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Michael Ferguson, Benjamin Unger, Sheldon Bruck, Chaim Levin, Jo Bruck, Bella Levin, Plaintiffs, v. JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, Alan Downing Life Coaching, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - HUDSON COUNTY DOCKET NO. L-5473-12 Civil Action **CERTIFICATION OF CHARLES S. LiMANDRI IN SUPPORT OF DEFENDANTS' REPLY BRIEF**

I, Charles S. LiMandri, certify:

1. I am an attorney at law, duly admitted to practice in the States of California, New York and the District of Columbia, as well as before the United States Supreme Court. I am double Board Certified in Pre-Trial Practice and Trial Advocacy by the National Board of Trial

Advocacy. I am also a member of the American Board of Trial Advocates, as well as the American College of Board Certified Attorneys.

2. I am the attorney for Defendants JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, and Alan Downing Life Coaching, LLC ("Defendants") in this case and have been admitted to practice in New Jersey *pro hoc vice* by this Court for this case. I have personal knowledge of the facts set forth below and could and would competently testify thereto if called upon to do so as a witness.

3. The deadline for the Plaintiffs to designate expert witnesses in this action was July 11, 2014. The Plaintiffs designated three expert witnesses: Dr A. Lee Beckstead, Ph.D., Dr. Janja A. Lalich, Ph.D., and Dr. Carol Bernstein, M.D.

4. None of the Plaintiffs' expert witnesses have been designated to address the issue of the Plaintiffs' medical causation (i.e., whether the Plaintiffs' alleged harm was caused by the Defendants' alleged misrepresentations). Rather, the Plaintiffs identified approximately 20 of Plaintiffs' mental health providers – without specifying which ones they plan to call as witnesses at trial – and none of them have been designated as expert witnesses.

5. Plaintiffs' confidential mental health treatment records for all of their post-JONAH providers do not reflect that they sought that treatment because of any harm caused by JONAH.

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6. A true and correct copy of the unpublished opinion *Hoffman v. Macy's, Inc.*, 2010 N.J. Super. Unpub. LEXIS 1412, 2011 WL 6585 (App.Div. June 28, 2010).is attached hereto as Exhibit A.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: August 29, 2014

Charles S. LiMandri

Exhibit A

Hoffman v. Macy's, Inc.

Superior Court of New Jersey, Appellate Division
February 3, 2010, Argued; June 28, 2010, Decided
DOCKET NO. A-6131-08T3

Reporter: 2010 N.J. Super. Unpub. LEXIS 1412; 2011 WL 6585

HAROLD M. HOFFMAN, Individually and in behalf of the class of purchasers at the Bloomingdale's one-day Las Vegas Sale of 4/18/09, Plaintiff-Appellant, v. MACY'S, INC., Defendant-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Certification denied by *Hoffman v. Macy's, Inc., 204 N.J. 38, 6 A.3d 441, 2010 N.J. LEXIS 1030 (2010)*

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3926-09.

Core Terms

ascertainable loss, Consumer, damages, misrepresentation, ascertainable, promised

Counsel: Harold M. Hoffman argued the cause Po se.

Sigrid S. Franzblau argued the cause for respondent (Riker Danzig Scherer Hyland & Perretti, LLP, attorneys; Ms. Franzblau, of counsel and on the brief).

Judges: Before Judges Messano and LeWinn.

Opinion

PER CURIAM

Plaintiff, Harold Hoffman, appeals from the July 17, 2009 order of the trial court dismissing his complaint against defendant, Macy's, Inc., for failure to state a claim pursuant to *Rule 4:6-2(e)*. We affirm.

We summarize the operative facts from plaintiff's complaint. Macy's owns and operates a Bloomingdale's department store in Hackensack. On or about April 18, 2009, Bloomingdale's advertised a one-day special sale "at which it purportedly offered various wares to its . . . customers at spectacular savings . . . ." Specifically, in plaintiff's words, the store "promised . . . that various wares could be purchased at a price below the 'regular price' . . . and below the 'previous sale price' for the said relevant items. [Bloomingdale's] explained . . . that the term 'previous sale price' was intended to identify the Manufacturer's Suggested Retail Price **[*2]** ("MSRP") for the item in question."

In reliance on this advertisement, plaintiff purchased a Nespresso model D290 automatic espresso machine for $ 299.99, which he was told "verbally and in writing . . . [was] a price point well below its 'regular price' of $ 625.00 . . . and well below its . . . MSRP of $ 499.99." Plaintiff claimed that Bloomingdale's "had never previously sold" this machine "at a $ 625.00 price point. . . . Further, the MSRP . . . was well below the $ 499.99 represented by [Bloomingdale's]."

Plaintiff's complaint sought certification as a class action, and asserted the following damages:

> Plaintiff and members of the class suffered ascertainable loss in the form of actual out of pocket loss as a result of defendants' [sic] unlawful conduct as aforesaid: the fabrication of false and misleading pricing information allocable to the items being offered for sale at the Bloomingdale's [one-day] [s]ale. Plaintiff and members of the class suffered a further element of ascertainable loss in that they, as consumers, received less than what was promised by defendant, i.e., various wares at a highly discounted price. Thus, the plaintiff and members of the class were injured and **[*3]** suffered ascertainable loss.

Plaintiff asserted five claims under the New Jersey Consumer Fraud Act, *N.J.S.A. 56:8-1 to -20* (CFA), and one claim of common law fraud.

In granting defendant's motion to dismiss, the trial judge first found that the complaint "d[id] not clearly set forth an

'unconscionable business practice.'" The judge determined that plaintiff had failed to "illustrate how the alleged misrepresentation of price violates the Consumer Fraud Act[,] . . . [or] how [] he, or other members of the putative class, were affected by the alleged misrepresentation." Plaintiff's general statement that defendant "'lied' and 'lured consumers into snapping up special values[,]' without providing further clarification[,] . . . [did not explain] how the misrepresentation 'victimized' him or the putative class."

Additionally, the judge determined that plaintiff had failed to "show 'ascertainable loss.'" Because plaintiff did not allege the espresso coffeemaker was in some way defective and, therefore, did not function properly, the judge found that plaintiff had no claim for his "out of pocket" expenses as the measure of loss. Nor did plaintiff "factually illustrate []" his claim that "he **[*4]** suffered an 'ascertainable loss' because he received 'less than promised'. . . ."

Finally, the judge dismissed plaintiff's common law fraud count because he found that it was not pled with the degree of specificity required by *Rule 4:5-8(a)*, [1] and plaintiff had failed to "provide any damages he suffered as a result of [d]efendant's alleged fraud."

On appeal, plaintiff contends that the dismissal of his complaint under *Rule 4:6-2(e)* was in error because (1) the judge failed to accord him the benefit of every reasonable inference in weighing the claims; and (2) the complaint states causes of action under both the CFA and common law fraud. We disagree and affirm substantially for the reasons in the trial judge's decision relating to plaintiff's failure to demonstrate an ascertainable loss, a pleading deficiency that renders both his statutory and common law claims subject to dismissal under *Rule 4:6-2(e)*.

We need not discuss the trial judge's findings and conclusions with respect to the "unconscionable business **[*5]** practice" element of plaintiff's CFA claims. Even assuming the judge incorrectly determined that plaintiff's pleadings had failed to make such a showing, we are nonetheless satisfied that dismissal of the complaint was proper due to its failure to state a viable claim for "ascertainable damages" caused by that "practice."

N.J.S.A. 56:8-19 provides that "[a]ny person who suffers any ascertainable loss of moneys or property . . . as a result of the use . . . by another person of any . . . practice declared unlawful under this act . . . may bring an action . . . in any court of competent jurisdiction." The CFA thus "imposes a standard of proof in consumer fraud actions by private plaintiffs that is higher than the standard that applies to enforcement proceedings by the Attorney General. . . . [A] private plaintiff must show that he . . . suffered an 'ascertainable loss . . . as the result of' the unlawful conduct." *Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 473, 541 A.2d 1063 (1988)* (quoting *Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 271, 390 A.2d 566 (1978)*).

Plaintiff relies upon *Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248, 872 A.2d 783 (2005)*, for the proposition that "either out-of-pocket loss or **[*6]** a demonstration of loss in value will suffice to meet the ascertainable loss hurdle and will set the stage for establishing the measure of damages." In that case, which arose from the plaintiffs' appeal of a grant of summary judgment to defendants dismissing their complaint, the Court "focuse[d] on the enigmatic requirement of an 'ascertainable loss' and, specifically, on what a plaintiff must demonstrate in order to survive a motion for summary judgment when challenged on that issue." *Id. at 238*. The Court held that

> when a plaintiff fails to produce evidence from which a finder of fact could find or infer that a plaintiff suffered a *quantifiable or otherwise measurable loss* as a result of the alleged CFA unlawful practice, summary judgment should be entered in favor of defendant . . . .
>
> [*Ibid.* (emphasis added).]

There, the plaintiffs had purchased new Mercedes Benz vehicles that had faulty fuel gauges; their dealers serviced and, in one case even replaced, the vehicles. *Id. at 239-42*. The trial court, in dismissing the plaintiffs' complaint, characterized their damages claim as follows:

> None of the plaintiffs . . . spent a single penny in relation to the fuel system problems they experienced. **[*7]** Nevertheless, plaintiffs attribute to themselves as a species of damages, an *unincurred* cost of repair extrapolated from *defendant's* internal warranty remediation efforts. Plaintiffs further assert an inchoate and unsubstantiated loss of the benefit of the bargain. Plaintiffs insist that they did not get what they bargained for and instead received an unsafe motor vehicle with a known fuel-reporting defect. . . .
>
> Here, no rational fact finder could conclude that plaintiffs suffered an objectively

[1] *Rule 4:5-8(a)* provides, in pertinent part: "In all allegations of . . . fraud . . . particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable."

> ascertainable loss or damage, even under the lens of the expansively protective legislative purpose of the Consumer Fraud Act and this State's public policies affording broad protection to consumers against deceptive commercial practices.
>
> [*Id. at 243* (internal quotation marks omitted).]

In affirming, the Supreme Court noted that "[t]here is little that illuminates the precise meaning that the Legislature intended in respect of the term 'ascertainable loss' in our statute." *Id. at 248*. The Court concluded, nonetheless, that

> [t]o raise a genuine dispute about such a fact, the plaintiff must proffer evidence of loss that is not hypothetical or illusory. It must be presented with some certainty demonstrating **[*8]** that it is capable of calculation . . . .
>
> The certainty implicit in the concept of an "ascertainable" loss is that it is quantifiable or measurable.
>
> . . . .
>
> The ascertainable loss requirement operates as an integral check upon the balance struck by the CFA between the consuming public and sellers of goods. The importance of maintaining that balance is obvious.
>
> [*Id. at 248, 251*.]

Particularly pertinent here is the Court's determination that the "[p]laintiffs needed to produce specific proofs to support or infer a quantifiable loss in respect of their benefit-of-the-bargain claim; *subjective assertions without more are insufficient to satisfy the requirement of an ascertainable loss that is expressly necessary for access to the CFA remedies*." *Id. at 252* (emphasis added). [2] This is consistent with the trial judge's finding here that "[p]laintiff's lack of factual support and abundance of conclusory statements do [] not substantiate a cognizable claim."

We are further satisfied that plaintiff's reliance upon *Union Ink Co., Inc. v. AT&T Corp., 352 N.J. Super. 617, 801 A.2d 361 (App. Div.), certif. denied, 174 N.J. 547, 810 A.2d 66 (2002)*, and *Miller v. Amer. Family Publishers, 284 N.J. Super. 67, 663 A.2d 643 (Ch. Div. 1995)*, is similarly misplaced. In *Union Ink*, customers of a wireless cellular phone service sued the defendant service provider on numerous grounds including the CFA, for alleged misrepresentations in the scope and quality of the services for which they had contracted. *352 N.J. Super. at 625-27*. In that context, we recognized that the "ascertainable loss" requirement "has been broadly defined as embracing more than a monetary loss. An ascertainable loss occurs when a consumer receives less than what was promised." *Id. at 646*. "[W]hat was promised" to the plaintiffs in *Union Ink* was a specific service "so reliable that a wireless phone could be a consumer's only phone[,]" *id. at 645*, an allegation which proved false and which **[*10]** caused the plaintiffs to lose the service for which they had paid.

In *Miller*, the plaintiffs purchased magazine subscriptions from the defendant in reliance on a promise that "they would receive two things: first, a magazine subscription; and second, the ability to remain a part of defendant's sweepstakes . . . and an enhanced likelihood of winning that sweepstakes." *284 N.J. Super. at 88*. In their complaint brought under the CFA, the plaintiffs claimed they "received the first[,] . . . [but] did not receive the second." *Ibid.* This led the trial court to conclude:

> That hypothesis seems to be a clear example of what one would normally believe the term "ascertainable loss" should encompass. If one sets out to purchase two things, and for the price paid receives only one, the conclusion seems inescapable that there has been an "ascertainable loss." Indeed, defendants [sic] submit no argument as to why that seemingly obvious conclusion should be rejected.
>
> [*Ibid.*]

Plaintiff does not cite, and we have not found, any case that ascribes an "ascertainable loss" to the situation presented here, namely his claim that defendant "did not deliver" on its "promise [] of various wares at a highly discounted **[*11]** price." Defendant "deliver[ed]" the espresso machine at the advertised price of $ 299.99. The claim that defendant misrepresented the MSRP or "regular price" of this item provides no basis for establishing an "ascertainable loss."

The beneficial purpose of the CFA is "to address . . . consumer complaints about fraudulent practices in the marketplace and to deter such conduct by merchants." *Thiedemann, supra, 183 N.J. at 245*. However, as noted, "the CFA private plaintiff must produce some specific proof to demonstrate a discernable loss." *Id. at 255*. This

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[2] In a footnote, the Court acknowledged several cases in which a "benefit-of-the-bargain claim" was found to "support an ascertainable loss sufficient to allow a CFA claim to proceed to the factfinder[,]" noting that "it is the quality of the **[*9]** proofs that will determine a claim's viability." *Id. at 252, n.8*. We incorporate that discussion here and note that the cases cited therein are all factually distinguishable to a degree that renders them inapposite to plaintiff's situation.

requirement "allow[s] advancement of the" legislative purpose. *Ibid.* We are unable to discern any loss incurred by plaintiff as a result of the conduct alleged. We are, therefore, satisfied that the trial judge properly granted defendant's motion to dismiss the CFA claims on this basis.

We briefly address plaintiff's common law fraud claim.

> To establish common-law fraud, a plaintiff must prove: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) *resulting* **[*12]** *damages."*
>
> [*Banco Popular N.A. v. Gandi, 184 N.J. 161, 172-73, 876 A.2d 253 (2005)* (emphasis added) (quoting *Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610, 691 A.2d 350 (1997)).*]

As plaintiff has failed to assert any cognizable loss or damages, his common law fraud claim was likewise properly dismissed.

Affirmed.