SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART

Docket No. MID-L-4958-13

WILLIAM DESIMONE, as executor of the Estate of EVELYN DESIMONE, deceased, individually in such capacity and on behalf of all others similarly situated,

Plaintiff,

v.

SPRINGPOINT SENIOR LIVING, INC., et al

Defendants.

CIVIL ACTION

OPINION

Not for Publication Without the Approval of the Committee on Opinions

Christopher M. Placitella argued the cause for plaintiffs (*Cohen, Placitella, and Roth, P.C.*, and the *Mayer Law Group* attorneys); *Mr. Placitella, Michael Coran, Michal McMahon,* and *Carl Mayer*, on the brief.

Bruce W. Clark, argued the cause for defendants (*The Clark Law Offices, P.A.* and, *Morgan, Lewis and Bockius, LLP,* attorneys); *Mr. Clark, John McGahren, Stephanie Feingold,* and *Michelle S. Silverman*, on the brief.

WOLFSON, J.S.C.

I. Introduction.

This action is brought by William DeSimone as the executor of the Estate of Evelyn DeSimone ("Plaintiff"), and arises out of Ms. DeSimone's ("DeSimone") stay in one of defendant's continuing care communities. Defendant Springpoint Senior Living, Inc., ("Springpoint" or "Defendant") owns and manages five senior living facilities throughout New Jersey, namely, Crestwood Manor, Meadow Lakes, Monroe Village, Stonebridge at Montgomery

and The Atrium at Navesink arbor.[1] The six-count complaint alleged that Springpoint utilized a "bait and switch" scheme in which the prospective residents were fraudulently induced into paying an entrance fee, promising that when the residential unit was vacated, a 90% refund would be tendered, except that in reality, the refund turned out to be substantially lower than promised.[2] Springpoint filed the instant motion to dismiss the Complaint for failure to state a claim pursuant to Rule 4:6-2(e), or, alternatively, for partial summary judgment. For the reasons set forth below, Defendant's motion to dismiss is granted.

II. Background.

A. Factual Background.[3]

In the fall of 2008, DeSimone, with her family's assistance, determined that due to her declining health she would benefit from living in a continuing care community. Elizabeth Savitsky ("Savitsky"), DeSimone's daughter (who possessed a power of attorney from her mother), began assisting her mother in choosing an appropriate location. Among the facilities considered was Monroe Village, owned and managed by Springpoint. At DeSimone's request,

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[1]The complaint also named defendant Gary T. Puma ("Puma") as the president and chief executive officer of Springpoint.

[2] The complaint alleges the following statutory and common law caused of action: (1) The Continuing Care Retirement Community Regulation and Financial Disclosure Act, N.J.S.A. 52:27D-336, et. seq., ("CCRC"); (2) violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et. seq., ("CFA"); (3) Breach of Contract, (4) Negligent Misrepresentation; (5) Fraud; (6) violation of the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-15 ("TCCWNA") (Plaintiff subsequently withdrew the TCCWNA claim in a letter dated January 15, 2014).

[3] Given that this is a motion to dismiss, I am required to accept the allegations in the complaint as true, and have afforded Plaintiff all reasonable inferences. See Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989); Seidenberg v. Summit Bank, 348 N.J. Super. 243, 251 (App. Div. 2002).

Springpoint forwarded certain marketing information to her and arranged an in-person information session.

The marketing material and the sales personnel all indicated that incoming residents are required to pay certain entrance fees and monthly charges, the amounts of which would vary depending on the type of living accommodation selected, as well as the level of care required.[4] Springpoint offered two payment options for the entrance fee. The first, and more modest one, called the "Traditional Plan" required a one-time, non-refundable entrance fee. The second option, the so-called "90% Refundable Plan," ("90% Refundable Fee") was more costly than the "Traditional Plan," but it included a potential refund of **up to** 90% of the entrance fee paid. According to Plaintiff, the marketing information and the sales personnel encouraged prospective residents to choose the 90% Refundable Fee.

By October 2008, DeSimone and her family elected to move into Springpoint's Monroe Village. After attending a sales presentation, the family received the required disclosure statement, and the accompanying 90% refundable residency and care agreement (the "R&C Agreement"). On its front page, the disclosure statement provided (as required by N.J.S.A. 52:27D-336) the following:

> THIS MATTER INVOLVES A SUBSTANTIAL FINANCIAL INVESTMENT AND A LEGALLY BINDING CONTRACT. IN EVALUATING THE DISCLOSURE STATEMENT AND THE CONTRACT PRIOR TO ANY COMMITMENT, IT IS RECOMMENDED THAT YOU CONSULT WITH AN ATTORNEY

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[4] Springpoint's Monroe Village is comprised of three different types of facilities: (1) Independent Living, for those residents who are generally self-sufficient, (2) Assisted Living, for those who require some help with the day-to-day activities; and (3) Skilled Nursing, for those people who require monitoring and/or continuous nursing care. Naturally, the monthly fees increase with the level of care required.

> AND A FINANCIAL ADVISOR OF CHOICE, IF YOU SO ELECT, WHO CAN REVIEW THESE DOCUMENTS WITH YOU.

(Capitals in original).

The disclosure statement also addressed other issues associated with living in the community, including, specifically, the refundability of the entrance fees:

> The 90% Refundable plan requires the payment of a higher Entrance Fee and allows for up to 90% of the Entrance Fee to be refunded. Payment of the refund shall be made upon the execution of a new residence agreement for the Living Accommodation and expiration of the rescission period of the incoming resident unless a current community resident transfers to the Resident's Living Accommodation upon its vacancy, in which case payment of the refund shall be upon payment of a new entrance fee and expiration of the rescission period of an incoming resident occupying the current resident's previous living accommodation . . . .

The refundability and calculation of the Entrance Fee after residency is terminated are described in further detail in Section VI of the Residence & Care Agreement:

> PROVIDER SHALL PROVIDE TO THE RESIDENT, THE RESIDENT'S LEGAL REPRESENTATIVE, A REFUND OF THE ENTRANCE FEE WITHOUT INTEREST EQUAL TO <u>THE LESSEER OF THE ORIGINAL ENTRANCE FEE OR THE SUBSEQUENT RESIDENT'S ENTRANCE FEE LESS:</u>
>
> (i) A FEE . . . OF 10% OF THE ENTRANCE FEE[5];
>
> * * *

<u>R&C Agreement</u> at p.20, (emphasis supplied)(capitals in original).

Approximately four months after receiving the disclosure statement and its accompanying R&C Agreement, Savitsky contacted Shannon Grieb ("Grieb"), a Springpoint sales person and asked what would happen if her mother wanted to move out in a year, or if she

[5]The amount of the refund was also reduced to the extent that the resident incurred certain health care costs and/or other assisted living expenditures (if any).

passed away. According to Savitsky, Grieb advised her that she would receive the 90% of the entrance fee, less any deductions for nursing care, but never mentioned the R&C Agreement's "lesser of" provision. Purportedly, relying on those representations, the sales pitches, and marketing materials, Savitsky selected the 90% refundable fee option.[6]

Sadly, prior to moving into her unit, DeSimone fell and broke her hip. Springpoint suggested that she could still move in to her unit, while availing herself of the physical therapy services offered through its Skilled Nursing Care facility.[7] She did so. However, after a month of physical therapy, it became apparent to the Springpoint personnel that Ms. DeSimone was unable to live independently. Accordingly, it was recommended that she remain in the Skilled Nursing Care facility, and that her independent living unit be put back on the market for re-letting to another resident. The family agreed, and DeSimone continued to reside in the Skilled Nursing facility until she passed away.

On July 2, 2010, Springpoint sent DeSimone's estate a "refund" in the amount of $80,136.00 pursuant to the 90% refundable plan. When the family asked about the resale price of their Mother's unit, it was explained that the subsequent unit owner paid a $127,000.00 entrance fee for the unit, (approximately $30,000.00 less than the fee paid by their Mother), due

[6]Based on the fee structure and the independent living accommodations unit selected, DeSimone's entrance fee was $159,000.00.

[7]While Plaintiff claims that this suggestion was motivated by Springpoint's desire to make a profit, the complaint does not, however, allege that the suggestion was made in bad faith or with any ill motive. Furthermore, Savitsky and DeSimone were admittedly aware from the onset that the cost of any skilled nursing care would be deducted from any refund, and there are no allegations that this provision was not disclosed.

to declining residency rates at the facility, and the consequent need to keep the facilities more fully occupied.[8]

B. The Allegations in the Complaint.

Plaintiff's complaint alleges that Springpoint orchestrated a "bait and switch" scheme, whereby elderly citizens were "induced" into selecting the "90% Refundable" plan, while it actively concealed the fact that the refund would not really be 90%, but rather, would be the "**lesser of**" the original entrance fee paid by Plaintiff, or the entrance fee paid by the subsequent resident less 10% of the entrance fee.[9] This scheme, it is asserted, was executed through the use of misleading and deceptive advertisements, coupled with intentional misrepresentations by Springpoint's sales personnel, and an incomplete and misleading disclosure statement, all being targeted at a vulnerable population. It was also claimed that Springpoint's failure to alert prospective residents that the facility was authorized to offer discounts on subsequent re-lets, or offer different payment options, (which, could effectively reduce the refunds due to Plaintiff or potential class members), violated the CCRC and the CFA.

III. Standard of Review.

Rule 4:6-2(e) mandates dismissal of a complaint when even a generous reading of factual allegations is insufficient to support a claim upon which relief could be granted. Rieder v. New Jersey Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). The reviewing court searches the complaint in depth and with liberality to ascertain whether a cause of action may be

[8] The remainder of the deductions from the fee was based upon the costs incurred during DeSimone's stay at the Skilled Nursing Facility, and are not disputed.

[9] See R&C Agreement at p. 20-21, and see *n.* 5, infra.

gleaned from the pleadings. Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). The invocation of this rule requires "an assumption that the allegations of the pleadings are true and affords the pleader all reasonable inferences." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 249-50 (App. Div. 2002)(internal citations omitted). If a generous reading of the allegations merely ***suggests*** a cause of action, the complaint will withstand the motion. F.G. v. MacDonnell, 150 N.J. 550, 556 (1996)(emphasis in the original).[10]

Notably, a motion to dismiss under R. 4:6-2(e) should be "approach[ed] with great caution" and should only be granted in "the rarest of instances." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). The court, however, must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief. Id.

IV. Discussion.

A. Consumer Fraud Act, Fraud, and Negligent Misrepresentation Claims.

Defendants assert that Plaintiff's claims that Springpoint violated the CFA and engaged in negligent misrepresentation and fraud must fail because: (1) there was no concealment of the refundabilty provision as all those terms were disclosed, in plain English, in the R&C Agreement; and (2) the parol evidence rule bars the introduction of any extraneous statements

[10] A motion for Summary Judgment, on the other hand, should be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. R. 4:46. At this stage, all evidence must be viewed in favor of the non-moving party, and a non-moving party should have an opportunity to develop the record through discovery, if necessary. Brill v. Guardian Life Ins. Co. of Am., 142 U.S. 520, 538 (1995). Since I am granting the Defendants' motion to dismiss, I need not undertake the applicable factual and legal analysis.

(including those by Grieb) made ***prior*** to the signing of the agreement, so long as those statements are offered to contradict the express terms of the agreement.

Plaintiff, on the other hand, argues that: (1) the parol evidence rule does not apply to statutorily-based CFA claims; and (2) since the alleged misrepresentations and omissions are not being offered to alter any of the express terms of the agreement, but rather, to demonstrate how DeSimone was fraudulently induced into signing this contract, the parol evidence rule is not a bar. Moreover, because the R&C Agreement is itself internally inconsistent, it is asserted that the extrinsic evidence, (i.e. a misrepresentation) is admissible to explain those purported inconsistencies. Plaintiff's contentions are unavailing.

The parol evidence rule will apply to the CFA-type claims so as to bar extraneous statements made prior to or contemporaneously with signing of the contract, where such statements contradict the express provisions in that contract. See Filmlife, Inc. v. Mal "z" Ena, 251 N.J.Super. 570, 576 (App. Div. 1991) ("[Parol evidence rule rationale] applies to the claimed violations of the Consumer Fraud Act (Act) . . . . Since plaintiffs cannot introduce extrinsic evidence to contradict express terms of the leasing agreement, they are also precluded from proving the claimed unconscionable commercial practice.").

Longstanding and basic principles of contract law dictate that a party to a contract is barred from introducing any oral promises which attempt to vary an integrated written agreement. Timken Silent Automatic Corp. v. Vetrovec, 119 N.J.L. 500, 502 (Sup. Ct. 1932). However, such testimony may be admissible where the execution of the instrument upon which suit was brought is said to have been induced by fraud. Id. 502-03. See also Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 377 (App. Div. 1960). Extrinsic evidence to

prove fraud is admissible, not because it is offered to alter or vary express terms of a contract, but rather, to avoid the contract or to prosecute a separate action predicated upon fraud. Id. at 378.

The fraud exception to the parol evidence rule is not absolute in New Jersey. Filmlife, supra, 251 N.J. Super. at 573. Indeed, if the purportedly fraudulent statement is contradictory to any ***expresses contractual*** provision, the oral testimony will be precluded. Id. New Jersey case law thus distinguishes "between fraud regarding matters ***expressly addressed*** in the integrated writing and fraud regarding matters ***wholly extraneous*** to the writing" because individuals "are usually bound by the import of documents signed by them and which they had the ability and opportunity to read." Id. at 573, 575 (emphasis supplied) (citing Commercial Credit Corp. v. Cooper, 101 N.J.L.530 (1905) and Peter W. Kero, Inc. v Terminal Constr. Corp., 6 N.J. 361 (1951)).

In Filmlife, for instance, the plaintiff alleged that a car salesman had orally promised to give him "cash" for his trade-in. Id. at 572. The lease, on the other hand, expressly provided that the allowance ***was to be credited*** toward his down-payment, in order to reduce his monthly payments. Id. Because the alleged oral misrepresentation contradicted an express term of the agreement, the court explained:

> The alleged oral misrepresentations, being contradictory of the undertakings expressly dealt with by the writings, are not effectual in that circumstance to avoid the obligation he knowingly assumed. The general rule is clear that a parol agreement which is in terms contradictory of the express words of a contemporaneous or subsequent written contract, properly interpreted, necessarily is ineffectual and evidence of it inadmissible, whether the parol agreement be called collateral or not.

Id. at 575 (internal citations and quotation marks omitted).

Accordingly, all of the plaintiff's fraud-based claims, including those based on the CFA and/or unconscionable business practices, were dismissed. Id. at 576. See also Montclair State Univ. v. Oracle U.S.A., Inc., 2012 U.S. Dist. LEXIS 119509, at *32 (D.N.J. Aug. 23, 2012) ("Integration clause will bar fraudulent inducement claims that are not based on duties extraneous to the parties' contract."); accord, Joseph McSweeeney Enters., LLC v. Mister Softee Sales & Mnf., LLC., 2013 U.S. Disc. LEXIS 122279, at *10-11 (D.N.J. Aug. 28, 2013).

Indeed, the cases relied on by Plaintiff support this proposition. In each case, the statements being offered ***were not*** specifically or expressly addressed and/or contradicted in the parties' contracts, but instead, were extraneous to those writings. For example, in McCarthy v. Hamilton Farm Gold Club, LLC, 2011 U.S. Dist. LEXIS 49105 (D.N.J. May 9, 2011), the District Court determined that the parol evidence rule would not apply to bar statements made by a golf club sales representative allegedly made to induce plaintiff to purchase a club membership. Id. at *1. The agreement there provided that the membership fee would be refunded in the event that one resigned from the Club, so long as that vacant membership was re-issued to a new member within thirty (30) days. Id. at *2. The sales representative stated that the "memberships in the Club were growing rapidly and filling up fast, thus reassuring Plaintiffs that there was a high likelihood that they would be able to obtain an immediate refund." Id. Importantly, that promise was not part of the contract. In fact, the contract specifically cautioned prospective members that "[t]here is no guarantee that a membership will ever be reissued or reissued within a specified time period, because reissuance is dependent upon another person desiring the membership and the Club's approval of the prospective member." Id. at *14.

Because the Court determined that the statements by the sales representative ***were not specifically covered*** or contradicted by the contract, they did not "categorically preclude the

Plaintiff's reliance on [the] alleged misrepresentations" that membership was growing fast, id. at *16-17, thereby fitting within the fraud exception to the parol evidence rule. By way of contrast, one cannot reasonably suggest that the statements attributed to Grieb in this case (as well as those contained in the advertisement brochures) are not specifically contradicted by, and squarely at odds with, the express terms of the R&C Agreement – an agreement that Savitsky had in her possession for ***four months*** prior to signing.

Plaintiff also attempts to avoid the reach of the parol evidence rule by arguing that the Disclosure Statement and the R&C Agreement are "at odds" with each other. This claim is without merit. The disclosure statement specifically directs and encourages the reader to look to the R&C Agreement for further details concerning the refundability of the entrance fee.

Given that the parol evidence rule bars the admissibility of the statements made by Grieb, as well as any of the marketing statements that contradict the express terms of the offering and contract documents statements (to the extent made ***prior*** to the signing of the R&C Agreement), I must determine whether the Estate can, without such evidence, still maintain a cause of action under the theories of common-law fraud, negligent misrepresentation, and/or the CFA. For the reasons set forth below, I conclude that it cannot.

1. Common Law Fraud.

Common law fraud consists of (1) a material misrepresentation of presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; and (4) reasonable reliance thereon by the other person; and (5) resulting damages. See Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). Since the statements complained of are barred by the operation of the parol evidence rule, Plaintiff cannot make out a prima faice case of fraud. Accordingly, this count of the complaint is dismissed.

2. Negligent Misrepresentation.

To sustain a claim for negligent misrepresentation, a Plaintiff must plead the following five elements: (1) an incorrect statement; (2) negligently made; (3) and justifiably relied on, and (4) as a result of such reliance; (5) one has suffered an ascertainable economic loss. See Kaufman v. I-Stat Corp., 165 N.J. 94, 109 (2000). Because the statements made by Grieb (as well as those contained in the marketing materials) are directly at odds with the express provisions of the contract, they cannot be introduced. As such, the plaintiff cannot proceed under a theory of negligent misrepresentation.[11]

3. The Consumer Fraud Act.

In order to bring a claim for consumer fraud under N.J.S.A. 56:8-19, (CFA), one must demonstrate: (1) that unlawful conduct occurred, (2) and caused (3) an ascertainable loss of moneys or property. See N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003). Unlawful acts that fall under this provision are outlined in N.J.S.A. 56:19-2:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of

[11] A prerequisite to maintaining an action under either common law fraud or negligent misrepresentation is that a plaintiff ***reasonably rely*** on the falsely or incorrectly made statements. See Kaufman, supra, 165 N.J. 94, 109 ("The element[sic] of reliance is the same for fraud and negligent misrepresentation.") Here, Plaintiff simply cannot demonstrate ***reasonable*** reliance given the specific terms of contract ***and*** the disclosure statement. Significantly, Plaintiff concedes that the R&C Agreement signed by her ***specifically addressed*** the issue of refundabilty of the entrance fees, as did the disclosure statement which unambiguously provides that the fee ***will not be refunded*** until "the execution of a new residence agreement for the Living Accommodation and expiration of the rescission period of the ***incoming resident.***" (Emphasis supplied). Unquestionably, the disclosure statement, coupled with the explanatory provisions detailed in the R&C Agreement would (or should) have alerted a reasonable person as to how the refundabilty of the investment would be calculated.

> any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . . .

Plaintiff first contends that the details regarding the refundabilty of the 90% entrance fee were "concealed" from DeSimone (and other members of the putative class). It is difficult to fathom how something specifically ***included*** in an agreement, could be said to have been concealed or omitted. As such, I am satisfied that this claim fails of its own weight.

Plaintiff's second alleged of violation of the CFA is based upon misleading advertising,[12] although which particular advertisement(s) was(were) in fact misleading, or whether DeSimone actually saw any of those misleading advertisements, has not been pleaded. While certain brochures were referred to in Plaintiff's reply papers, ***none*** of them could have been seen by DeSimone, since they ***were not used until after her passing***, and even then, they related to a ***different facility***. Compare Chattin v. Cape May Greene Inc., 243 N.J. Super. 590, 607 (App. Div. 1990) (Submission of CFA claims to the jury not required where "there was no evidence that any of the homeowners with consumer fraud claims had seen, read, or relied upon [the brochure in question.]"). Accordingly, without addressing the merits of the underlying misleading advertisement claim, I find that the Complaint insufficiently pleads a prima facie case of misleading advertising. That Count is, therefore, likewise dismissed.

[12] Because it is independent of the signed contract, this claim is not precluded by the parol evidence rule.

B. Breach of Covenant of Good Faith and Fair Dealing.

Plaintiff also alleges that Springpoint breached the covenant of good faith and fair dealing by "intentionally manipulating the Entrance Fees on relets through price reductions and other incentives." (Compl. ¶ 124 at 46), and that Springpoint abused its power as a drafter by shifting the risk of any downward reduction in Entrance Fees to Plaintiff (without disclosing such risk) while not offering to provide Plaintiff (or the putative class) with any upside if Entrance Fees were raised. Springpoint, in response, points to the absence of any evidence (or even any allegations) that it reduced unit prices in bad faith, or in a conscious effort to harm Ms. DeSimone or her family.

Every contract entered into in this State contains an implied covenant of good faith and fair dealing. See Sons of Thunder v. Borden, Inc., 148 N.J. 396 (1997); Wilson v. Amerada Hess Corp., 168 N.J. 236 (2001); Wade v. Kessler Inst., 172 N.J. 327 (2002). That covenant prevents one party from doing "anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Wilson, supra, 168 N.J. at 244. Although an implied covenant of good faith may not override any express terms of a contract, "a party's performance under a contract may breach that implied covenant even though that performance does not violate the pertinent express term." Id.

The fact that one party to the contract is empowered to determine price cannot, in and of itself, establish a violation of the covenant of good faith and fair dealing. See Wilson, supra, 168 N.J. at 244. Indeed, such is the reality in business transactions generally, and it is consistent with the normal expectations of consumers in their routine purchases, as well. That only one party

has the "upside" of any price increase, or unilaterally sets the purchase price, does not violate a party's good faith obligation.

The Wilson case, which addressed the duty owed by a party with unilateral power to set price in its contractual relationship, is instructive. There, a dealership entered into a contract to purchase gasoline from a distributor that retained the exclusive right to set the price. Id. at 240. The dealer argued that the distributor acted in bad faith by raising prices to a level where the dealer could not earn a profit, allegedly in furtherance of the dealer's scheme to replace independent franchise dealers with distributor-owned co-op stations. Id. In analyzing whether such actions violated the covenant of good faith and fair dealing, the Supreme Court framed the salient issue to be whether the discretion over price was exercised "arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract[,]" noting that allegations of bad faith or "unfair dealing should not be permitted to be advanced in the abstract and absent **improper motive**." Id. at 251 (emphasis supplied)(internal citations omitted).

Unlike the allegations in Wilson, supra, Springpoint has not been accused of purposely lowering its unit prices so as to intentionally deprive Plaintiff of a higher refund, a rather remarkable contention inasmuch as such an action would have the concomitant effect of reducing its own profits. This is especially so since Springpoint is also the sole beneficiary of any price ***increase.*** In point of fact, the Estate did not plead that Springpoint had an "improper motive," or that the discounts were offered for ***illegitimate*** reasons. To the contrary, it admits that given the (then) declining economy, Springpoint made a ***valid and reasonable business judgment***.

It is thus readily apparent that Plaintiff's complaints are not about Springpoint's ***performance*** of its contract, but rather, reflects Plaintiff's perception that the terms of the contract are simply unfair. Clearly, Springpoint's failure to "disclose" that it retained the right to change prices (through promotions and different payment options) is entirely irrelevant to Defendant's ***performance*** under the contract. Instead, it addresses its formation, at best. Because the doctrine of good faith and fair dealing applies only to the performance and enforcement of the contract, (see Wilson, supra, 168 N.J. at 245, (citing Restatement Second of Contracts § 205 (1981))) and does not deal with the formation or the dissatisfaction with the express terms thereof, this count fails as a matter of law.

C. Continuing Care Retirement Community Regulation and Financial Disclosure Act.

Plaintiff's complaint also alleges that Springpoint violated N.J.S.A.52:27D -336 (the CCRC) by: (1) omitting the material provisions regarding the refundabilty of 90% refundable fee in the ***disclosure statement,***[13] and (2) by failing to indicate (anywhere) that Springpoint retained the power and control over the sale and re-letting prices of the units. Springpoint, on the other hand, maintains that the Statute ***specifically authorizes*** such pricing provisions to be included in the R&C Agreement.[14]

[13] Of course, Plaintiff concedes that the refund details were included in the R&C Agreement. They maintain, however, that the Statute specifically required Springpoint to place this material provision in the ***disclosure statement***, and that its inclusion in the R&C Agreement alone was legally insufficient.

[14] Because control of its pricing is such a basic, commonly-known fact, Springpoint also suggests that requiring "disclosure" of its right to set prices would be superfluous.

The CCRC was enacted in 1986. It requires continuing care communities, such as Springpoint, to provide a disclosure statement to any prospective resident. Specifically, N.J.S.A.52:27D -336, ("the Disclosure Provision" or "Section 336") provides:

> The provider shall provide a **disclosure statement** to a prospective resident of a continuing care facility or the person with whom the provider shall enter into a contract to provide continuing care, prior to the execution of the contract or at the time of or prior to the transfer of any money or other property to the provider by or on behalf of the prospective resident, whichever occurs first. The cover page of the disclosure statement shall state in a prominent location and type face, the date of the disclosure statement. **The disclosure statement shall be written in plain English and in language understandable by a layperson.**
>
> The provider shall attach a copy of the **standard form of contract for continuing care used by the provider as an exhibit to each disclosure statement**.

(Emphasis supplied)

The section goes on to identify the types of information that must be disclosed to a prospective resident prior to occupancy:

> The disclosure statement shall contain the following information **unless the information is contained in the contract**:
>
> The name and business address of the provider and a statement of whether the provider is a partnership, corporation or other type of legal entity.
>
> * * *
>
> **A description of all fees required of residents, including the application fee, entrance fee and periodic charges, if any, the manner by which the provider may adjust periodic charges or other recurring fees and the limitation on the adjustments, if any,** and if the facility is already in operation or if the provider or operator operates one or more similar facilities within this State, tables showing the frequency and average dollar amount of each increase in periodic rates at each facility for the previous five years or as many years as the facility has been operated by the provider or operator, whichever is less.
>
> Other material information concerning the facility or the provider as required by the department **or** as the provider wishes to include.

N.J.S.A.52:27D -336 (emphasis supplied)

N.J.S.A. 52:27D-347 creates a "private" right of action through Section 347, which states:

> A provider or person acting on behalf of the provider is liable to the person who contracts for the continuing care for damages, including repayment of all fees paid to the provider, facility or person who violates this act plus interest thereon at the legal rate, court costs and reasonable attorney's fees, if the provider or person acting on behalf of the provider:
>
> **(1)** Enters into a contract for continuing care at a facility which does not have a certificate of authority issued pursuant to this act;
>
> **(2)** Enters into a contract for continuing care at a facility without having first delivered a disclosure statement to a person contracting for continuing care pursuant to this act; or
>
> **(3) Enters into a contract for continuing care at a facility with a person who has relied on a disclosure statement which omits a material fact required to be stated therein pursuant to this act**.

(Emphasis supplied)

Plaintiff here does not allege that Springpoint violated either sub-section (1) or (2) of this provision. Rather, the claim is that the disclosure statement does not, itself, contain a material provision regarding the refundability of the entrance fee. Accordingly, there are two novel issues to be resolved here. First, I must determine whether including the details of the entrance fee's refundability in ***the R&C Agreement,*** as opposed to the ***disclosure statement*** violates the Act; and second, whether the Statute mandates "disclosure" of the fact that Springpoint retained the right to change the prices of future re-lets.

The CCRC was enacted as a protective measure for New Jersey senior citizens. Recognizing that continuing care communities were becoming an increasingly "preferred alternative for the long-term residential, social and health care needs" for the elderly, the Lawmakers directed the Department of Community Affairs to establish a regulatory scheme to

monitor the operation of these facilities. See Seabrook Village, supra, 371 N.J. Super. at 329. The main thrust of the CCRC, however, was the legislative concern for the financial stability of these entities because "tragic consequences can result to senior citizens when a continuing care provider becomes insolvent or unable to provide responsible care," (Assembly Committee Nos. 2594 and 2613 (adopted January 24,1985 at p. 1)), and to ensure the "full disclosure of the contractual obligations and ownership of the facilities," along with the "full disclosure of the rights of residents in the facilities and the cost to the residents of residing in the facilities[.]" (See Sponsor Statement Assembly, NO. 2432, at 22). To that end, a "**continuing care contract is required to disclose specific information"** including the resident's rights and the duties of the provider. Id. at 23. Like the disclosure statement, the continuing care agreement must also be written in plain English. N.J.S.A. 52:27D-344.

A review of the statutory history and legislative intent does not support Plaintiff's contentions. While I am mindful of New Jersey's strong public policy of protecting our State's most vulnerable citizens,[15] that policy is neither jeopardized nor thwarted by allowing Springpoint to include important and material terms in its continuing care contract as opposed to the disclosure statement.[16] This is especially so, since the contract and the disclosure statement

[15] See e.g., N.J. Ass'n. for Retarded Citizens v. Human Serv., 89 N.J. 234, 252 (1982); see also, D.J.L. v. Armour Pharmaceutica Co., 307 N.J. Super. 61, 91 (Law Div. 1997).

[16] When faced with statutory enactments that related to the same subject matter, the language is "to be considered as a homogeneous and consistent whole, giving effect to all their provisions." Watson v. Jaffe, 121 N.J. Super. 213 (App. Div. 1972). Thus, the reviewing court is to analyze the statutory provisions, carefully examining the statutory language and legislative intent in an effort to harmonize the statutes. State v. Reavey, 213 N.J. Super. 37, 47 (App. Div. 1986). Of course,

> statutes are to be read sensibly rather than literally and the controlling legislative intent is to be presumed as 'consonant to reason and good discretion. We are further guided by the express instruction of the

(Footnote continues on the next page)

are both required to be written in plain, and untechnical language. I discern no legislative preference from either the statutory language or the legislative history that even suggests, much less requires, material information to be included within the four corners of one document as opposed to another, so long as the material terms ***are*** included, and are written in plain English.[17]

The CCRC expressly and unambiguously authorizes Springpoint to place its refund details in the attached/integrated R&C Agreement. Plaintiff's suggestion that the Statute and the private right of action ***ought*** to provide more safeguards for such a vulnerable segment of our

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> Supreme Court: It is the proper function, indeed the obligation, of the judiciary to give effect to the obvious purpose of the Legislature, and to that end words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms.

Seabrook Village v. Murphy, 371 N.J. Super. 319, 328 (App. Div.2004) (citing New Capitol Bar & Grill Corp. v. Div. of Emp't Sec., Dep't of Labor and Indus., 25 N.J. 155, 160 (1957)); see also State in the Interest of S.S., 367 N.J. Super. 400, 406 (App. Div. 2004)).

[17] In support of its contention that the ***disclosure statement*** alone must contain certain provisions, Plaintiff points to the comments of Governor Kean, in his statement to the Legislature urging it to "develop amendments which will provide workable and strong protections for senior citizens," especially because

> [w]hen a senior citizen joins a community, often he must turn over a substantial portion of his assets. In addition he is required to pay monthly maintained fees to ensure the continuation of services offered at the facility. In light of this I believe more safeguards should be built into this legislation to protect residents and prospective residents. For example, I believe that more complete disclosure requirements should be considered.

Pl's Op. Br. at 18.

Nothing in the Governor's remarks support the contention that material provisions must be disclosed in any particular document – only that such information be disclosed.

population, while laudable, falls more properly within the province of the Legislature and not the Courts.[18]

The logic of Springpoint's position is further supported by Am. Na. Bak & Trust of N.J. v. Presbyterian Homes of N.J., 148 N.J. Super. 465 (App. Div. 1977). In that case, Plaintiff alleged that a retirement community had violated the predecessor statute to the CCRC, the Retirement Community Full Disclosure Act (RCFDA), N.J.S.A. 45:22A-1,[19] by providing a misleading prospectus that failed to explain that the entrance fee paid by the resident would not be refunded if the he/she died while still a resident at the community. Id. at 468. The prospectus in that case, as in this case, had attached to it, and made specific reference to, the residence agreement, where the manner and extent to which the capital fee would be returned, was

[18] I am not unconcerned about the seriousness of the misrepresentations purportedly made by Grieb. The CCRC requires Springpoint to designate a person to answer any questions from potential residents regarding both the disclosure statement and the Residency and Care Agreement. Plaintiff alleges that Springpoint's designated representative, Grieb, intentionally or negligently misinformed and misled them. Such conduct, if true, is certainly inappropriate and worthy of criticism. It is, nonetheless (perhaps regrettably), not encompassed within the Private Right of Action, and as such, there is no recourse for this Plaintiff under the CCRC. Whether, and to what extent, sanctions for such behavior should be imposed, falls within the purview of the DCA, unless or until the Legislature, in its collective wisdom, expansively amends the Private Right of Action to include challenges to such fraudulent conduct.

[19] Although the case involved the predecessor Statute to the CCRC, Section 16 (a) of that Statute also imposed disclosure requirements:

> Any person who disposes of retirement subdivision or community lands in violation of section 5, or who in disposing of such lands covered by this act makes an untrue statement of a material fact, or who in disposing of such lands omits a material fact required to be stated in a statement of record or public offering statement or necessary to make the statements made not misleading, is liable as provided in this section to the purchaser unless in the case of an untruth or omission it is proved that the purchaser knew of the untruth or omission or that the person offering or disposing of subdivided lands did not know and in the exercise of reasonable care could not have known of the untruth or omission, or that the purchaser did not rely on the untruth or omission.

detailed. Id. at 469. The plaintiff there also argued that the prospectus was misleading, because it did not, itself, contain that particular provision. Finding no merit in that assertion, the court reasoned:

> The prospectus did in fact refer to the residence agreement in which the "no refund" provision is clearly set forth. Nor is there any requirement in the statute or regulations that such clause appear in the prospectus, N.J.S.A. 45:22A-7; N.J.A.C. 5:17-4.8. Our examination of the residence agreement satisfies us that the disclosure in the Residence agreement is sufficient to prevent the prospectus from being misleading.

Id. at 470.

Likewise, in this case, the R&C Agreement was specifically attached to, and made a part of, the Monroe Village disclosure statement. That disclosure statement expressly directed the reader to look to this agreement for an explanation regarding the circumstances, the extent and the manner in which an entrance fee would be refunded. Like the RCFDA before it, the CCRC simply does not require such material information to be placed in the ***disclosure statement*** as opposed to the ***R&C Agreement***. Provided the provision is written in plain, non-technical English, it is entirely appropriate, and of no moment, that it was included in the R&C Agreement.[20]

Plaintiff's second contention also lacks merit. Although neither the disclosure statement nor the R&C Agreement expressly noted that Springpoint may, from time to time, run marketing promotions, offer discounts on units, or accept different payment options, the R&C Agreement expressly indicates that a future resident may be charged a lower entrance fee than the one originally paid, since it provides that one would receive the "***LESSER*** OF THE ORIGINAL

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[20] Although this issue is not presently before me, it is probable that the refund provision satisfies the Act's plain English requirement.

FEE, ***OR THE SUBSEQUENT RESIDENT'S ENTRANCE FEE;*** (i) LESS A FEE . . . OF 10% OF THE ENTRANCE FEE[.]" (capitals in original)(emphasis supplied).

Accordingly, Plaintiff's claimed cause of action under the CCRC, to the extent based upon Springpoint's non-disclosure of its right to change the unit prices in Monroe Village, is dismissed.

V. Conclusion.

DeSimone and her family were in possession of both the R&C Agreement and the Disclosure Statement well in advance of contracting for, and acquiring, her unit. The disclosure statement, in bold, capital letters, cautioned them that: (1) the arrangement involved a financial risk; and (2) that they should consult with an attorney or financial advisor. They did neither. Whether they ever read the R&C Agreement or not, whether they understood the "lesser of" language or not, the fact remains that Plaintiff is bound by the terms and provisions of those documents.

While it remains unclear why Springpoint did not include the ***"lesser of"*** provision in its disclosure statement and advertising materials (as it evidently chose to do in at least one other development), I am nonetheless persuaded that based on the existing pleadings, no violations of Statutory, Regulatory, or Common Law principles have occurred.

For the reasons set forth above, Plaintiff's complaint is dismissed for failure to state a cause of action. Defendants shall submit an appropriate form of order under the five (5) day rule, incorporating this opinion by reference. No costs.