FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CLARINDA BESONG, **Plaintiff,** **vs.** **MOBIL OIL MARIANA ISLANDS, INC. and A. A. ENTERPRISES, INC.,** **Defendants.**	**CIVIL ACTION NO. 07-0095C** **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND CAUSE OF ACTION**

I. Introduction

THIS MATTER came before the Court for a hearing on January 7, 2008 at 1:30 p.m. in Courtroom 220A on the motion of Defendants Mobil Oil Mariana Islands, Inc., and A. A. Enterprises, Inc., to dismiss Plaintiff's Second Cause of Action as stated in Plaintiff's Second Amended Complaint. Defendants appeared by and through attorneys Vincent J. Seman and John D. Osborn. Plaintiff was represented by George L. Hasselback, Esq. After considering the arguments of counsel, and for the reasons fully stated on the record, the Court issued its ruling granting Defendants' motion and dismissing Plaintiff's Second Cause of action without leave to amend.

II. Procedural Background

Plaintiff's original complaint was filed March 19, 2007, alleging a single cause of action for negligence arising from an April 3, 2006, slip-and-fall accident that occurred when she exited Defendants' store at the Mobil station in Chalan Piao, Saipan. Defendants' answer was filed on May 2, 2007. On July 9, 2007, by stipulation, Plaintiff amended her complaint to correct the name of one defendant and Plaintiff's First Amended Complaint was answered by Defendants on July 17, 2007. On July 31, 2007, Plaintiff sought a second stipulation to include an additional claim under the CNMI Consumer Protection Act (4 CMC §§ 5101-5123) ("CPA") against both Defendants, which Defendants rejected. On August 6, 2007, Plaintiff moved the Court for leave to amend her complaint pursuant to Com. R. Civ. P. 15(a). Defendants objected to the proposed amendment, arguing that the factual allegations of the complaint were insufficient to state a cause of action under the CPA and that the proposed amendment would be futile, because the claim would necessarily be subject to dismissal under Com. R. Civ. P. 12(b)(6). (Defs.' Opp'n to Pl.'s Mot. pp. 4-6).

On September 17, 2007, the Court heard argument on Plaintiff's motion to amend, including arguments for and against the availability of a remedy under the CPA for the harm alleged by Plaintiff. The Court granted Plaintiff leave to amend her First Amended Complaint to attempt to state a cause of action for Defendants' alleged consumer-protection violation(s) under the CPA. The Court stated as a reason for its ruling that the precise scope of the CPA has not yet been settled in the CNMI by judicial decisions and that the issue would best be decided in the context of a Rule 12(b)(6) motion, once the pleading was filed with the Court and the Plaintiff could, through further briefing and citation to legal authority, defend the legal sufficiency of her claim as well as to allow Defendants the opportunity to rebut Plaintiff's arguments. Plaintiff filed the Second Amended Complaint on October 26, 2007. Defendants responded with the present motion to dismiss Plaintiff's Second Cause of Action alleging Defendants' violation of the Consumer Protection Act.

III. Analysis

Plaintiff submits that the legal sufficiency of her Second Cause of Action was impliedly decided in her favor when the Court allowed her to file an amended complaint and therefore the issue is now moot under the doctrine of the law of the case. (Opp'n to Mot. to Dismiss, pp. 3-7). This argument is rejected as contrary to the record of the prior proceeding and

unsupportable under the law of the case doctrine. *Wabol v. Villacrusis*, 4 N.M.I. 314, 318 (1995); *See*, 6 WRIGHT & MILLER, FED. PRAC. & PROCEDURE, CIV. § 1487, n. 21.[1]

In support of her claim for relief under the Consumer Protection Act, Plaintiff argues that the concrete ramp at the entrance to Defendant's store and upon which she slipped should be construed as a "service" which Defendant introduced "into commerce" as contemplated by the Act. (Opp'n to Mot. to Dismiss, p. 8; Second Amended Complaint, ¶ 31). Plaintiff cites a previous ruling of this Court in an unrelated case for the proposition that, as a remedial statute and pursuant to 4 CMC § 5123(a), the consumer protection provisions of the CPA should be liberally construed and that any ambiguous terms found in the Act should be interpreted in favor of the consumer. *NMHC v. SSFM Int'l, Inc.*, Civ. No. 06-0123 (N.M.I. Sup. Ct. 2007) (Order, Dec. 20, 2006, p. 14) (*amended*, April 9, 2007). Plaintiff also cites a Connecticut Superior Court decision sustaining a cause of action based upon personal injury by an apartment-building tenant under Connecticut's Unfair Trade Practices Act against the tenant's landlord when the landlord was alleged to have knowingly violated another statute intended to protect the safety of tenants. *Simms v. Candela*, 711 A.2d 778, 782 (Conn.Super. 1998).

Plaintiff's cited authority is inadequate to support a cause of action for relief under the CPA based upon the facts stated in the Second Amended Complaint. In interpreting the statute, the Court is guided in the first instance by the plain meaning of the words used therein, as understood from the context of the entire statute. *Commonwealth Ports Authority v. Hakubotan Saipan Ent., Inc.*, 2 N.M.I. 212, 222-224 (1991). A "service" in trade is ordinarily understood to be "[a]n intangible commodity in the form of human effort, such as labor, skill, or advice." BLACKS LAW DICTIONARY (8th ed. 2004). The CPA provides a remedy for "unfair or deceptive acts or practices in the conduct of any trade or commerce," that applies to commerce in "services" which the merchant knows or should know will be unsafe in normal use, "including performing a service which may cause an unsafe condition." 4 CMC § 5105(r).

The Court finds no ambiguity in the word "services," however, and the plain meaning of the word as it appears in the CPA cannot be stretched to include Plaintiff's use of the concrete ramp at the entrance to Defendants' store as described

[1] Plaintiff relied on the federal district court decision of *City of Charleston, South Carolina v. Hotels.com,LP*, et al., ___ F.Supp.2d ___ , 2007 WL 3256707 (D.S.C.), in support of her "law of the case" doctrine argument. This Court finds it factually distinguishable because in *Hotels.com*, the court addressed the same issues raised by the defendants in their motion to dismiss. *Id. at 12*. In this case, the Court specifically did not entertain the legal arguments on the CPA issue raised by the Defendants in granting Plaintiff's Motion to Amend until both parties briefed it fully.

in the Third Amended Complaint. Although the ramp is a publicly accessible portion of the premises from which Defendants conduct business, Defendants did not "sell, advertise, offer for sale, contract for sale, exchange, distribute for consideration, or solicit for purchase" the use of the ramp to Plaintiff or to the general public, nor is the use of the ramp a commodity in the form of "human effort, such as labor, skill, or advice." 4 CMC § 5104(b). In sum, Defendants' maintenance of the ramp, or its premises generally, was simply not the subject of a transaction that falls within the CPA. *See*, *Rojas v. Wal-Mart Stores, Inc.*, 857 F.Supp. 533, 537 (N.D. Tex. 1994), *citing*, *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1029 (5th Cir. 1991). The *Simms* decision cited by Plaintiff, in which the merchant-consumer transaction at issue was a residential lease between a landlord and tenant and where the landlord was assumed to have knowingly leased the premises to the tenant in separate violation of public policy, is clearly distinguishable. *Simms*, *supra*, 711 A.2d at 781.

Moreover, the court in *Simms* itself noted: "This reasoning does not mean that every slip and fall by a tenant can be turned into a [consumer protection] violation. If a landlord negligently drops a banana peel on the steps and a tenant falls as a result, the landlord may well be liable in negligence, but there would be no [consumer protection] violation." *Id*. While the Court interprets the CPA liberally in favor of its remedial purpose, it may not apply conjectural or hyper-extended definitions of ordinary terms to augment its scope. *Commonwealth v. Saburo*, 2002 MP 3, ¶ 12 (Castro, A.J., *dissenting*) ("It is a clear principal of statutory construction that the intention of the legislature is to be sought for primarily in the language used and when the language expresses an intention reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture."). This Court has previously indicated that it will judge the sufficiency of a cause of action under the CPA by comparing the reasonably interpreted statutory provisions to the plaintiff's factual allegations taken as true; it is insufficient to simply append a CPA claim to any civil action in which the defendant happens to be in business. *NMHC v. SSFM Int'l, Inc.*, (Order, p. 10), *citing*, *La Mode, Inc., v. Wang Tai Ent. (Int'l) Dev., Ltd.*, (D.N.M.I. Civ. No. 99-0023, May 18, 2000). In this case, the concrete ramp at the entrance to Defendants' store cannot reasonably be construed to be a "service" that Defendants "introduced into commerce" as contemplated by the CNMI's Consumer Protection Act and Plaintiff has alleged no further facts that may sustain a claim for relief under the CPA.

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IV. Conclusion

For the reasons stated above and on the record, Defendants' motion to dismiss Plaintiff's Second Cause of Action for violation of the CNMI Consumer Protection Act (4 CMC §§ 5101-5123) is GRANTED.

SO ORDERED this 15th day of January, 2008.

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RAMONA V. MANGLONA, Associate Judge