SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,	**:**	**Case No. 2018 CA 8262 B**
***Plaintiff*,**	**:**	
	:	
v.	**:**	
	:	
EVOLVE, LLC,	**:**	
***Defendant*.**	**:**	**Judge Heidi M. Pasichow**

ORDER (1) DENYING DEFENDANT'S MOTION TO DISMISS; AND (2) GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court based upon Plaintiff District of Columbia's (the "District") Motion for Summary Judgment ("Summary Judgment Motion"), filed on November 1, 2019, and Defendant Evolve, LLC's ("Evolve") Motion to Dismiss ("Motion for Judgment on the Pleadings"), also filed on November 1, 2019. Defendant seeks to dismiss this case for failure to state a claim. Plaintiff seeks Summary Judgment, arguing that no reasonable juror could find for Defendant. All parties are represented by Counsel. The Court denies the Motion for Judgment on the Pleadings and grants the Motion for Summary Judgment.

I. *Procedural History*

This case began on November 28, 2018 when Plaintiff filed the Complaint against Evolve, LLC and Evolve Property Management, LLC, alleging that Defendants had violated the Consumer Protection Procedures Act ("CPPA") by refusing to rent units in Defendants' building, located at 821 Maryland Ave., N.E. Washington, D.C. 20002, to applicants receiving subsidies from the United States Department of Housing and Urban Development's ("HUD") Housing Choice Voucher Program ("HCVP"). On November 30, 2018 Plaintiff filed Plaintiff's Motion for a Temporary Restraining Order ("TRO"), and Plaintiff's Motion for Preliminary Injunction ("PI"). On December 17, 2018 Plaintiff voluntarily dismissed Defendant Evolve Property

Management, LLC without prejudice, leaving only Defendant Evolve, LLC. On January 1, 2019 this case was transferred to Judge Heidi M. Pasichow.

On January 23, 2019 the parties appeared before Judge Pasichow for a Hearing on Plaintiff's Motion for TRO and Plaintiff's Motion for PI. At the January 23, 2019 Hearing the parties agreed to a resolution of Plaintiff's Motion for TRO and Plaintiff's Motion for PI, and the Court therefore denied the Motions as moot. The Court also entered, with the consent of the parties, a Track 3 Scheduling Order on January 23, 2019.

On May 15, 2019 Plaintiff filed Plaintiff's Motion for Partial Summary Judgment as to Liability. On May 28, 2019 Defendant filed Defendant's Motion to Extend Defendant's Time to Oppose Motion for Partial Summary Judgment. On June 4, 2019 the Court granted Defendant's Motion to Extend Defendant's Time to Oppose Motion for Partial Summary Judgment. On June 5, 2019 Defendant filed Defendant's Second Motion to Extend Defendant's Time to Oppose Motion for Partial Summary Judgment, which the Court granted on June 10, 2019. On June 12, 2019 Defendant filed Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment as to Liability. On June 19, 2019 Plaintiff filed Plaintiff's Reply in Support of [Plaintiff's] Motion for Partial Summary Judgment as to Liability.

On July 22, 2019 Plaintiff filed Plaintiff's Consent Motion to Revise the Court's Scheduling Order, which the Court granted on July 24, 2019. On August 15, 2019 Plaintiff filed Plaintiff's [Second] Consent Motion to Revise the Court's Scheduling Order, which the Court granted on August 16, 2019. On September 9, 2019 the Court denied Plaintiff's Motion for Partial Summary Judgment as to Liability without prejudice, finding that Plaintiff was effectively asking for an advisory opinion.

On September 17, 2019 Plaintiff filed Plaintiff's [Third] Consent Motion to Revise the Court's Scheduling Order, which the Court granted on September 26, 2019. On November 1, 2019 Plaintiff filed the instant Motion for Summary Judgment. On the same day, Defendant filed the instant Motion to Dismiss. On November 15, 2019 Plaintiff filed Plaintiff's Opposition to Defendant's Motion to Dismiss and Defendant filed Defendant's Opposition to Plaintiff's Motion for Summary Judgment on Liability. On November 22, 2019, Plaintiff filed Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment on Liability and Defendant filed Defendant's Reply in Support of [Defendant's] Motion to Dismiss.

The parties attended mediation on January 8, 2020 but were unable to resolve the instant dispute. On February 5, 2020 Plaintiff filed Plaintiff's Motion in Limine to Exclude Evidence of Intent, and also filed Plaintiff's Consent Motion in Limine to Confirm the Scope of Bifurcation of Liability and Remedies Issues, asking the Court to bifurcate any trial in this case into first a trial on liability and second a trial on damages, if any.

II. *Legal Standard*

a. Motion for Judgment on the Pleadings

As a preliminary matter, Defendant's Motion to Dismiss is properly considered as a Motion for Judgment on the Pleadings. A Motion to Dismiss for Failure to State a Claim is exceedingly untimely at this stage. A Motion to Dismiss alleging that a Complaint fails to state a claim for relief "must be made before a pleading." Super. Ct. Civ. R. 12(b). Although failure to assert a defense of failure to state a claim does not waive the defense, Super. Ct. Civ. R. 12(h)(2), it does preclude the party from raising the defense by Motion. The instant Motion to dismiss was filed nearly eleven (11) months after Defendant filed a responsive pleading in this case. Accordingly, a Motion made under Superior Court Rule of Civil Procedure 12(b)(6) is untimely.

However, Defendant is allowed to present the instant Motion as a Motion for Judgment on the Pleadings. Super. Ct. Civ. R. 12(h)(2)(B); Super. Ct. Civ. R. 12(c). The standard for considering a Motion for Judgment on the Pleadings is effectively the same as the standard for considering a Motion to Dismiss for Failure to State a Claim. *Osei-Kuffnor v. Argana*, 618 A.2d 712, 713 (D.C. 1993). Accordingly, the Court will consider Defendant's Motion as a Motion for Judgment on the Pleadings, which is decided on the same standard as a Motion to Dismiss.

To survive a Motion to Dismiss, a Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543-44 (D.C. 2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Dismissal of a Complaint for failure to state a claim upon which relief can be granted should only be awarded if "it appears beyond doubt that the Plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *See* Super. Ct. Civ. R. 12(b)(6); *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 (D.C. 1999).

When considering a Motion to Dismiss, a Court must "construe the facts on the face of the Complaint in the light most favorable to the non-moving party, and accept as true the allegations in the Complaint." *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996). A Court should not dismiss a Complaint merely because it "doubts that a Plaintiff will prevail on a claim." *See Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997). However, the Court need not accept inferences if such inferences are unsupported by the facts set out in the Complaint. *See Kowal v. MCI Comm. Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Nor must the Court accept legal conclusions cast in the form of factual allegations. *Id.*

A pleading must contain a "short and plain statement of the claim showing that the pleading is entitled to relief." *See* Super. Ct. Civ. R. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). To survive a Motion to Dismiss under Super. Ct. Civ. R. 12(b)(6), a Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the Plaintiff pleads factual content that allows the Court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Id.*

b. Motion for Summary Judgment

Rule 56(a) provides in relevant part, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995); *Smith v. Washington Metropolitan Area Transit Authority*, 631 A.2d 387, 390 (D.C. 1993). In meeting their burden to show that there is no genuine dispute to any material fact, the movant must provide "evidence from which, were it accepted as true, a trier of fact might find for the [movant]." *Allen v. District of Columbia*, 100 A.3d 63, 67 (D.C. 2014).

If the moving party successfully carries this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013); *Bruno v. Western Union Financial Services, Inc.*, 973 A.2d 713, 716 (D.C. 2009); *Osbourne*, 667 A.2d at 1324. This standard does not merely require an opposing party to raise a disputed factual issue, but rather show that the fact is material and that there is sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial. *William J. Davis, Inc. v. The Tuxedo LLC*, 124 A.3d 612,624 (D.C. 2015).

Viewing the non-moving party's evidence in the light most favorable to it, the Court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Hunt v. District of Columbia*, 66 A.3d 987, 990 (D.C. 2013). The Court may grant summary judgment only if no reasonable juror could find for the non-moving party as a matter of law. *Biratu v. BT Vermont Avenue, LLC*, 962 A.2d 261, 263 (D.C. 2008); *Tucci v. District of Columbia*, 956 A.2d 684, 690 (D.C. 2008). In making this determination, the court cannot "resolve issues of fact or weigh evidence at [this] stage." *Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1244 (D.C. 2009). Making credibility determinations, weighing the evidence, and drawing legitimate inferences from the facts are *jury* functions, not those of a judge. *Anderson,* 477 U.S. at 255. If the court declines to grant all relief requested, the court may "enter an order stating any material fact— including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case." Super. Ct. Civ. R. 56(g).

III. *Analysis*

a. Law of the Case

As a preliminary matter, the Court addresses an argument underlying both Defendant's Motion and Defendant's Opposition to Plaintiff's Motion: that the Court's September 9, 2019 Order bars certain findings under the doctrine of law of the case. The Court's September 9, 2019 Order denied Plaintiff's Motion for Partial Summary Judgment because Plaintiff was asking for an advisory opinion that a violation of the HRA was inherently a violation of the CPPA in all cases, when the case before the Court is to determine the liability of Defendant. The Court also expressed skepticism for Plaintiff's position that a violation of the HRA automatically constituted a CPPA violation, but denied the Motion for Partial Summary Judgment on

procedural grounds as discussed above. The Court at no point ruled that a violation of the HRA cannot, on its own, be a violation of the CPPA. Accordingly, Defendant's law of the case argument is unpersuasive.[1]

b. Motion for Judgment on the Pleadings

The Court denies Defendant's Motion as Plaintiff has stated a claim which, if proven at trial, would entitle Plaintiff to relief. First, Defendant argues that the Court has, in its September 9, 2019 Order, already ruled that it is not enough for Plaintiff to plead violation of another law to in turn plead a CPPA violation. Defendant argues that Plaintiff must couple the allegation of a violation of another law (in this case the D.C. Human Rights Act ("HRA")) with other allegations of conduct that would violate the CPPA. However, as noted above, Defendant misinterprets the Court's September 9, 2019 Order.

Defendant also argues that Plaintiff has not pled sufficient facts to show that Defendant intentionally made misrepresentations of material facts. However, intent is not an element that Plaintiff is required to prove. *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 422 (D.C. 2013).

Next, Defendant argues that Plaintiff must allege facts sufficient to show a material omission as defined by the Federal Trade Commission ("FTC"). However, the CPPA is not limited solely to scenarios where the FTC would find a violation. Although the Court may consider the FTC's interpretation of unfair trade practices, D.C. Code § 28-3901(d), the D.C. City Council has expressly provided that the language in question was intended to "expand the

[1] Even if the Court had ruled that pleading a violation of the HRA is not enough to plead a violation of the CPPA, the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided and is not a limit to their power." *Kleinbart v. United States*, 604 A.2d 861, 866 (D.C. 1992). "The law of the case doctrine . . . is, in any event, discretionary." *In re Sa.C.*, 178 A.3d 460, 462 (D.C. 2018). It is fully within the Court's discretion to consider revisiting previously raised issues, *Minick v. United States*, 506 A.2d 1115, 1117 (D.C. 1986). Even if the Court had ruled that Plaintiff must allege additional information to allege a violation of the CPPA, the Court could exercise its discretion to revisit that ruling.

scope of the CPPA." Committee of the Whole, Report on Bill 22-185, the "Consumer Protection Clarification and Enhancement Amendment Act of 2018." Accordingly, although the Court may consider the FTC's interpretation of what constitutes an unfair trade practice, the Court is not bound to only the FTC's interpretation, but may also consider other sources of authority.

One such source of authority that is binding upon this Court is the District of Columbia Court of Appeals, which has previously held that an allegation of a violation of the law of the District of Columbia is "actionable under the CPPA." *Dist. Cablevision Ltd. P'shp v. Bassin*, 828 A.2d 714, 722 (D.C. 2003). Although the issue of a whether a violation of the HRA rises to the level of a *per se* violation of the CPPA is dealt with below, the allegation of a violation of the HRA is sufficient to allow the Complaint to survive a Motion for Judgment on the Pleadings. Accordingly, the Court denies the Motion for Judgment on the Pleadings.

c. Motion for Summary Judgment

Plaintiff asserts two separate grounds for finding in its favor and granting it Summary Judgment. First, Plaintiff asserts that it has shown that there is no material dispute of fact that Defendant violated the CPPA by making representations that prospective tenants receiving HCVP subsidies were not qualified to rent apartments at Defendant's property because that misrepresentation was both material and tended to mislead. While Defendant did falsely represent that persons receiving subsidies under the HCVP were not qualified to rent the units in question,[2] "[o]rdinarily the question of materiality should not be treated as a matter of law."

[2] The Court notes that Defendant explains its behavior by representing that the owners of Defendant had recently moved to the United States Virgin Islands, which made it difficult to communicate with the D.C. Department of Consumer Regulatory Affairs as well as to receive physical checks in relation to the HCVP subsidy. This is immaterial to the Court's analysis. Defendant was transacting business in the District and wass of course obligated to comply with its legal obligations no matter where its owners were located. Defendant's general list of procedural and bureaucratic grievances with District agencies show inconvenience at best, and Defendant has not cited any authority that would relieve Defendant of its legal obligations when it was inconvenient for Defendant to comply with its legal duties.

Saucier v. Countrywide Home Loans, 64 A.3d 428, 442 (D.C. 2013) (quoting *Green v. H & R Block, Inc.*, 355 Md. 488, 735 A.2d 1039, 1059 (Md. 1999)) (internal quotations omitted). As the materiality of the misrepresentations is in dispute, it is for the finder of fact to decide the materiality of the misrepresentations after trial, and the Court denies Summary Judgment on the first grounds.

Next, the Court turns to Plaintiff's argument that a violation of another law of the District of Columbia is automatically a CPPA violation when made in the context of a consumer transaction. The Court again notes that its September 9, 2019 Order did not conclusively rule on this issue, but even if it had the doctrine of law of the case is not a bar to this Court's authority. The Court finds that a violation of the HRA is not necessarily a violation of the CPPA, but the Court finds that a violation of the HRA in the context of a consumer transaction is a violation of the CPPA and enters Summary Judgment for the Plaintiff.

The Court of Appeals has held that a Plaintiff need only show (1) violation of a District of Columbia statute; (2) in the context of a consumer transaction to succeed on a claim under the CPPA. *Dist. Cablevision Ltd. P'shp v. Bassin*, 828 A.2d 714, 722-723 (D.C. 2003) (it is sufficient to show violation of the law of the District in a consumer transaction to show a CPPA violation); *accord Atwater v. District of Columbia Dep't of Consumer & Reg. Affairs*, 566 A.2d 462, 465 (D.C. 1989); *Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 325-26 (D.C. 1999). Accordingly, if Plaintiff shows that there is no material dispute of fact that Defendant violated a District of Columbia Statute and that the violation occurred in the context of a consumer transaction, then Plaintiff is entitled to Summary Judgment. The parties do not dispute that Defendant was a merchant within the meaning of the CPPA and that the transaction in question was a consumer transaction as defined by the CPPA. *See, e.g.*, D.'s Opp. to Pl.'s Mot.

Sum. J. Therefore, the Court need only determine whether Defendant violated the HRA as Plaintiff asserts.

The HRA explicitly prohibits Defendant from discriminating against a prospective tenant on the grounds of a tenant's "source of income," such as a subsidy from the HCVP. D.C. Code § 2-1402.21(a). Here, it is undisputed that Defendant not only did not allow prospective tenants receiving a subsidy from the HCVP to schedule showings, but Defendant also advertised and explicitly informed prospective tenants that Defendant did not accept "Section 8" vouchers (using the colloquial term for HCVP subsidies). *Compare* Pl.'s Statement of Undisputed Material Facts *with* D.'s Responses to Pl.'s Statement of Undisputed Material Facts. Defendant therefore violated the HRA by failing to "initiate or conduct any transaction in real property," D.C. Code § 2-1402.21(a), due to the source of income of prospective tenants: their reception of HCVP subsidies. Defendant, by discriminating against HCVP recipients, violated the District's Human Rights Act. Accordingly, because the HRA violation occurred in the context of a consumer transaction, Defendant is liable for a breach of the CPPA, and Plaintiff is entitled to Summary Judgment.

IV. *Conclusion*

Plaintiff has not only pled a violation of the CPPA, but has shown that no material dispute of fact exists as to the Defendant's violation of the CPPA. Plaintiff is therefore entitled to Summary Judgment that Defendant is liable for violating the CPPA. The Court therefore grants the Motion for Summary Judgment, denies the Motion for Judgment on the Pleadings, denies all other outstanding Motions as moot. The Court accordingly vacates the February 26, 2020 Pretrial Conference and reschedules it for March 24, 2020 at 2:00 P.M. to resolve the outstanding issue

of damages. The Court orders the parties to submit an Amended Joint Pretrial Statement on or before March 17, 2020.

For the foregoing reasons, it is this 25th day of February, 2020,

ORDERED that the Plaintiff's Motion for Summary Judgment is **GRANTED**; it is,

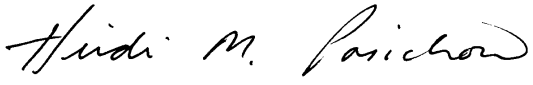
FURTHER ORDERED that Defendant's Motion to Dismiss is **DENIED**; it is,

FURTHER ORDERED that Plaintiff's Motion in Limine to Exclude Evidence of Intent is **DENIED AS MOOT**; it is,

FURTHER ORDERED that Plaintiff's Consent Motion in Limine to Confirm the Scope of Bifurcation of Liability and Remedies Issues is **DENIED AS MOOT**; it is,

FURTHER ORDERED that the Pretrial Conference set for February 26, 2020 is **VACATED AND RESCHEDULED TO MARCH 24, 2020 AT 2:00 P.M. IN COURTROOM 516**; and it is,

FURTHER ORDERED that the parties **SHALL FILE** an **AMENDED JOINT PRETRIAL STATEMENT ON OR BEFORE MARCH 17, 2020**.



Heidi M. Pasichow
Associate Judge

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