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May 28, 2014

Honorable Peter F. Bariso, Jr. J.S.C  
Superior Court of New Jersey  
595 Newark Ave  
Jersey City, NJ 07306

Re: Supplemental Briefing in Support of Plaintiff's Motion for Partial Summary Judgment  
*Ferguson, et al. v. JONAH, et al.*, Hudson County Docket No. L-5473-12

Dear Judge Bariso:

Please accept this letter in lieu of a more formal brief regarding the potential application of *D'Agostino v. Maldonano*, 216 N.J. 168 (2013 N.J.) to the above-referenced case.

As the Court will recall, the defendants have moved for partial summary judgment on plaintiffs' claims for recovery of monies allegedly expended to treat mental and emotional damage resulting from defendants' services because such expenses are not "ascertainable loss" and therefore cannot be recovered as damages under Section 56:8-19 of the Consumer Fraud Act.

At the May 9, 2014 hearing on the motion, the Court asked the parties to brief the question of whether *D'Agostino v. Maldano* makes a distinction between "ascertainable loss" and "damages sustained," as those terms are used in Section 56:8-19, which would permit the recovery of trebled damages for items that would not qualify as ascertainable loss. As explained below, it does not. On the contrary, while it does not reach the issue directly, *D'Agostino* cites with approval cases which make clear that "damages sustained" under the CFA are limited to "ascertainable loss."

In *D'Agostino*, the defendant essentially defrauded the plaintiffs out of their house. (*D'Agostino v. Maldano*, 216 N.J. 168, 177-178 (2013 N.J.)) The trial court found a CFA violation. (*Id.* at 178.) As an equitable remedy, the trial court deemed the conveyance of the property from plaintiffs to defendant to be void, restoring title to plaintiffs as if no transaction had occurred. (*Id.* at 179.) The trial court also determined that the plaintiffs had lost the increased equity in the home as a result of the defendant's conduct and were entitled to treble damages. It calculated the plaintiffs' damages by (1) subtracting the value of the improvements the defendant had made from the increased equity ("net equity"); (2) trebling that amount; and (3) subtracting the net equity to account for the restoration of the house to the plaintiffs. (*Id.*)

The Appellate Division affirmed the trial court's finding of a CFA violation, but reversed the trial court's determination with respect to ascertainable loss and the calculation of damages. "It concluded that because the trial court voided the deed that had conveyed the Property to the defendant, it effectively restored the plaintiffs to their position prior to the defendant's unconscionable practice, and that plaintiffs therefore suffered no ascertainable loss." (*Id.* at 180.)

The Supreme Court affirmed in part and reversed in part and reinstated the trial court's judgment. (*Id.* at 173.)

As a threshold matter, the Supreme Court noted that the CFA requires a plaintiff to prove three elements: 1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss. (*Id.* at 184 [internal quotes and citations omitted].) When a plaintiff has proven these elements, Section 56:8-19 of the CFA requires an award of treble damages. (*Id.* at 185.)

Initially, the Supreme Court agreed with the trial court and the Appellate Division that the defendant's conduct constituted a CFA violation. (*Id.* at 188-190.) The appeal also required "the Court to consider a second issue: whether there was an ascertainable loss and, if so, the remedy to be imposed, when a CFA plaintiff proves that a defendant's violation of N.J.S.A. 56:8-2 resulted in the plaintiff's loss of equity in a residential property." (*Id.* at 190.)

In short, the question considered by the Supreme Court was whether an ascertainable loss (loss of equity) could constitute damages for the purpose of trebling even if there was no actual loss because of an equitable remedy (restoration of title). The Court answered in the affirmative:

It would contravene the goals of the CFA if a plaintiff, who proves an unlawful practice and ascertainable loss and is awarded equitable relief premised upon that loss, is rendered ineligible for the mandated award of treble damages by virtue of that equitable remedy. (*Id.* at 195.)

In short, the existence of ascertainable loss resulting from a defendant's CFA violation should be determined on the basis of the plaintiffs' position following the defendant's unlawful commercial practice, not after a judicial remedy has been imposed restoring plaintiffs' property pursuant to the CFA. Accordingly, we reverse the Appellate Division's determination that plaintiffs failed to demonstrate ascertainable loss. (*Id.* at 198.)

The dissent in *D'Agostino* argued that the majority's decision resulted from an erroneous "conflation" of the distinct concepts of "ascertainable loss" and "damages sustained." (*Id.* at 210-211.) In response, the majority rejected the notion that its opinion was premised on any misunderstanding of those terms. (*Id.* at 192.)

The majority first noted that the two concepts have separate functions in the CFA analysis: "ascertainable loss plays a distinct role in a CFA claim constituting an element of the statutory cause

of action. Without a 'bona fide claim of ascertainable loss that raises a genuine issue of fact,' a CFA claim fails. There is no calculation of 'damages sustained' unless the ascertainable loss requirement is first satisfied." (*Id.* [internal quotation marks and citations omitted].)

It went on to explain, however, that "ascertainable loss" and "damages sustained" are not unrelated. (*Id.*)

In short, the statute and our case law envision that a plaintiff's loss of money or property may constitute the requisite "ascertainable loss" -- entitling the plaintiff to collect damages -- and the "damages sustained" for purposes of N.J.S.A. 56:8-19, which are to be trebled. In a given case, the same quantifiable loss of money or other property, suffered by the plaintiff as a result of the defendant's CFA violation, may serve both purposes in the analysis, consistent with the statute's remedial intent and the requirement of proving damages with certainty. The dissent's concern that our holding in this regard derives from a misinterpretation of N.J.S.A. 56:8-19 is therefore unfounded. (*Id.* at 193.)

Thus, the Supreme Court in *D'Agostino* held that when CFA plaintiffs establish a CFA violation, ascertainable loss, and a causal connection between the violation and the loss, they are entitled to trebled damages, even if a judicial remedy restores the loss. (*Id.* at 198.) The *D'Agostino* Court did not address, let alone decide, the question of whether "damages sustained" can be broader than "ascertainable loss." In fact, to reach such a decision, the Supreme Court would have had to overrule or disapprove its prior holding in *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 612-613 (N.J. 1997), which it clearly did not.

In *Gennari*, one CFA plaintiff appealed the denial of non-economic damages, and "the Appellate Division held that non-economic damages were not recoverable under the Act." (*Id.* at 612.) The Supreme Court first quoted the pertinent statute:

Any person who suffers *any ascertainable loss* of moneys or property, real or personal, as a result of the use or employment by another person [who commits a violation under the Act]. . . . [T]he court shall, in addition to any other appropriate legal or equitable relief, award threefold *damages*, sustained by any person in interest.

[N.J.S.A. 56:8-19 (emphasis added).]

The Court went on to hold:

One reading of the Act is that a party who suffers any ascertainable loss has standing to sue and can recover three times “any and all damages sustained.” **The alternative, and we believe more appropriate, interpretation is that “damages” are limited to “ascertainable loss.”** At common-law an injured party could recover only for the injuries sustained. Absent a clear expression of legislative intent changing the common law rule, we are reluctant to read the Act to encompass non-economic losses. (*Id.* at 612-613 [emphasis added].)

Notably, while the *D’Agostino* Court did not cite *Gennari* for this proposition, it did rely on it for two others. (*D’Agostino v. Maldonado*, *supra*, 216 N.J. at 183 [“We construe the CFA in light of its objective ‘to greatly expand protections for New Jersey consumers.’”]; *id.* at 189 [“[A] simple breach of warranty or breach of contract is not per se unconscionable.”].) Presumably then, the Court was aware of the above-quoted passage in *Gennari*, but it did not distinguish, disapprove or otherwise limit it.

Moreover, the *D’Agostino* Court quoted specific language from two other cases – *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 140 (1999) and *Cole v. Laughrey Funeral Home*, 376 N.J. Super. 135, 144-45 (App. Div. 2005) – which state forthrightly that treble damages under the CFA are limited only to ascertainable loss of moneys or property. (*Id.* at 193.)

Until the New Jersey Supreme Court rules differently – which it did not in *D’Agostino v. Maldonado* – “damages sustained” under the CFA are the ascertainable loss proved up by the

plaintiffs. Ascertainable loss does not include non-economic damages.

The case before this Court is indistinguishable from *Gupta v. Asha Enterprises, L.L.C.*, 422 N.J. Super. 136 (App.Div. 2011). The plaintiffs in *Gupta* claimed that they had sufficiently plead ascertainable loss by seeking damages in the amount of the cost of a trip to India to undergo a purification ritual. (*Id.* at 149.) The court noted, however that plaintiffs were seeking **the cost of cure for an alleged spiritual injury** that could not be categorized as either a loss of moneys or property. (*Id.* [emphasis added].)

The *Gupta* court distinguished the case upon which plaintiffs rely in their opposition, *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 22, (1994), pointing out that the cost of “cure” in that case (kitchen repairs) was the result of the loss of the value of **property** that had been rendered unsafe and unsightly by the defendants’ CFA violation. (*Id.*) The court concluded that the *Gupta* plaintiffs could not demonstrate an underlying loss of the value of property. (*Id.*) Moreover, citing *Gennari v. Weichert Co. Realtors* and *Cole v. Laughrey Funeral Home*, the court found that it would be improper to expand the definition of ascertainable loss to cover the injuries alleged by plaintiffs. (*Id.*)

Similarly here, the plaintiffs are seeking to recover for the cost of cure for an alleged emotional and mental injury which cannot be properly be categorized as either a loss of moneys or property under the CFA. Plaintiffs have not, and cannot, show an underlying loss of the value of property. According, they cannot recover damage for the “cost of cure.”

Plaintiffs’ attempt to distinguish this case from *Gupta* on the basis that this one involves “shoddy services” and *Gupta* involves “shoddy goods” is necessarily unavailing. First, plaintiffs have not sued defendants for their allegedly “shoddy services” – if they had intended to, they could

have asserted a negligence cause of action and sought to recover their noneconomic damages. Rather, they have sued plaintiffs only for alleged misrepresentations in the sale or advertisement of their services under N.J.S.A. 56:8-2.

More importantly, New Jersey law does not make such a distinction. In order to recover, regardless of the goods or services at issue in any particular case, CFA plaintiffs must show “an ascertainable loss of moneys or property.” Non-economic losses – including emotional or mental damage and the related cost of repairing that damage – are simply not recoverable under the CFA.

For all the foregoing reasons, and for the reasons set out in defendants’ moving and reply papers, defendants respectfully request that this Court enter summary judgment against plaintiffs on their claims for recovery of the costs of mental health treatment allegedly incurred to repair emotional damage allegedly caused by defendants’ program.

Respectfully

Michael P. Laffey  
Attorney for Defendants

mpl/hs  
cc: Bruce D. Greenberg Esq