws of the state in which the Premises are located*, such provision shall be ineffective only to the extent of such prohibition or invalidity". See Martinez-Santiago v. Public Storage, 38 F. Supp. 3d 500, 511 (D.N.J. 2014) (emphasis added). While the contractual provision did not explicitly state in a simple, declarative sentence that some provisions may be invalid under state law, the District Court concluded that the wording of the savings clause implied that assertion with its facially apparent emphasis on "the laws of the state in which the Premises are located". Id. Unlike the provisions Martinez-Santiago, the challenged provision "unless prohibited by law" does not impliedly assert that some provisions may be invalid in a specific jurisdiction, or void where

prohibited by law in a specific state. The language in this case is much more flexible than the language at issue in Martinez-Santiago.

Plaintiffs' complaints do not allege facts sufficient to satisfy the statutory basis for a claim; specifically, that the Orders contain provisions that are or "may be void, unenforceable or inapplicable in some jurisdictions". See N.J.S.A. § 56:12-16. The challenged provision simply states that the lessee "assumes and agrees to pay, unless prohibited by law, any such sales, use or occupational taxes imposed on or applicable to the transaction". (Barbarino Compl. ¶ 13 & Ex. A; Duke Comp. ¶ 13 & Ex. A). This language does not violate TCCWNA and therefore, Plaintiffs' complaints failed to articulate a legal basis entitling plaintiff to relief. See Sickles, 379 N.J. Super. at 106.

Moreover, the phrase "unless prohibited by law" complies with the current sales and use tax structure in New Jersey. Firstly, the contractual provision in the Orders that obligates the Plaintiffs' to pay the taxes associated with leasing the vehicles fully complies with New Jersey law. As the law remains today, New Jersey law makes the lessee primarily responsible for paying the sales taxes related to vehicle leasing transaction. Plaintiffs cannot point to any statutory authority that states otherwise. The inclusion of flexible language "unless prohibited by law" neither alters this responsibility nor creates confusion as to which party, the lessee or lessor, bears the responsibility. Secondly, even if, *arguendo*, the New Jersey Legislature amended the current sales and use tax structure and shifted responsibility for paying the sales taxes onto another party, such as the lessor rather than the lessee, the "unless prohibited by law" language is flexible enough to comply with such a change. As the law remains today and for purposes of this litigation, the contractual provisions in the Orders unambiguously obligated Plaintiffs to pay all taxes associated with leasing the vehicles and the inclusion of flexible language such as "unless prohibited by law" does not deceive or create confusion as to the rights and responsibilities of the Plaintiffs.

All American did not fail to disclose that a provision was unenforceable in New Jersey. Unlike other TCCWNA case law, there is no additional disclosure that the Orders could make to more fully inform the Plaintiffs of their rights and responsibilities as lessees of a vehicle in the State of New Jersey. Compare Shelton, 214 N.J. at 427-428, Martinez-Santiago, 38 F. Supp. 3d at 511, with Bohus, 784 F.3d at 921. The Legislature enacted TCCWNA as a remedial measure with the overarching purpose of ensuring that consumers know the full terms and conditions of consumer contracts entered into by consumers with a vendor. See Shelton, 214 N.J. at 430, 442. In other words, TCCWNA's primary goal is to prevent confusion among consumers as to their legal rights. The Court does not find that the language of the Orders creates confusion. Plaintiffs' interpretation, if accepted, would permit Plaintiffs and the putative class to reap a windfall in the form of civil penalties despite suffering no harm or deprivation of rights, and subject vehicle retailers to potentially endless liability for executing contracts that seemingly comply with the language of TCCWNA as drafted. If the New Jersey Legislature intends for TCCWNA to target flexible language such as the language used in the Orders, the Legislature should clarify the language and scope of the statute. At this juncture, the Court finds that the challenged provision accurately and unambiguously informs consumers of their obligations to pay sales tax under New Jersey law and the flexible language of "unless prohibited by law" does not violate TCCWNA. In accordance with the foregoing reasons, Defendant's motion to dismiss Plaintiffs' complaints is **GRANTED**.

HON. ROBERT C. WILSON