(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

MARIO DELUCA,

Plaintiff-Appellant,

v.

ALLSTATE NEW JERSEY

INSURANCE COMPANY,

Defendant-Respondent.

_____

AUBURN INSURANCE AGENCY, LLC,

Plaintiff-Appellant,

v.

ALLSTATE NEW JERSEY

INSURANCE COMPANY,

Defendant-Respondent.

RICHARD SORGE,

Plaintiff-Appellant,

v.

ALLSTATE NEW JERSEY

INSURANCE COMPANY,

Defendant-Respondent.

May 13, 2014

Before Judges Simonelli, Fasciale and Haas.

On appeal from the Superior Court of New Jersey, Chancery Division, General Equity Part, Bergen County, Docket Nos. C-185-11, C-291-11, C-299-11.

W. Michael Garner argued the cause for appellants.

David J. D'Aloia argued the cause for respondents (Saiber LLC, attorneys; Mr. D'Aloia, of counsel; Joan M. Schwab and Rina G. Tamburro, on the brief).

Jason N. Silberberg, Deputy Attorney General, argued the cause for amicus curiae New Jersey Department of Banking and Insurance (John J. Hoffman, Acting Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. Silberberg, on the brief).

PER CURIAM

In these consolidated cases, Mario DeLuca ("DeLuca"), Richard Sorge ("Sorge"), and Auburn Insurance Agency, LLC. ("Auburn") (collectively "plaintiffs") appeal from a December 28, 2011 order dismissing their complaints and granting summary judgment to defendant Allstate New Jersey Insurance Company ("Allstate"). We affirm.

Plaintiffs acted as independent insurance agents for Allstate under Exclusive Agency Agreements ("EAs"). Plaintiffs sought damages contending that Allstate wrongfully terminated their EAs and breached the implied covenant of good faith and fair dealing. The parties cross-moved for summary judgment before Judge Robert P. Contillo. Before disposing of the motion, the judge invited the New Jersey Department of Banking and Insurance (the "Department") to file an amicus brief. The judge conducted oral argument, issued a comprehensive written decision, and concluded that (1) applying the New Jersey Franchise Practices Act ("the Act"), N.J.S.A. 56:10-1 to -31, to insurer-agent relationships would interfere with the regulatory framework set out in New Jersey's insurance code; (2) the relationship between Allstate and plaintiffs did not constitute a franchise under the Act; and (3) Allstate's termination of the EAs did not contravene the implied covenant.

On appeal, plaintiffs argue primarily that the judge erred by concluding that the Act was inapplicable to their insurer-agent relationship with Allstate. Plaintiffs contend that they have established the existence of a franchise relationship with Allstate. They maintain that the judge therefore erroneously concluded that plaintiffs failed to establish a "community of interest" and a "place of business" as those terms are used within the meaning of the Act. Finally, plaintiffs argue that the judge erred by dismissing their common law claims of good faith and fair dealing.

When reviewing a ruling on summary judgment, "we apply the same standard governing the trial court -- we view the evidence in the light most favorable to the non-moving party." Nicholas v. Mynster, 213 N.J. 463, 477-78 (2013). If there is no genuine issue of material fact, like here, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Nicholas, supra, 213 N.J. at 478. After a thorough review of the record and consideration of the controlling legal principles, we conclude that plaintiffs' arguments are without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), and we affirm substantially for the reasons thoroughly expressed by Judge Contillo in his comprehensive written decision. We add the following remarks.

I.

We reject plaintiffs' contention that the Act applies to their EAs, primarily because of conflicts between the Act and the highly regulated insurance industry. Applying additional regulation is not appropriate where a regulatory scheme "deal[s] specifically, concretely, and pervasively with [a] particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes." Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 270 (1997). A court must be satisfied that a direct and unavoidable conflict exists between two regulatory schemes before it is compelled to determine which of those regulatory schemes is applicable in the case before it. Ibid. The conflict "must be patent and sharp, and must not simply constitute a mere possibility of incompatibility." Ibid. Such is the case here.

One example of the conflict relates to termination of an agent's services. N.J.S.A. 17:22-6.14a(d) of the insurance laws provides that the termination of a contract between an insurer and an agent "for any reason other than one excluded herein shall become effective after not less than [ninety] days' notice in writing given by the [insurance] company to the agent" and the Department. This statute protects the agent

against the immediate termination of the agreement by the insurer in all circumstances except those specific ones set out in N.J.S.A. 17:22-6.14a(e).[1] However, if any of the circumstances set out in N.J.S.A. 17:22-6.14a(e) are present, then the agent forfeits such protection and the agreement may be terminated immediately.

A franchisee, however, enjoys at least a sixty-day period of protection from the franchisor's immediate termination of the franchise in all circumstances except the franchisee's conviction of certain indictable offenses or voluntary abandonment of the franchise. N.J.S.A. 56:10-5 provides that

> [i]t shall be a violation of this act for any franchisor directly or indirectly through any officer, agent, or employee to terminate, cancel, or fail to renew a franchise without having first given written notice setting forth all the reasons for such termination, cancellation, or intent not to renew to the franchisee at least [sixty] days in advance of such termination, cancellation, or failure to renew, except (1) where the alleged grounds are voluntary abandonment by the franchisee of the franchise relationship in which event the aforementioned written notice may be given [fifteen] days in advance of such termination, cancellation, or failure to renew; and (2) where the alleged grounds are the conviction of the franchisee in a court of competent jurisdiction of an indictable offense directly related to the business conducted pursuant to the franchise in which event the aforementioned termination, cancellation or failure to renew may be effective immediately upon the delivery and receipt of written notice of same at any time following the aforementioned conviction. It shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause. For the purposes of this act, good cause for terminating, canceling, or failing to renew a franchise shall be limited to

> failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise.
>
> [(Emphasis added).]

Also, under this statute, a franchisee can only be terminated by the franchisor for "good cause" involving the franchisee's failure to substantially comply with the requirements of the franchise. Ibid. The judge observed that

> [i]f the [Act] is deemed applicable to insurance company-agent relations, an insurance agent[-franchisee] could not be terminated by the [insurance company-] franchisor unless he or she has violated the terms of a given franchise agreement. This conflicts directly with N.J.S.A. 17:22-6.14a.e, which gives the insurance company the right to terminate -- immediately -- an insurance agent for, among other reasons, "insolvency, abandonment, gross and willful misconduct, or failure to pay" premiums. Agents violating their individual contracts - - or not violating any specific provision of their contracts but say, having become insolvent, abandoned the agency, been guilty of gross or willful misconduct, or failed to pay premiums, could not, if the [Act] applies, be terminated by the insurer for [sixty] days (N.J.S.A. 56:10-5), unless the insurer had received written notice that the agent has been convicted of an indictable offense. Ibid. This is in conflict with N.J.S.A. 17:22-6.14a, which permits immediate termination in certain circumstances and termination [on notice of ninety days] in others.

These conflicts, as well as the numerous other examples cited in the judge's decision, pertain to direct, unavoidable, patent, sharp, and real differences between the Act and the heavily regulated insurance

scheme. As a result, we agree with the judge that the Act is inapplicable to plaintiffs' insurer-agent relationship with Allstate.

II.

Even if there were no conflicts between the Act and the regulated insurance industry, which is not the case, the relationship between Allstate and plaintiffs did not constitute a franchise under the Act because there was no "community of interest," and plaintiffs did not maintain a "place of business," as those terms are used under the Act.

A.

Regarding the concept of "community of interest," pursuant to N.J.S.A. 56:10-3a, the Act defines a franchise as

> a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.
>
> [(Emphasis added).]

A "'[c]ommunity of interest exists when the terms of the agreement between the parties or the nature of the franchise business requires the licensee, in the interest of the licensed business's success, to make a substantial investment in goods or skill that will be of minimal utility outside the franchise.'" Instructional Sys., Inc. v. Computer Curriculum Corp., 130 N.J. 324, 359 (1992) (quoting Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp., 944 F.2d 1131, 1143 (3d Cir. 1991)). The investments are usually "tangible capital investments, such as 'a building designed to meet the style of the franchise, special equipment

useful only to produce the franchise product, and franchise signs.'" Id. at 356 (citation omitted). As the judge stated, plaintiffs made no such investments.

Plaintiffs suggest that their investment of good will by promoting Allstate's good name constitutes a "community of interest" under the Act. We need not resolve whether such a non-tangible investment amounts to a "community of interest" under the Act because plaintiffs have not shown that they have maintained a "place of business" as that term is used in the Act.

B.

Pursuant to N.J.S.A. 56:10-4a, the Act applies only to franchises "the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey." A "place of business" means

> a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services. Place of business shall not mean an office, a warehouse, a place of storage, a residence or a vehicle, except that with respect to persons who do not make a majority of their sales directly to consumers, "place of business" means a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services, or an office or a warehouse from which franchisee personnel visit or call upon customers or from which the franchisor's goods are delivered to customers.
>
> [N.J.S.A. 56:10-3f (emphasis added).]

Plaintiffs are not insurers; they are insurance agents. As correctly noted by the judge, "[i]n New Jersey, only an insurer authorized to do business in New Jersey may sell insurance." See N.J.S.A. 17:17-10 (stating, among other things, that the commissioner shall issue certificates authorizing insurance companies to commence business and setting forth grounds on which the commissioner may refuse to issue such certificates); N.J.S.A. 17:17-12 (providing that it is a misdemeanor to "solicit, negotiate or effect any contract of insurance of any kind" unless authorized); N.J.S.A. 17:32-18 (indicating that out-of-state insurers may only transact business if they meet certain conditions). Plaintiffs are not so authorized and, thus, cannot sell Allstate's insurance. Consequently, plaintiffs have not maintained a "place of business" within the meaning of N.J.S.A. 56:10-3f.

III.

Finally, we reject plaintiffs' argument that the judge erred by dismissing plaintiffs' common law claims for breach of the implied covenant of good faith and fair dealing based on Allstate's termination of their EAs. "[E]very contract in New Jersey contains an implied covenant of good faith and fair dealing." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997). The implied covenant applies to "both the performance and enforcement of the contract." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224 (2005). Under this "implied covenant . . . 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965) (quoting 5 Williston on Contracts § 670, at 159-60 (3d ed. 1961)).

Thus, "[a] plaintiff may be entitled to relief under the covenant if its reasonable expectations are destroyed when a defendant acts with ill motives and without any legitimate purpose." Brunswick, supra, 182 N.J. at 226. However, "[w]ithout bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance." Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001). "The party claiming a breach of the covenant of good faith and fair

dealing 'must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.'" Brunswick, supra, 182 N.J. at 225 (quoting 23 Williston on Contracts, § 63.22, at 513-14 (Lord ed. 2002)).

Here, plaintiffs alleged that Allstate breached the implied covenant by terminating their EAs in an unreasonable and arbitrary manner. Pursuant to the EAs, either party could terminate the relationship without cause, upon providing ninety days written notice to the other party.[2] Plaintiffs assert that Allstate's lack of good faith was evident in its "concealing from Appellants [both] the consequences of failing to meet Expected Results and the conditions under which termination [of the EAs] would ensue."

The record shows, however, that Allstate adequately informed plaintiffs about the consequences of their failure to meet their Expected Results. The EAs required plaintiffs to "meet certain business objectives established by the Company in the areas of profitability, growth, retention, customer satisfaction and customer service." Allstate conducted annual reviews to determine whether plaintiffs were achieving Expected Results. At their annual reviews for the year 2007, Allstate advised plaintiffs that they had not met their Expected Results in some areas, and Allstate stated that "[f]ailure to meet the requirements as defined may put the agency relationship in jeopardy. It is expected that all agencies perform at the expected level."

Thereafter, plaintiffs failed by wide margins to meet their minimum Expected Results for the years 2008, 2009, and 2010, positioning them among the "worst performing" agencies in Allstate. From March through July 2010, Allstate contacted plaintiffs and informed them that their performances were deficient and that their continued failure to meet Expected Results could jeopardize their agency relationships with Allstate. Allstate informed DeLuca that he would be terminated if he did not meet his Expected Results for the year 2010. Plaintiffs did not meet their Expected Results for 2010, and in early 2011, Allstate informed plaintiffs that they had three months to show that they were on track to meet their

Expected Results for 2011. Plaintiffs failed to show improvement, resulting in their termination under the EA's "without cause" provision. Allstate's warnings were patent, timely, and unmistakable.

Finally, Allstate's termination of the agencies has not plainly denied plaintiffs either the "benefit of the bargain originally intended," Brunswick, supra, 182 N.J. at 225 (citation omitted), or the "fruits of the contract." Palisades Props., Inc., supra, 44 N.J. at 130. Pursuant to the EAs, Allstate was required to pay plaintiffs considerable sums for their economic interests in their agencies, even though Allstate essentially gave those interests to plaintiffs at no charge when the agencies were formed. Allstate's payments to plaintiffs do not bespeak a bad motive or intention on its part. Without proof of such bad motive or intention, plaintiffs do not have viable claims for breach of the implied covenant. Brunswick, supra, 182 N.J. at 225; Wilson, supra, 168 N.J. at 251.

Affirmed.

1 Such circumstances include when an agent is paid a salary and not a commission, when the agent represents only one company, when a contract is terminated due to insolvency, abandonment, gross and willful misconduct, or the agent's failure to pay moneys due to the insurance company, when an agent's license is revoked, when a company renews a contract that had been processed by a terminated agent, and when insurers and certain agents enter into contracts.

2 The EAs also allowed Allstate to terminate the agreements "for cause." The judge declined to make findings regarding whether Allstate could lawfully terminate the EAs under this provision, determining instead that the "dispute need not be resolved, as [Allstate] properly implemented termination under the provision allowing for unilateral termination, without cause." We note that "[t]he obligation to perform in good faith exists in every contract, including those contracts that contain express and unambiguous provisions permitting either party to terminate the contract without cause." Sons of Thunder, supra, 148 N.J. at 421.
