SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
DOCKET NUMBER: PAS-L-084324-85

JAMES REID, BURLIA REID, MAMIE BULL, Plaintiffs -vs- NORTH JERSEY HOME ENERGY CENTER, GOLD BOND FINANCIAL SERVICE, et al. Defendants	TRANSCRIPT OF MOTION **DECISION ONLY**

Heard at: Passaic Courthouse
Paterson, New Jersey

Heard on: September 6, 1991

BEFORE:

HONORABLE NICHOLAS G. MANDAK, J.S.C.

TRANSCRIPT ORDERED BY:

MADELINE L. HOUSTON, ESQ.

APPEARANCES:

MADELINE L. HOUSTON, ESQ.
For the Plaintiff.

ALAN BROWN, ESQ.
NATHAN SISSELMAN, ESQ.
ROBERT MARGULIES, ESQ.
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For the Defendants.

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THE COURT: I'm going to react to the motions today. And I'm able to do that, quite honestly, because I found that the issues were very clearly delineated by counsel. I found them to be very thoroughly briefed and I appreciate the fact that counsel has addressed them in a sense that made it easy for the Court to analyze the issues and to feel that the case law has been provided where it was available. So, with that in mind, I felt comfortable rendering a decision, of course, after hearing any additional thoughts that you might have with respect to oral argument.

I'm going to address the consumer fraud issue first. The issue arises because there is no specific statute of limitations which encompasses the consumer fraud act or which is included within the consumer fraud act. The issues boils down to whether treble damages under the consumer fraud act are penal for purposes of determining the applicable statute of limitations.

The defendants suggest, in citing the Ryan case and the Addis case, that a statute is penal if it addresses a public wrong, even incidentally, or is enforceable by the State. The theory here is that the concept that an action to recover more than the plaintiff's actual damages is penal. Even if the statute is deemed both penal and remedial, which is the case in many of the cases cited, the

two year statute of limitations under 2A:14-10 applies, contends the defendants, -- particularly referring to Addis, which I feel is the most compelling case supportive of the defendants' position.

It's cited in 23 New Jersey at 142. Reading from Page 148, the Supreme Court says the statutory penalty of NJS 2A:42-38 is both remedial and penal, a factor inferentially recognized in the Freedman case, the Ryan case -- I'm omitting the citations. The tenant recovers the measure of unlawful rental extracted and, by statutory direction, is the recipient of the punitive award.

The total recovery is arbitrarily computed, but takes cognizance of the actual loss only as a base. According to the statutory direction, the landlord "forfeits" an amount three times that base. This operates as a sanction. True, it is largely a wrong to an individual, but excessive rental charges also impugn the statutory purpose of stabilizing rentals in emergency areas and, thus, incidentally wrong the public.

Arguing further, the defendants urge that a number of federal cases, led by Gordon versus Loews 247 F.2 451, follow Addis and have applied the two year statute of limitations to private civil antitrust suits for treble damages. The plaintiff responds by distinguishing those cases or attempting to distinguish those cases purported to

be supportive of the defendants' position and asserting the applicability of the Holly versus Coggins case, which is 43 North Carolina Appellate 229.

That case, as you are aware, deals with unfair trade practices under the North Carolina law and considers a number of factors in concluding that the one year penalty statute of limitations does not apply, that the three year statute of limitations under General Statutes 1-522 does apply, which in effect says the three years applies "upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it."

Some of the factors that were considered in the Holly case are: (1) the focus on the nature of the right and not the remedy; (2) a finding that penal deals with punishment and the need for a deterrent and that the unfair trade practices treble damage provision does not manifest such a singularity of purposes; (3) that the State essentially has three purposes in this time of legislation: 1) the incentive; 2) the remedy and 3) the deterrent, the Court in Holly determined that only the third element, deterrent, has anything to do with punitive damages; (4) specific reference in the statute to the civil penalty enforceable by the Attorney General, which was also applicable to the North Carolina Statute, by the way.

And, next, the Holly Court points out that we really have a hybrid here. It addresses the individual grievances and also the harm to the public welfare, essentially creating thereby two separate statutory applications, one for the penalty, being the two years, and one for the individual right. Lastly, the Holly Court points out that when you have a doubt in these situations, surely you should opt for the longer statute of limitations.

In effect, the Holly Court, in acknowledging treble damages to be punitive, in other words, a penalty, rejects the notion that all such statutes must be treated as "penal" for statute of limitations purposes. Rather, the Holly Court points to a complex scheme of public and private enforcement which necessitates a complex analysis of a legislative intent.

In distinguishing Addis, the plaintiff first notes that the remedy provided for by statute in Addis is expressly called a forfeiture. In referring to Ryan, the act used the word 'penalties' and the violations of the statutes which were indictable. And the case there, in Ryan, was really not decided on a statute of limitations issue.

Notwithstanding these cases, a further look, I believe, at the consumer fraud act of New Jersey is necessary. As you, I think, are aware -- I'm sure you're

aware, the statute initially provided for investigation and enforcement by the Attorney General. That was back in 1960. That was by means of injunctive relief, appointment of receivers and assessment of penalties. It was under 568-8 and 568-13. The penalty provisions of 568-13 would clearly fall under 2A:14-10, the two year statute of limitations.

It was determined that, first, the Attorney General couldn't do all that was necessary to effectuate the purposes of what the legislature wanted accomplished by consumer fraud act. Secondly, it was found that the individual consumer received little or no benefit. So, to create an incentive, 568-19 was passed in 1971, some eleven years after the initial consumer fraud act. It provided for treble damages and it provided for attorney's fees.

I've given counsel the benefit of the legislative history, which I have procured. I don't know whether this is all of it, but in the release issued by the Office of the Governor on June 29, 1971, at the bottom of that page, I note that it says, "In addition, the bill provides a private right of action for consumers against those who violate the consumer fraud act. Under this provision, the consumer will be entitled to triple damages, reasonable attorney's fees and reasonable cost of suit."

The Governor stated that this provision, in his opinion, will provide easier access to the Courts for the

consumer, will increase the attractiveness of consumer actions to attorneys and it will also help reduce the burdens of the division of consumer affairs. The legislative attitude toward the consumer, I believe, has changed dramatically in the last 30 or 40 years. And this type of legislation, which is essentially remedial, almost always has some clause attached to punish or deter violations.

And under 568-19, "The real purposes were accomplished in providing, first, a remedy to the aggrieved individual and, secondly, an incentive to pursue that remedy. True, there is a punishment or a deterrent to the violator, but that punishment is an incident to the remedy and not a separate purpose of the statute in itself."

I truly believe that Holly sets the right course as to what the full impact of the consumer fraud act means, both from a legislative point of view and from the consumer point of view. And that the bottom line is that the statute, which substantially is remedial, but has some punitive aspects and, necessarily so, should not be rendered less effective by reducing the time frame for its enforcement.

Remember, when 568-19 was passed in 1971, some penalty provisions already existed in the statute relative to enforcement by the Attorney General's Office. Everyone

seems to agree, at least my reading of the briefs suggest that the the two year statute of limitations of 2A:14-10 would be applicable then and now to those provisions which relate to enforcement by the Attorney General for the imposition of penalties.

Now the legislature allows for individual enforcement of what, essentially, is fraudulent conduct. I'm aware that not all violations of the consumer fraud act would necessarily be characterized as fraudulent, as we understand that term to be, but the statutes are clearly directed towards such conduct. It speaks of deception. It speaks of unlawful activity.

And I don't know precisely the language that I used with respect to my findings of liability, but whether there was an intent or not an intent, without referencing the subject of intent, it's, clearly, that the activities that took place here certainly had the potential to deceive.

The unsophisticated consumer who has been duped and unknowingly been cheated or unknowingly not provided with important and essential information is granted a cause of action founded on some form of fraud or deception. To create an incentive to pursue that claim and to avoid the need of asserting and proving punitive damages and to provide a deterrent, the consumer is afforded treble damages under the consumer fraud act.

As noted by the plaintiff in their brief, it would be anomalous to allow the defrauded consumer a shorter time frame than that allowed for common law fraud when the punitive aspects under the common law could far exceed treble damages. Fraud, by the way, as you're aware, allows for a two, six year statute of limitations.

I think it's necessary to address Addis very directly because, frankly, without Addis I feel my decision on this issue would be relatively easy. Certainly, if Addis is found to be applicable, its conclusions must be followed. However, this Court believes that Addis can not be applied generally and that its conclusions must be applied only to those circumstances that fit precisely the point.

I note parenthetically that it was relatively easy and comfortable for the federal courts to follow Addis with respect to private civil antitrust violations because it was a state court decision and the federal courts felt obliged to some degree to rely on what the state court had decided. And, two, probably more importantly, the antitrust laws were already more penal in nature because they involved potential criminal charges.

But looking at Addis, as already noted, the statute in Addis provides the landlord "forfeit" in amount three times the damages or actual loss. Aside from the fact that that is a distinction that the Court questioned because

of the simple use of the word forfeit, Ms. Houston did point out an additional factor today that facially appears to have some merit.

I know I haven't too much time to think about it, but she did evidence the fact that forfeit is taking away something that was illegally gained, whereas, the treble damage issue has no relationship to what may have been illegally gained. It relats to what the victim suffered and then trebles that amount.

Secondly, with respect to Addis, the Addis case was limited to rental charges, whereas the consumer fraud act covers the whole gamut of consumer activity, much, much, much broader in its application. With respect to that, clearly the Addis court did not have in mind, in my judgment, the wide ranging consumer policy that was initiated and has been promulgated by the legislature since that time.

568-19, additionally, is essentially a remedial statute. Its primary purpose was to afford a remedy to the individual, not to impose a forfeiture or penalty on the defendant. Addis did not involve fraud. It simply was a rental overcharge. Addis did not involve separate penal provisions enforceable by the Attorney General's Office.

I call your attention, by the way, on this issue, to 56:8-14 which follows 56:8-13 -- that makes sense, which

establishes the penalty provisions under the consumer fraud act. 13 establishes the penalty provisions, 14 tells us how you get them. And 14 specifically provides that, in enforcing and collection of those penalties, the summary proceeding pursuant to the penalty enforcement act NJS 2A:58-1 can be used.

And if one were to look at the penalty enforcement act, one would see that, in a specific procedure without a jury, a summary proceeding can be used by the Attorney General to collect these penalties. A whole different procedure has been established for the collection of what are classified as "penalties" under the consumer fraud act.

We don't have that in Addis, but we have it in the consumer fraud act which clearly indicates to me an intention to differentiate those procedures that are to be used to collect these penalties and those procedures that are to be used to collect treble damages under Section 19. We all know that treble damages are matters that have to be tried if there's a dispute in a completely plenary hearing with a jury, so the procedures for the sections are different. It is not, then, unusual or unnatural to suggest that the statute of limitations for the two sections, equally, is different.

Going back now to Holly, I note that Holly is not the only case that sets the consumer fraud act apart from

other statute of limitations cases. The plaintiff has cited Gabriel versus O'Hara at 534 A.2nd 488, which is a Pennsylvania cases and deals again, as did Holly, with the unfair trade practices and consumer protection law.

Whether we're talking about unfair trade practices, whether we're talking about a consumer fraud act, whether we're talking about an unfair trade practices and consumer protection law, we're essentially talking about the same type of legislation that has the same purposes. And here, in the Pennsylvania case, the Court points out that the statute encompasses an array of practices, false advertising, breach of contract, fraud, misrepresentation, breach of warranty. And since there was no specifically applicable statute of limitations, the "catchall" six year statute of limitations must apply.

In concluding, the Pennsylvania court notes,

> "We find that the application of the six year catchall period of limitations will effectuate the broad remedial policies of the legislature in enacting the statute and insure that the consumers injured by unfair and deceptive practices may pursue their rights under the unfair trade practices and consumer protection law."

It's at Page 496.

Where the concept argued by the defendants, that

an action to recover more than the plaintiff's actual damages is a penalty, results in the conclusion that necessarily must be controlled by 2A:14-10 is an argument that the Court rejects. The word penalty can be used in many contexts and forms and is commonly used to refer to the payment of something more than necessary to make the victim whole. Such terminology is not consistent with the language of 2A:14-10, which speaks of actions at law for any forfeiture upon any penal statute.

Reference has been made to the Dolman case, wherein the word punitive is used. However, the Court finds that that word is used in the sense that treble damages was not something that could be applicable to a public utility, not used in the sense of a statute of limitations context. Justice Pashman's concurring opinion is referred to, it's quoted as related to his comment that sanctions under 568-18 are mandatory. That was his concern, that those requirements are mandatory and not discretionary. That was the same issue in Skeer, S-K-E-E-R, 187 supra 467, which is cited by the defendants. This case did not address the word penalty, again, in a statute of limitations context.

The last issue raised by the defendants with respect to this consumer fraud act is that when a liability is created by a statute, NJSA 2A:14-1 does not apply. Here the defendants rely on one sentence of State versus Atlantic

City, which is in 23 New Jersey 259. It's a 1957 case. The reference is RS2:24-1, which is the source of 2A:14-1. And the sentence was, "Of course, a liability created by a statute does not fall within the limited provisions of RS2:24-1."

We know that 2A:14-1 has replaced 2:24-1 and is a much broader statute and, frankly, it's entirely different. The limitations and limited applicability of 2A:24-1 are quite evident, not so with 2A:14-1. Also, this sentence was nothing more than dicta, since the Court determined that the obligation was a debt in a suit and any consumer was barred, thereby, by the six year statute of limitations.

Lastly, there is no authority for the rule provided in the case, nor is there any analysis of the statute or of the rule offered by the Court. Particularly, there's no analysis of the language, "contract without a speciality," which language is now gone from the statute in2A:14-1. So I don't feel that there's any particular persuasive language in State versus Atlantic City with respect to a cause of liability created by a statute.

In addition, the 1961 amendment specifically exempted a statutory cause of action, namely 12A:2-725, from the limitations established by 2A:14-1. Thus, at least in the mind of the legislature, the law that is stated in the Atlantic City case was not applicable to that statute. In

Atlantic City, the State argued that the consumer depositor had a cause of action based upon a liability imposed by law, namely, the rules and regulations of State Administrative agencies and, consequently, the six year statute of limitations was not applicable.

The point was that, if the six year statute of limitations was not applicable, no statute of limitations is applicable. And that's one of the points that Ms. Houston has made generally throughout this argument, that, even if 2A:14-1 is not applicable, if 2A:14-10 is not, then none is. And none, therefore, would be available for the defendants.

I do not find the case law sufficiently on point in this issue to persuade the Court to exclude the applicability of 2A:14-1 because of the underlying cause of action based on a statute, in any event.

The bottom line is that this Court finds that 56:8-19 was passed by the legislature with the intent to have a remedial result. The fact that treble damages was mandated was not with the intent to create a penalty, albeit it has that effect, but rather to put teeth into the remedy.

The Court finds that 2A:14-10 is not applicable to the consumer fraud acts and not applicable to that section namely, 56:8-19, and does not provide that the individual consumer and action at law brought for any forfeiture upon any penal statute. That is not the type of action that is

contemplated by Section 19 and, therefore, 2A:14-10 is found not applicable.

I would like to move on to the truth in lending law issue. USC A, Section 16-35 is that part of the truth in lending regulation that grants the right of rescission. Subsection Paragraph F of that section provides a time limitation of three years after the date of the consummation of the transaction or upon the sale of property, whichever occurs first, for the obligor to exercise the right of rescission. Pursuant to the code of Federal Regulation CFR, a consumer wishing exercise their right of rescission must do so by written notice to the creditor submitted by mail, a telegram or other means of written communication as set forth under 12 CFR 226 2382.

Now, the defendants in their notice of motion for summary judgment assert a number of alternative theories. First, that the complaint does not constitute notice to rescind. Secondly, that, if it does, the notice would be for the benefit of only the three original plaintiffs. Three, again, if it does mainly constitute notice to rescind, the notice would be notice only as to the defendant, North Jersey Home Energy Center which was served and on the other defendants when they were served. Fourth, that the notice can not be effective until the class has certified, which I believe was October 9, 1986. Fifth, that the notice can not

be effective until the deadline for opting out of the class which was, as Mr. Brown stated, May 6, 1987.

First, with respect to the issue of whether the complaint is notice, the Court finds that it is notice. There was no specific requirement under the act as to the form of the notice, except that it be written. Quite frankly, the contents of the complaint provide not only the notice for rescission, but also provides a reason for same. The complaint specifically says so.

The plaintiff has provided the unreported case of Hunter versus Richmond Equity. It's a United States District Court case in the Northern District of Alabama. It does indicate, whether it be in the order or the decision, that the complaint is notice. I don't really need the Hunter case to support my conclusion. I just feel that the document of a complaint adequately satisfies the requirement of notice. Whether it be only between the three plaintiffs and the defendant, North Jersey, it at least does that and we'll get into the other issues later on, but I'm satisfied that it does meet the requirements of the statute with respect to notice.

Secondly, what, if any, is the significance of filing the complaint with respect to the other punitive members of the class and the three years limitations? Without specifically addressing the arguments on this issue

presented by the defendant, the Court simply opts to accept what it believes to be the applicable law, that being clearly addressed by the plaintiff in their briefs. The class action tolls time limitations of all punitive class members.

The Court is persuaded by the applicability of American Pipe & Construction Company versus Utah, 414 U.S. 538. This case deals with the State of Utah's commencement of a Sherman Antitrust treble damage class action against the petitioner, in which the State of Utah purported to represent various State and local agencies in other states.

After a determination rejecting the class action, numerous class members moved to intervene. The motions were denied at the trial level on the basis that the limitation period had run. The Court of Appeals reversed and the United States Supreme Court affirmed concluding, "The commencement of the original class suit tolls the running of the statute of all purported members of the class," at Page 553.

The case involves an analysis of Federal Rules Civil Practice 23, which deals with class actions. What makes the case so persuasive is that the points made in analyzing the rule and its purpose are equally applicable to our Rule 432-1 regarding class actions. As a matter of fact, if one were to note the comment to our rule 432-1, I

read as follows, "The class action rule 432-1 to 432-4 is adopted as part of the 1969 revision. Follow the 1966 amendment to the Federal Rules of Civil Procedure 23."

And those rules of civil procedure, by the way, as indicated in the American Pipe case, Federal Rules, were amended, in part, specifically to avoid the necessity of individual notices in this type of situation in class actions and to avoid the unfairness that would be created by the precise argument that's being made by the defendants here.

American Pipe points out that the 1966 amendment, in part, eliminated the unfairness that might have earlier required individualized satisfaction of the statute of limitations by each member of the class and requires a "holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined."

The purpose of the class action and the rule is to avoid the unnecessary filing of repetitious papers and motions by other potential class members and this can only be done by protecting the class members from the point of the commencement of the suit or the filing of the class action. Here the plaintiff asserted claims that were typical -- I'm talking about the case in our case, were typical of the class in the complaint, the potential class

is equally clearly identified in the complaint.

In addressing the functional operation of the statute of limitations, Justice Stewart in American Pipe wrote at 554-55, I think, in part responding to Mr. Mackiewicz's arguments which were legitimately made, that the American Pipe case says, in response to those arguments,

> "The policies of insuring essential fairness to the defendants and in barring a plaintiff who 'has slept on his rights' [citations omitted] are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifying the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment within the periods set by the statute of limitations. The defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit or as a principal suit with additional intervenors."

More recently, Crown Cork and Seal versus Parker, at 462 U.S. 345, reaffirmed the rule set out in American

Pipe, -- it's a 1983 case, that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class. And, finally, one of the leading treatises on class action, Newburg, on class action, Section 5.02, at 425, points out, and I think it's cited in plaintiff's brief, that's where I got it from and checked it:

> "It is now established that the filing of a class complaint will toll the statute of limitations for the benefit of the class, even when the class is subsequently denied. This tolling of the limitation period is a valuable aid to class members in preserving rights that otherwise would expire from lack of enforcement."

Going on to the third issue involved, when was notice effected upon the defendants, other than North Jersey Home Energy Center? Was the service of the complaint upon North Jersey sufficient notice for service as to all defendants' assignees? We have seen that, pursuant to 12 CFR 226.23 8-2, requires written notice upon the creditor. 15 USCA at 1602(f) defines creditor. The term is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of the indebtedness.

The statutory language is unambiguous. Case law

has considered the language and concluded that it means precisely what it says, see Littlefield versus Walt Flannagan and Carwit 498 Federal 2nd 1133, Court of Appeals, Tenth Circuit, 1974. The plaintiffs have satisfied the requirement of serving the creditor as required by the truth in lending law.

Next, some question has been raised concerning the right of rescission vis a vis a class action in the issue of election of remedies. I believe part of that has already been determined by the Court. I do not believe that the issue concerning the election of remedies is a meritorious issue.

Lastly, with respect to the sale and refinancing, I believe all parties agree that a sale of a residence prior to the notice of rescission bars the right of rescission. There is some dispute as to the effect of refinancing that the plaintiff asserts, at least at this time, but there has been no refinancing and, thus, on the basis of that representation, the issue is moot. If there is determined later on that there is refinancing, obviously the issue can be restored.

The last point raised in the defendant's brief is the question concerning legal fees and whether they are limited to claims brought within one year. The requirements for rescission set forth, under Section 1635, there is no

provision for attorney's fees in that section. Rather, attorney's fees, under 1635, are provided under Section 1640(a)(3). And 1640(e) provides a one year limitation for any actions brought under "this section."

Essentially, the defendants contend that the one year begins to run from the consummation of the transaction and, for practical purposes, the contention would render the claims for attorney's fees as time barred. In response, I would say, first, that the contention defies logic and renders the legislation on rescission nonsensical. Second, the use of Morris versus Lomar and Mettleton Company 708 Federal Supplement 1298 in support of the defendants' contention is unsound. The Court does not find support for the defendants' claim in its reading of that case.

And, third, the one year limitation in Section 1640(e) relates to action under "this section, namely, the civil liability provided for actual damages or statutory damages." It does not necessarily apply to 1635, but we have a federal case that tells us that it does not apply to 1635. And that's Burley versus Bastrop Loan Corp. at 407 F. Supp. at 773, wherein the Court stated, "We thus hold that the fee award provisions of Section 1640(A)(3) are separable from the one year limitations in Section 1640(E)" Skipping a few lines, "Section 1630(A)(3) must not be read in a vacuum. It must be read in pari materia with its companion

sections and it may not be divorced from the other basic prophylactic provisions of the act." The quote is taken from Page 779.

Based on these conclusions by the Court on the three issues raised by the defendants, the summary judgment motions are in all respects denied.

* * *

STATE OF NEW JERSEY:
: ss.
COUNTY OF PASSAIC :

I, PATRICIA CHESONIS, do certify that the foregoing is a true and accurate transcript of the proceedings in the matter of James Reid, et al. versus North Jersey Home Energy Center, et al. (oral opinion only) heard by the Passaic County Superior Court on September 6, 1991 and recorded on Tapes No. 1 and 2 of that Court.

10/24/91

Patricia Chesonis #327