

SUSAN DOHERTY, on behalf of herself, and all others similarly situated, Plaintiff, v. THE HERTZ CORPORATION, AMERICAN TRAFFIC SOLUTIONS, INC., and PLATEPASS, LLC, Defendants.

Civil Action No.1:10-cv-00359 (NLH)(KMW)

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
NEW JERSEY**

**November 24, 2010, Decided
November 24, 2010, Filed**

EXCERPT OF OPINION:

OPINION

HILLMAN, District Judge:

This matter comes before the Court by way of the motion filed by defendants, The Hertz Corporation, American Traffic Solutions, Inc. and PlatePass, LLC seeking to dismiss the amended complaint of plaintiff, Susan Doherty. For the reasons expressed below, defendants' motion will be denied in its entirety.

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II. BACKGROUND²

To begin, an introduction of the relevant parties is beneficial. Defendants are The Hertz Corporation, American Traffic Solutions, Inc., and PlatePass, LLC. The Hertz Corporation ("Hertz") is a corporation engaged in the business of renting cars. American Traffic Solutions, Inc. ("ATS"), is a corporation engaged in the business of implementing and maintaining cameras and electronic toll enforcement programs on roads and highways throughout the country. PlatePass, LLC ("PlatePass") is a corporate subsidiary and/or registered trademark of ATS that provides an electronic toll payment service that enables rental car customers to use the high-speed, cashless electronic toll lanes on roads and highways.

Plaintiff, Susan Doherty, rented a vehicle from Hertz after she was involved in a traffic accident on September 23, 2009 and left without her own car. To effectuate the rental, Doherty entered into a written rental contract with Hertz. She signed three documents that comprised the rental agreement. First, she signed a document entitled "Terms and Conditions," which provided, among other things, that Doherty may be billed for tolls she incurred while using the rental vehicle and any administrative fees related to the cost of collection. Second, she signed a document entitled "Rental Record," which, like the Terms and Conditions, authorized the disclosure of Doherty's billing information to ATS for toll collection purposes. Finally, Doherty signed documentation concerning the condition of the vehicle. According to Doherty, the Terms and Conditions provided that only the documents signed by Doherty constituted the agreement for the rental of the vehicle. None of these three signed documents ever mentioned PlatePass, automatic or electronic toll collection services, or a flat, per diem administrative fee.

About a day after the initial transaction, Doherty exchanged her rental car for another. At that time, a Hertz representative informed Doherty that the terms of her initial agreement would not change and that her rental transactions would be treated as one continuous rental. When Doherty entered the rental vehicle, she noticed a PlatePass transponder device on the windshield with a notice stating that a toll is charged to the credit card used for the car rental. The notice made no mention of administrative fees.

On October 6, 2009, Doherty returned the second car after having used the PlatePass service to pay tolls on nine separate days during her approximate two-week rental period. When she returned her vehicle to Hertz, she received a statement of charges, showing the amount that she had paid for the rental and a number of fees and surcharges. The statement did not set forth any fees related to tolls or toll collection.

Shortly thereafter, Doherty received a bill from PlatePass that represented that she owed a small fee for the cash price of tolls and administrative fees. The invoice also had a notice declaring an administrative fee policy by which the rental car customer would be charged the cash prices for tolls and a \$2.50 per diem service fee, with a maximum fee charge of \$10 per week. According to the bill, Doherty owed a total amount of \$3.25.

While the invoice provided no indication that anything other than the small amount was owed or that Doherty's bank account would be accessed, on October 13, 2009, PlatePass deducted \$77.75 directly from Doherty's account without any further notice or authorization. Doherty referenced PlatePass' website and learned that she had been charged \$57.75 for tolls at the cash price and \$20 in administrative fees. She also discovered that, according to the website and in contradiction to the invoice, the maximum fee that could be charged to Doherty was \$10 per month, not per week.

On or around December 10, 2009, Doherty filed a complaint against Hertz, ATS, and PlatePass in the Superior Court of New Jersey. Defendants removed Doherty's action to this Court. Doherty amended her complaint and now alleges breach of contract, unjust enrichment, conversion, consumer fraud, and civil conspiracy against defendants. Among her litany of allegations, Doherty avers that defendants impermissibly charged her the posted cash amount for tolls rather than the less expensive, electronic toll fee that was actually charged. She also alleges that the PlatePass electronic toll services were not adequately disclosed in the parties' agreement, and that defendants impermissibly imposed administrative fees for times and amounts that were never disclosed or were misrepresented.

On or around April 2, 2010, defendants filed a Motion to Dismiss Doherty's amended complaint for failure to state a claim upon which relief may be granted.

III. DISCUSSION

B. Breach of Contract

Defendants argue that Doherty's amended complaint cites language in the rental agreement that expressly permits defendants to charge for tolls and administrative fees, and her pleaded facts demonstrate that she was properly charged under the rental agreement for use of the electronic toll payment service. Because the rental agreement's terms are clear and unambiguous, defendants argue, Doherty cannot create ambiguity where it does not exist.

Doherty claims that defendants breached the contract when, among other things, they charged her undisclosed administrative fees and charged her more than the tolls charged to the car. Doherty contends that defendants' reading of the contractual agreement is wrong and that, in any event, a factual question exists as to the contract's proper construction and scope.

To establish a breach of contract claim, a plaintiff must show that (1) the parties entered into a valid contract, (2) the defendant did not perform its obligations under the contract, and (3) the plaintiff suffered damages as a result. *Murphy v. Implicito*, 920 A.2d 678, 689 (N.J. App. Div. 2007) (citation omitted).

Turning to the terms of the documents that Doherty signed, which comprised the rental agreement, the Terms and Conditions stated:

13.a. PAY YOUR TICKETS/TOLLS IMMEDIATELY: You will be responsible for and pay all parking or traffic violation fines and penalties, all towing, storage and impoundment fees and all tolls and tickets charged to the Car during the rental period. You authorize Hertz to release your rental and charge card information to its designated vendor "American Traffic Solutions" for the exclusive purpose of processing and billing for fines, penalties and fees. You also agree to indemnify Hertz or American Traffic Solutions if they pay same. You agree to pay, upon billing, an administrative fee related to the cost of collection or cost of providing information about You to a court or governmental agency for each unpaid parking, toll or other citation incurred during the term of this rental.

(Amend. Compl. P 17). The only portion of the Rental Record concerning toll collection provided:

You authorize us to release your rental and charge card information to our designated vendor, American Traffic Solutions for the exclusive purpose of processing and billing tolls, parking or traffic violations fines and . . . penalties and related administration fees incurred during the term of your rental.

(Amend. Compl. P 19).

The Court begins with the assumption, which appears uncontested, that the written agreement between the parties at the time of contracting obligated Doherty to pay her own tolls, whether she did so in cash or by taking advantage of the PlatePass transponder device equipped in the rental vehicle. Stated differently, the Court does not understand Doherty's breach of contract claim to encompass a claim that defendants agreed by contract to assume the cost of the tolls. The Court also proceeds from the assumption that Doherty has acknowledged or would acknowledge that if she did not pay the tolls in cash and those tolls were paid by the PlatePass system, or some other means, that she was obligated by contract to reimburse defendants for the toll actually charged to the car.

Rather, the Court construes Doherty's contractual claim to contain two elements: (1) that the agreement only allowed defendants to charge administrative fees when Doherty breached her obligation to pay tolls when due, and (2) that the agreement only allowed defendants to seek reimbursement for the tolls actually charged to the rental car without any additional "up-charges." In essence, the Court reads Doherty's amended complaint to allege that she was overcharged for tolls and impermissibly billed for any and all administrative fees in breach of the written agreement between the parties. With respect to those latter two claims, the Court finds that Doherty has pleaded plausible causes of [*12] action for breach of contract.

More specifically, Doherty asserts that her contract with defendants did not permit them to charge administrative fees merely for her use of the electronic toll payment service. Rather, she submits, administrative fees could be imposed only for whatever efforts would be necessary to collect an unpaid toll. The Court agrees that a reading of the contract provisions, in *pari materia*, demonstrates that Doherty has stated a colorable claim. A reasonable interpretation of the Terms and Conditions and the Rental Record, when read together, is that defendants could charge administrative fees only for the cost of collecting an unpaid toll whenever a customer breached her duty to pay for the toll herself -- not that a fee could be charged simply for the customer's use of the electronic toll payment service. In other words, the contract fails to provide adequate notice about the applicability of the fees, and the occasions on and mechanisms through which they may be charged.

While Doherty should have known that she would have to reimburse any tolls justly charged to the defendants through the electronic toll payment service or other means, nothing in the contract indicates, expressly or unequivocally, that she would be responsible for administrative fees merely for availing herself of the convenience of the service. Moreover, because there is no suggestion that Doherty failed to pay for the tolls, defendants certainly did not have to undertake any collection efforts themselves. Accordingly, Doherty has stated a viable claim for breach of contract with respect to defendants' billing of administrative fees.

In addition, the Court construes Doherty's complaint to include a claim that defendants breached the written contract by charging an amount for the tolls themselves in excess of the amount actually charged by the toll collector to her rental vehicle. Doherty alleges that as part of the electronic toll payment service, defendants received a discounted toll charge, yet billed her the more expensive, cash price of the tolls. If, in fact, defendants' electronic toll payment service was credited with a discount but defendants nevertheless charged Doherty more than the actual cost of the tolls incurred by the service, Doherty may have a viable claim for breach of contract. Again, nothing in the contract appears to us to suggest or state that Doherty would be responsible for a greater amount of tolls than the amount actually incurred by the electronic service that she utilized. On the contrary, it is reasonable to read the contract as only requiring Doherty to pay the amount of tolls that were actually charged through the electronic toll payment service or other means.

Therefore, the Court concludes that based on the plain language of the parties' contractual agreement -- assuming *arguendo* the contract's validity -- Doherty has stated a claim for breach of contract upon which relief may be granted with respect to defendants' imposition of administrative fees and alleged up-charge of tolls. For the reasons stated above, defendants' Motion to Dismiss Doherty's breach of contract claim is denied.

C. Unjust Enrichment

Defendants argue that where there is an express contract covering the identical subject matter of the claim, Doherty cannot pursue a quasi-contractual claim for unjust enrichment. Defendants further contend that the rental agreement shows that they were entitled to collect the contested fees and charges, and there was no unjust benefit conferred upon them.

Doherty claims that the rental agreement does not allow defendants to impose administrative fees in connection with automatic toll collections unless certain costs were incurred nor may they up-charge on discounted tolls. Doherty asserts that there was no mutual assent in the contractual provisions concerning administrative fees and toll up-charges, and that such fees and charges were extra-contractual. Moreover, Doherty posits that the parties' contract is void for unconscionability. Thus, when defendants charged Doherty for undisclosed administrative fees and up-charged tolls, defendants were unjustly enriched at her expense and beyond the scope of a possibly void contract.

To establish a cause of action for unjust enrichment, a plaintiff must show that "defendant(s) received a benefit and that retention of that benefit without payment would be unjust." *Goldsmith v. Camden County Surrogate's Office*, 975 A.2d 459, 462 (N.J. App. Div. 2009) (citation and internal quotation marks omitted). Indeed, "[u]njust enrichment is not an independent theory of liability, but is the basis for a claim of quasi-contractual liability." *Id.* at 463 (citation and internal quotation marks omitted). While a plaintiff may not recover on both a breach of contract claim and an unjust enrichment claim, a plaintiff may plead alternative and inconsistent legal causes of action arising out of the same facts. See Fed. R. Civ. P. 8(d)(2) ("A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."), (3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."); *Shankman v. State*, 876 A.2d 269, 280 (N.J. 2005) (noting that "it is well settled" that plaintiffs "may plead alternative or inconsistent claims" (citing N.J. Ct. R. 4:5-6)); *Caputo v. Nice-Pak Prods., Inc.*, 693 A.2d 494, 497 (N.J. App. Div. 1997).

At this stage, Doherty may plead alternative legal theories. If the rental agreement is later found void for lack of mutual assent or unconscionability, then Doherty may proceed with her unjust enrichment claim. Alternatively, if a valid written contract existed on the terms she claims, then the existence of this contract would prevent Doherty from asserting a claim of quasi-contractual liability. For now, Doherty may advance her claim of unjust enrichment.

For the reasons stated above, defendants' Motion to Dismiss Doherty's unjust enrichment claim is denied.

D. Conversion

Defendants argue that Doherty's conversion claim sounds in tort and is barred as a matter of law because this case arises out of an undisputed contractual relationship and defendants did not owe any independent duties to Doherty. Further, defendants posit that Doherty, by agreeing to the contract and its clear language, authorized defendants to bill her bank account for fees and charges.

Doherty claims that she has a property interest in her bank account, and that defendants deprived her of her property by charging her account without notice or authorization. She contests defendants' assertion that the contract explicitly allows defendants, specifically PlatePass, to withdraw money from her account without more express authorization.

Conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *LaPlace v. Briere*, 962 A.2d 1139, 1144-45 (N.J. App. Div. 2009) (quoting *Barco Auto Leasing Corp. v. Holt*, 548 A.2d 1161, 1164-65 (N.J. App. Div. 1988)), certif. denied, 970 A.2d 1049 (2009). Although it is an intentional tort, a defendant need not knowingly or intentionally act wrongfully for a conversion to occur. *Id.* at 1145. Moreover, a plaintiff may plead alternative or inconsistent legal theories, such as breach of contract and conversion. See Fed. R. Civ. P. 8(d) (2),(3); *Shankman*, 876 A.2d at 280; *Caputo*, 693 A.2d at 497.

While defendants contend that Doherty's conversion claim cannot stand because a tort remedy does not arise from a contractual relationship, Doherty may plead in the alternative at this stage in the litigation. Doherty's complaint states that only the three signed documents constitute the entire rental agreement, and that the agreement never mentions a flat, per diem fee or PlatePass' electronic toll collection services. Doherty argues that through the pretext of the signed rental agreement with Hertz and ATS, PlatePass withdrew funds from Doherty's account without notice or authorization. Moreover, Doherty elsewhere suggests that the contract may be void due to lack of mutual assent or unconscionability. Thus, Doherty has at least stated a colorable claim of conversion against defendants, assuming *arguendo* the invalidity of the contract.

For the reasons stated above, defendants' Motion to Dismiss Doherty's conversion claim is denied.

E. Consumer Fraud

Defendants argue that Doherty has not pleaded an unlawful practice under consumer protection law because her amended complaint demonstrates that defendants disclosed in the rental agreement all fees and charges. Defendants also assert that Doherty has failed to plead facts that, if proven true, would evince that defendants knowingly concealed the administrative fees with the intent of inducing Doherty's reliance upon the alleged omission.

Doherty claims, among other things, that defendants misrepresented and did not disclose certain pertinent information and committed unconscionable practices by failing to make clear: (1) the connection between PlatePass, the electronic toll payment services, and the administrative fee policy; (2) the amount of administrative fees, the manner in which they are calculated, and the occasions on which they are assessed; (3) whether the rental involving two vehicles would be treated as a single transaction for billing purposes; and (4) whether she would be charged the discounted cost of tolls that defendants incurred or the more expensive cash value of the tolls.

The New Jersey Consumer Fraud Act (CFA) "imposes liability on any person who uses: '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.'" *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d 1076, 1086 (N.J. 2007) (quoting N.J.S.A. § 56:8-2); see *Furst v. Einstein Moomjy, Inc.*, 860 A.2d 435, 440 (N.J. 2004) (same). In analyzing claims under the CFA, there are only three elements required for *prima facie* proofs: (1) unlawful conduct by defendant; (2) an ascertainable [*22] loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss. *Merck & Co.*, 929 A.2d at 1086.

Accepting Doherty's pleadings as true as is required at this stage of litigation, she has asserted facts that may establish a prima facie case of consumer fraud. First, Doherty has alleged facts that, if true, could demonstrate unlawful conduct by defendants. For example, if defendants charged Doherty for undisclosed fees and up-charged tolls, or misrepresented the applicability of those fees, then defendants may have committed consumer fraud. Moreover, for those omissions or nondisclosures that require intent or knowledge to constitute an unlawful practice, Doherty highlights the timing, manner, and incongruity of the notices that she received and pointedly suggests that lack of any earlier or comprehensive disclosures -- for the per diem administrative fee charge, for example -- may evince the intent or knowledge to conceal or omit a material fact. Second, Doherty has shown an ascertainable loss by explaining the exact fees and charges that were allegedly undisclosed or misrepresented, but were still charged to her account. Finally, Doherty has asserted [*23] facts that show a causal connection between the unlawful conduct and the ascertainable loss when she averred that she was charged for non-disclosed and misrepresented fees and charges through the pretext of her rental agreement with Hertz.

For the reasons stated above, defendants' Motion to Dismiss Doherty's consumer fraud claim is denied.

IV. CONCLUSION

For the foregoing reasons, defendants' Motion to Dismiss Doherty's amended complaint is denied in its entirety. An Order consistent with this Opinion will be entered.

Date: November 24, 2010
At Camden, New Jersey

/s/ NOEL L. HILLMAN

Hon. Noel L. Hillman, U.S.D.J.