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THE ARC MERCER, INC., Plaintiffs, v. MEDIANEWS GROUP, THE TRENTONIAN, and L.A. PARKER, Defendants.	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY LAW DIVISION DOCKET NO. MER-L-000168-23 CIVIL ACTION **ORDER ON MOTION TO DISMISS**

THIS MATTER having been opened to the Court by Ballard Spahr LLP, attorneys for Defendants MediaNews Group, owner of The Trentonian newspaper, and L.A. Parker ("Defendants"), by way of a motion to dismiss the complaint of plaintiff The Arc Mercer, Inc. ("Plaintiff"), pursuant to R. 4:6-2(e) ("Motion"); and the Court having considered the papers in support of the Motion, together with any papers in opposition thereto, as well as the arguments of counsel, if any; and good cause having been shown;

IT IS THIS 28th day of August, 2023 hereby **ORDERED** as follows:

1. Defendants' Motion is **GRANTED** and the complaint filed by Plaintiff is hereby **DISMISSED WITH PREJUDICE**.

/s/ R. Brian McLaughlin
HON. R. BRIAN MCLAUGHLIN, J.S.C.

Opposed [x]
Unopposed [ ]

Statement of Reasons

This matter comes before the Court on a motion to dismiss. Arc Mercer LLC brought the instant action alleging a single count of a violation of the New Jersey Law Against Discrimination ("NJ LAD"). Movant Defendants argue Plaintiff has failed to plead facts to sustain a prima facie case under NJ LAD, and the alleged actions are outside the NJ LAD's statutory grant. Additionally, Movants maintain 303 Creative v. Elenis, 143 S. Ct. 2298 (2023), controls and abrogates any previous binding precedent pertaining to "pure speech." This Court, having read the papers and convened argument on August 10, 2023, finds the NJ LAD does not contemplate the instant behavior.

This case follows a traditional defamation fact pattern. Defendant journalist, alerted to the planned attendance of several prominent elected officials at a charity event held at a venue co-owned by an allegedly controversial figure, wrote a series of opinion articles critical of said elected officials. The articles levied a similar criticism at Plaintiff Arc Mercer for hosting the gala at the venue. Surprisingly, this case comes before this Court as a purported violation of the NJ LAD. Plaintiff alleges the criticism of their decision to host the gala at the venue is imputed to their work with their disabled clients and amounts to an interference of their fundraising efforts in violation of N.J.S.A. 10:5-12 (l) and (n). Compl. ¶ 16.

Rule 4:6-2(e) allows a court to dismiss a complaint for a failure to state a claim upon which relief can be granted. Motions to dismiss are only granted in the "rarest of circumstances." Sickles v. Cabot Corp., 379 N.J. Super 100, 106 (App. Div. 2005) (quoting Printing-Mart Morristown v. Sharp Electronics Corp., 116 N.J. 739, 771-72 (1989)). A complaint will survive a motion to dismiss if a broad reading gives rise to a mere suggestion of a cause of action. Camden Cty. Energy

Recovery Assocs., Ltd. P'ship. v. N.J. Dep't. of Envtl. Prot., 320 N.J. Super. 59, 65 (App. Div. 1999).

In addressing any motion to dismiss for failure to state a claim, the court must "accept as true all factual assertions in the complaint." Smith v. SBC Communications Inc., 178 N.J. 265, 268-69 (2004). Moreover, in doing so, the court must afford the Plaintiff every reasonable inference to be drawn from the factual assertions. Id. at 282. Dismissal is nonetheless required where the complaint's factual allegations are "palpably insufficient" to support a claim upon which relief can be granted. Rieder v. State Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (citations omitted).

I. Under the liberal Printing Mark standard, Plaintiff a pleads prima facie NJ LAD discrimination case.

A prima facie case under the NJ LAD must allege facts supporting an inference of intent to discriminate on the basis of disability. See Oasis Therapeutic Life Ctrs., Inc. v. Wade, 457 N.J. Super. 218, 230 (App. Div. 2018). Here, Plaintiff alleges "[u]pon information and belief, the Arc is the only organization that has held an event at the Stone Terrace since June 2020 that had a client base of developmentally and intellectually disabled individuals." Compl. ¶ 10. Movant argues given the "absence of any allegation of knowledge," the complaint merely highlights Defendants' editorial choice to address only Plaintiff's event and not others and thus fails to raise an inference of discriminatory intent even under the liberal pleading standard for NJ LAD claims. Br. in Supp. at 5. Movant further emphasized at oral argument that Defendants, in fact, praised Plaintiff's mission to aid disabled individuals. See also Compl. (Exh. B) at 1-3. For their part, Plaintiff asserts that a fourth article, involving unflattering comparisons between the Plaintiffs and other instances of actual discrimination, sets forth a plausible basis for disability discrimination.

This Court agrees that discriminatory intent is difficult to discern in the instant action; any connection between the articles and Plaintiff's disabled clients is attenuated at best. It would appear the articles are critical of the organization's choice of venue, but not its underlying work with disabled clients. However, given the appropriate standard reviews all interferences in favor of the non-moving party, this Court finds that Plaintiff's complaint—as sparse as it is in this area—presents at least a colorable prima facie case for discrimination.

II. Neither the enumerated list nor the catch-all in N.J.S.A. 10:5-12 (l) can be construed to include a charitable gala. NJ LAD does not contemplate this cause of action.

Movant argues NJ LAD applies to commercial transactions, not the charitable fundraiser in question. The relevant provisions state:

> [i]t shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . .
>
> > l. For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person . . .
> >
> > n. For any person to aid, abet, incite, compel, coerce, or induce the doing of any act forbidden by subsection[] l. . . .
>
> [N.J.S.A. 10:5-12.]

The parties present competing definitions to supplement their interpretations of the ordinary meaning of the catch-all term in N.J.S.A. 10:5-12 (l) "or otherwise do business with." Movant argues, "[t]he plain meaning of "do business with" is to engage or seek to engage in a commercial transaction.[1]" Plaintiff avers "the term, 'business,' means, inter alia, '[p]atronage.'" Opp. to Mot. at 11-12 (citing Patronage, The American Heritage Dictionary 118 (3rd ed. 1994)).

[1] Br. in Supp. at 8 (citing To Do Business, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/%22do%20business%22 (defining "to do business with" as "to sell to or buy from").

To Plaintiff, patronage is expansive beyond commercial transactions as a patron "supports, protects, or champions someone or something." Id. at 12. Movant points out in the latest edition of Plaintiff's chosen dictionary, "business" is synonymous with patron insofar as there is a commercial connotation. Reply Br. at 8.

Additionally, both parties point to competing judicial canons of construction as well. Movant suggests the ejusdem generis canon applies and the catch-all term in N.J.S.A. 10:5-12 (l) "or otherwise do business with" must be read to conform with the more specific items in the enumerated list. Br. in Supp. at 13. As reiterated by our Supreme Court:

> [u]nder the ejusdem generis principle of statutory construction, when specific words follow more general words in a statutory enumeration, we can consider what additional items might also be included by asking whether those items are similar to those enumerated.
>
> [Board of Chosen Freeholders v. New Jersey, 159 N.J. 565, 576 (1999).]

For their part, Plaintiff argues that NJ LAD, as a remedial statute, must be read broadly. Opp. to Mot. 10. However, our Courts have not hesitated to apply ejusdem generis to the NJ LAD to determine the scope of certain provisions, such as what constitutes a place of public accommodation. See Board of Chosen Freeholders, 159 N.J. at 576-67; Dale v. Boy Scouts of Am., 160 N.J. 562, 594 (1999), rev'd on other grounds sub nom. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

Plaintiff argues the rule against surplusage applies and the phrase "provide goods, services or information to" must have some meaning independent of the other items within the enumerated list of N.J.S.A. 10:5-12 (l). Generally, under the rule against surplusage, the proper interpretation of a statute is one in which every word or phase has meaning; nothing is redundant or meaningless. In Re DiGugliemo, 252 N.J. 350, 360-61 (2022). According to Plaintiff, this Court should find the "provide goods, services or information to" phrase to encompass charitable contributions to

differentiate it from the other items within the enumerated list of N.J.S.A. 10:5-12 (l). Opp. to Mot. at 11.

In response, Movant argues the noscitur a sociis canon applies, and the common characteristic between the specific items within the N.J.S.A. 10:5-12 (l) list is their commercial nature. Reply Br. at 7. Under the noscitur a sociis canon, when a word has more than one possible meaning, the appropriate meaning is gleaned from the surrounding words. See Gilhooely v. Cty. Of Union, 164 N.J. 533, 542 (2000). Here, Movant argues that Plaintiff's application of surplusage is too broad given the common characteristic is the commercial nature of the list. Reply Br. at 7.

This Court agrees and finds that the "provide" language references a commercial transaction separate from the other enumerated items—the bartering of services for services. Furthermore, this Court agrees with Defendants in that the ordinary meaning of the words suggests the specific items under the list pertains to commercial transactions, while the catch-all, under the ejusdem generis canon, does so as well. Finding that the charitable gala falls outside the NJ LAD, this Court accordingly grants the motion.

III. This Court makes no finding as to the constitutionality of the NJ LAD post- 303 Creative.

In the alternative, Movant argues that 303 Creative controls and modifies the scope of the NJ LAD to the extent it applies to pure speech. 143 S. Ct. 2298 (2023). There, the US Supreme Court in reviewing a potential use of Colorado's analogous anti-discrimination law found the application of that law would amount to compelled speech. That is the extent to which that case relates to the instant action. 303 Creative originates from a prospective wedding website business and owner-plaintiff's desire not to use her "words and original artwork" to promote a viewpoint with which she did not agree. Id. at 2303.

The argument largely hinged on characterizing the Plaintiff's speech as either commercial or pure speech. Compare id. at 2312, with id. at 2340 ("Therefore, any burden on the company's expression is incidental to the State's content-neutral regulation of commercial conduct.") (Kagan, J., dissenting). Ultimately, the divided Court, guided by the parties' stipulations, held the some-day intentions of the plaintiff in creating customizable websites:

> amounted to a form of speech intends to create "customized and tailored" expressive speech for each couple "to celebrate and promote the couple's wedding and unique love story."[2]
>
> [303 Creative LLC, 143 S. Ct. at 2316.]

To this Court, this expressive speech is distinguishable from the instant news articles Plaintiff journalist was paid to produce. However, this Court need not make any finding on 303-Creative's effect on the NJ LAD and accordingly does not.

[2] The parties further stipulated "Ms. Smith 'will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites' do not violate her beliefs."