NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0674-22

WILLIAM PACE and ROBERT WALTERS, on behalf of themselves and others, similarly situated,

Plaintiffs-Respondents,

v.

HAMILTON COVE, HAMILTON COVE APARTMENTS, HAMILTON COVE UR HOLDCO, LLC, GREYSTAR, GREYSTAR MANAGEMENT SERVICES, L.P., GREYSTAR REAL ESTATE PARTNERS, LLC, GREYSTAR RS HM, LLC, GREYSTAR RS NE, LLC, HARTZ MOUNTAIN INDUSTRIES OF NEW JERSEY, INC., and HARTZ MOUNTAIN INDUSTRIES-NJ LLC,

Defendants-Appellants.

APPROVED FOR PUBLICATION
May 18, 2023
APPELLATE DIVISION

Argued April 18, 2023 – Decided May 18, 2023

Before Judges Sumners, Geiger and Fisher.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1076-22.

Christopher A. Rojao argued the cause for appellants (McCarter & English, LLP, attorneys; Ryan A. Richman and Christopher A. Rojao, of counsel and on the briefs; Ryan M. Savercool, on the briefs).

Miriam S. Edelstein argued the cause for respondents (Costello & Mains, LLC, attorneys; Kevin M. Costello, Deborah L. Mains, Miriam S. Edelstein, and Lauren Bess, on the briefs).

The opinion of the court was delivered by

GEIGER, J.A.D.

In this putative class action, plaintiffs assert claims of common law fraud and violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, against their landlord. Defendants argue that plaintiffs' lease agreements waived their right to file a class action. We hold that a waiver of the right to maintain a class action is unenforceable absent a mandatory arbitration agreement.

We take the following alleged facts from plaintiffs' complaint. See Seidenberg v. Summit Bank, 348 N.J. Super. 243, 249-50 (App. Div. 2002) (holding that Rule 4:6-2(e) "requires an assumption that the allegations in the pleading are true and affords the pleader all reasonable factual inferences").

Representative plaintiffs William Pace and Robert Walters are residential tenants of defendant Hamilton Cove Apartments, a luxury apartment complex in Weehawken comprised of three buildings containing

hundreds of apartments. Weehawken has a higher-than-average property crime rate. In its advertisements, brochures, and oral statements to prospective tenants, Hamilton Cove Apartments promised the apartment complex would have "elevated, 24/7 security." During an April 2020 tour of the apartment complex, defendant's representative advised Pace that security personnel would be stationed 24/7 at a podium near each building's entrance. The promises were knowingly false when made. Plaintiffs relied on these representations, which were an important factor in deciding to lease the apartments at the rent level charged.

Upon moving into the apartments, plaintiffs learned that the apartment complex's security cameras did not function. In addition, a front desk greeter/mailroom attendant in building A was only stationed at the front of the building from approximately 11:00 a.m. to 5:00 p.m. on weekdays, with shorter hours on weekends, as opposed to being present 24/7. During those hours, the front desk greeters were not always present due to job duties that required them to leave their post. In the fall of 2021, the front desk greeters' hours were extended to 7:00 p.m., with more consistent staffing on weekends. In February 2022, the front desk greeters' hours were extended to 9:00 p.m.

Plaintiffs allege defendants engaged in an unconscionable business practice in violation of the CFA, and that tenants overpaid for the apartments

because they did not receive the full value promised, constituting an ascertainable loss. The putative class consists of all the tenants of Hamilton Cove Apartments.

In support of their request for class action status, plaintiffs contend: (1) there are many questions of law and fact common to the class of Hamilton Cove Apartments' tenants; (2) the class suffered similar fraudulent inducement and damages; (3) the named plaintiffs' claims are typical of the claims of the putative class; (4) the representative plaintiffs will fairly and adequately protect the interests of the class; (5) the defenses to the class's claims are identical; (6) the prosecution of separate actions by individual members of the class would risk inconsistent or varying results that might establish incompatible standards of conduct for defendants; (7) questions of law and fact common to the class predominate over any questions which affect only individual members; (8) a class action is a superior vehicle to other available methods for the fair and efficient adjudication of this controversy; (9) there is no other identical litigation pending against defendants; (10) it is desirable to concentrate the claims of the class members in one forum at one time; and (11) it will not be difficult to manage the class action.

While the subject lease itself is nine pages, numerous addendums are attached to the lease, including the following class action waiver at issue:

> **3. CLASS ACTION WAIVER**. You agree that you hereby waive your ability to participate either as a class representative or member of any class action claim(s) against us or our agents. While you are not waiving any right(s) to pursue claims against us related to your tenancy, you hereby agree to file any claim(s) against us in your individual capacity, and you may not be a class action plaintiff, class representative, or member in any purported class action lawsuit ("Class Action"). Accordingly, **you expressly waive any right and/or ability to bring, represent, join, or otherwise maintain a Class Action or similar proceeding against us or our agents in any forum.**
>
> **Any claim that all or any part of this Class Action waiver provision is unenforceable, unconscionable, void, or voidable shall be determined solely by a court of competent jurisdiction.**
>
> **YOU UNDERSTAND THAT, WITHOUT THIS WAIVER, YOU MAY HAVE POSSESSED THE ABILITY TO BE A PARTY TO A CLASS ACTION LAWSUIT. BY SIGNING THIS AGREEMENT, YOU UNDERSTAND AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIVIDUALLY. THIS CLASS ACTION WAIVER SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THIS LEASE CONTRACT.**

The leases include a three-day attorney review period, which permits tenants to opt out of the leases in writing on notice to the landlord within that timeframe. Otherwise, the leases are "legally binding as written." The leases also contain an introductory notice advising the prospective tenants of the attorney review clause.

Prior to discovery, defendants moved pursuant to Rule 4:6-2(e) to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted, or, in the alternative, to strike plaintiffs' class action allegations. Defendants advanced two arguments. First, defendants contended that the leases were not contracts of adhesion, the class action waivers were valid and enforceable, and a class action was not necessary to vindicate plaintiffs' interests. Second, defendants contended plaintiffs relied solely on a price-inflation theory to prove predominance, and that theory is not recognized under New Jersey law to prove predominance.

In opposition, plaintiffs argued the leases were contracts of adhesion, the class action waivers were unconscionable, and the case law supporting the enforceability of class action waivers is inapplicable to this case. As to the price-inflation theory, plaintiffs noted that predominance is but one of three alternative elements to maintain a class action and that they otherwise meet the standard to prove predominance. They also asserted that defendants mischaracterized their price-inflation argument.

The trial court issued an order and memorandum of decision denying the motion in its entirety. The court found plaintiffs pleaded their fraud claims with the requisite specificity required by Rule 4:5-8. As to whether the leases were contracts of adhesion, without deciding that issue, the court found

plaintiffs sufficiently supported their claims to survive the dismissal motion. Regarding the requirements imposed by Rule 4:32-1(a) for maintaining a class action, the court agreed with plaintiffs that meeting one of the three alternatives satisfied the rule, and that plaintiffs had done so.

We granted defendants' motion for leave to appeal that interlocutory ruling. Defendants raise the following points for our consideration:

> I. PLAINTIFFS CLEARLY AND UNAMBIGUOUSLY WAIVED THEIR RIGHT TO MAINTAIN A CLASS ACTION PURSUANT TO THE VALID AND BINDING CLASS ACTION WAIVERS.
>
> > A. The Class Action Waiver Addenda Comply with this State's Contractual Waiver-of-Rights Principles Because They Contain a Clear and Unambiguous Waiver of the Right to Maintain a Class Action.
> >
> > B. Plaintiffs' Attempts to Void Their Express Manifestation of Assent to the Class Action Waiver Addenda Fail.
>
> II. PLAINTIFFS' LEASE CONTRACTS ARE NOT UNCONSCIONABLE CONTRACTS OF ADHESION.
>
> > A. The Lease Contracts are not Contracts of Adhesion.
> >
> > B. The Lease Contracts and Class Action Waivers Are Not Unconscionable.

C. Discovery is Not Necessary to Determine Whether the Class Action Waiver Addenda are Unconscionable.

III. THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION AND HOLD THAT PLAINTIFFS' SIGNED CLASS ACTION WAIVERS ARE ENFORCEABLE.

Our review of the trial court's decision denying dismissal of the complaint and the striking of plaintiffs' class action allegations is de novo. See Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (review of "whether plaintiffs . . . sufficiently pled a class action against defendants . . . such that their complaint should have survived a motion to dismiss" is de novo); Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019) ("We apply a de novo standard of review when determining the enforceability of contracts, including arbitration agreements."); Cerciello v. Salerno Duane, Inc., 473 N.J. Super. 249, 257 (App. Div. 2022) (noting the enforceability of a class action waiver provision is a question of law subject to de novo review). Under this standard, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Because this appeal is from the denial of a Rule 4:6-2(e) motion to dismiss and involves plaintiffs' demand for class certification, we accept as

true the allegations asserted in plaintiffs' complaint and view the pleadings in a light favorable to plaintiffs. Lee v. Carter-Reed Co., LLC, 203 N.J. 496, 505 (2010). "[T]he trial court nevertheless must engage in a 'rigorous analysis' to assess whether the requirements of class certification have been met under Rule 4:32-1(b)(3) . . . ." Id. at 505-06 (citing Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 106-07 (2007)). The trial court must consider the "'claims, defenses, relevant facts, and applicable substantive law' in determining whether a class action: (1) presents common issues of fact and law that predominate over individual ones, (2) is a superior means of achieving efficient and just results, and (3) is manageable." Id. at 506 (quoting Iliadis, 191 N.J. at 107).

Defendants argue that class action waivers are enforceable so long as they are clear and unambiguous. We conclude that defendants' reliance on the cases they cited, which are materially distinguishable, is misplaced because in each of those case the class action waiver was coupled with an arbitration agreement.

At this early posture of the case before discovery, defendants do not dispute that plaintiffs can pursue their common law fraud and CFA claims through litigation in the Superior Court. We deem the absence of an agreement requiring these claims to be arbitrated to be controlling.

In this State, "class actions are a favored means of adjudicating numerous claims involving a common nucleus of facts for which individual recovery will be small." Cerciello, 473 N.J. Super. at 257. "Therefore, we 'liberally construe' the class action requirements established under Rule 4:32-1." Ibid.; see also Delgozzo v. Kenny, 266 N.J. Super. 169, 179 (App. Div. 1993); Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:32-1 (2023) ("[Rule 4:32-1] is required to be liberally construed and the class action permitted to be maintained unless there is a clear showing that it is inappropriate or improper."). In Lee, the Court explained the reasons for favoring class actions:

> At times, a large number of individuals may have valid claims related to consumer fraud or some other wrong, but those claims in isolation are "too small . . . to warrant recourse to litigation." In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 435 (1983). The perpetrator of that fraud or wrong also may be a corporate entity that wields enormous economic power. A class action permits "claimants to band together" and, in doing so, gives them a measure of equality against a corporate adversary, thus providing "a procedure to remedy a wrong that might otherwise go unredressed." Id. at 424. In short, the class action is a device that allows "an otherwise vulnerable class" of diverse individuals with small claims access to the courthouse. Iliadis, 191 N.J. at 120; see also Muhammad v. Cnty. Bank of Rehoboth Beach, 189 N.J. 1, 17 (2006) ("The class-action vehicle remedies the incentive problem facing litigants who seek only a small recovery."). In addition, a class action furthers other policy goals, including "judicial economy,"

> "consistent treatment of class members," and "protection of defendants from inconsistent [results]." Iliadis, 191 N.J. at 104.
>
> [203 N.J. at 517-18.]

We recognize that the right to pursue a class action may be waived in an arbitration agreement. See Gras v. Assocs. First Cap. Corp., 346 N.J. Super. 42, 49-52 (App. Div. 2001). We also recognize that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, preempts states from invalidating class action waiver clauses contained within arbitration agreements on public policy or unconscionability grounds. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341-42 (2011). Section 2 provides that arbitration agreements covered by the FAA "shall be valid, irrevocable, and enforceable save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, Section 2's "saving clause preserves generally applicable contract defenses . . . ." Concepcion, 563 U.S. at 343.

The majority in Concepcion specifically found that several aspects of class-based dispute resolution, such as increased formality, slower and more costly processes, and increased risks to defendants in the event of an unfavorable outcome, were incompatible with the basic characteristics of arbitration. Id. at 348-51. The Court explained that "[r]equiring the

availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id. at 344.

"By its very nature, an agreement to arbitrate involves a waiver of a party's right to have [his or] her claims and defenses litigated in court." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 425 (App. Div. 2011). Here, in contrast, there was no agreement to arbitrate contractual disputes. Plaintiffs and the other tenants were free to litigate their contractual and fraud claims in court. Therefore, the policies favoring arbitration and encouraging enforcement of arbitration agreements, as expressed in section 2 of the FAA, see Southland Corp. v. Keating, 465 U.S. 1, 10 (1984), or the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -36, see Roach v. BM Motoring, LLC, 228 N.J. 163, 173-74 (2017), do not apply and what the Supreme Court of the United States has said about class action waivers – because it was all intended to enhance the FAA's arbitration policies – is irrelevant outside that context.

Instead, New Jersey's public policy favoring class actions, as described in cases like Lee, applies. Assuming the facts alleged by plaintiffs are true, a class action is clearly favored in this matter. Hundreds of tenants at Hamilton Cove are similarly affected by the lack of promised security. Economic

efficiency and judicial economy would be enhanced by the utilization of class action litigation, and inconsistent results would be avoided.

To avoid the consequences of our public policy favoring class actions, defendants strenuously argue that because the lease agreements were subject to a clear and unambiguous three-day attorney review period, which were conspicuously brought to the prospective tenants' attention, the leases were not contracts of adhesion, and the class action waivers were not unconscionable, and thus enforceable. They also argue that because the CFA provides for treble damages and an award of reasonable attorney's fees to prevailing plaintiffs, members of the class are not effectively precluded from pursuing relief under the CFA. We are unpersuaded by these arguments.

Here, the damages alleged by plaintiffs are unliquidated. Discovery has not commenced. At this early stage of the case, the quantum of damages incurred by class members is unknown. The trial court has not yet considered that factor or certified the class. Defendants' attempt to estimate the damages suffered by individual plaintiffs is purely speculative. We decline to guess the alleged ascertainable loss or damages suffered by the named plaintiffs or members of the putative class.

More fundamentally, as in Estate of Ruszala, ex rel. Mizerak v. Brookdale Living Communities, Inc., "our ruling does not focus solely on

plaintiffs' ability to individually vindicate their common law rights to obtain complete and fair compensation for their alleged injuries." 415 N.J. Super. 272, 299 (App. Div. 2010). Instead, "[o]ur consideration of the 'public interests affected by the contract' . . . compels a broader inquiry into how the identified restrictions affect our State's public policy of protecting" consumers. Id. at 299-300 (quoting Muhammad, 189 N.J. at 25).

The freedom to contract is limited. When unaffected by the case law emanating from the FAA, contractual provisions that dismantle or disable important procedures and due process rights provided in our Part IV rules should not be enforced. See id. at 298-99 (finding that discovery restrictions in an arbitration provision precluding nursing home residents from deposing nursing home staff were "palpably egregious" and unenforceable "because they are clearly intended to thwart plaintiffs' ability to prosecute a case"). Class action waivers fall squarely within that category.[1] Class action waivers are

[1] Class action waivers have been declared unenforceable outside of the arbitration context in some jurisdictions. See, e.g., Killion v. KeHE Distribs., LLC, 761 F.3d 574, 592 (6th Cir. 2014); Hall v. U.S. Cargo & Courier Serv., LLC, 299 F. Supp.3d 888, 893-94 (S.D. Ohio 2018); see also Christopher R. Leslie, The Arbitration Bootstrap, 94 Tex. L. Rev. 265, 324 (2015). Cf. Fiser v. Dell Comput. Corp., 188 P.3d 1215, 1217, 1220 (N.M. 2008) (holding a class action waiver unenforceable because it was "contrary to New Mexico's fundamental public policy to provide a forum for relief for small consumer claims" even assuming the contract's arbitration provision was binding).

clearly contrary to the public policy of this State. The loss of procedural rights and the salutary benefits of class actions should not be countenanced. See Vasquez v. Glassboro Serv. Ass'n, Inc., 83 N.J. 86, 98 (1980) (noting that "courts in new Jersey have refused to enforce contracts that violate the public policy of the State" or are "inconsistent with the public interest or detrimental to the common good"); Achey v. Cellco P'ship, ___ N.J. Super. ___, ___ (App. Div. 2023) (holding that an arbitration agreement "permeated by provisions which are unconscionable and violative of New Jersey public policy" is unenforceable). In Achey, we found that a contractual provision requiring the plaintiffs to notify the defendants of their claims within 180 days of receiving their cell phone bills violated public policy. ___ N.J. Super. at ___.

Considering our longstanding, fundamental public policy favoring class actions, we hold there is no societal interest in enforcing a class action waiver in a contract that does not contain a mandatory arbitration provision and conclude that the class action waivers in this case are unenforceable as a matter of law and public policy.[2] By adopting this bright-line rule, we advance

[2] In our view, unenforceability is not dependent upon a finding that the class action waiver is otherwise unconscionable or part of a contract of adhesion. See Fiser, 188 P.3d at 1218-21 (holding the class action waiver unenforceable without determining if the contract was adhesive or procedurally unconscionable). A class action waiver is substantively unconscionable because it is contrary to public policy. To the extent our analysis and holding

the recognized benefits of class actions for both litigants and the courts. The public policy favoring class actions "furthers numerous practical purposes, including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations, and allocation of litigation costs among numerous, similarly situated litigants." Dugan v. TGI Fridays, Inc., 231 N.J. 24, 46-47 (2017) (quoting Lee, 203 N.J. at 518).

Affirmed.

---

is contrary to Cerciello, which held that a clear and unambiguous class action waiver embedded in an arbitration clause was enforceable despite the defendant's inability to compel arbitration due to its failure to pay administration fees, we decline to follow Cerciello.