

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
HUDSON COUNTY
DOCKET NO. HUD-L-5473-12
APP. DIV. NO. _____

MICHAEL FERGUSON, et al,	:	
	:	TRANSCRIPT
Plaintiffs,	:	
vs.	:	OF
	:	
JONAH, ARTHUR GOLDBERG, ALAN	:	MOTION
DOWNING & ALAN DOWNING LIFE	:	
COACHING, LLC,	:	
	:	
Defendants.	:	

Place: Hudson County Superior Court
Administration Building
595 Newark Avenue
Jersey City, NJ 07306

Date: May 9, 2014

B E F O R E:

HONORABLE PETER F. BARISO, JR., J.S.C.

TRANSCRIPT ORDERED BY:

BRUCE GREENBERG, ESQ., (Lite, DePalma, Greenberg,
LLC)

A P P E A R A N C E S:

MR. LAFFEY, ESQ.,
Attorney for the Plaintiff.

MR. DINELLI, ESQ.
Attorney for the Defendant.

Audio Recorded By: N/A

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NOTE: THE NAMES OF THE ATTORNEYS WERE TAKEN FROM THE LOG, AS THERE WERE NO APPEARANCES PUT ON THE RECORD. ALSO, THERE IS SOMEONE PARTICIPATING BY PHONE, BUT WAS NOT IDENTIFIED ON THE LOG OR ON THE RECORD.

I N D E X
May 9, 2014

ARGUMENT

By Mr. Dinelli 11, 13
By Mr. Laffey 12

THE COURT

Decision 15

Colloquy

THE COURT: I find this next motion, which is motion number two, somewhat interesting, and probably not for the reason that the parties find it interesting. I have a motion before me for partial summary judgement. The relief being requested is partial summary judgement, dismissing the claims of plaintiffs for emotional harm or damage, and the consequential damages there from.

Now I don't think the plaintiff has a disagreement with your position that they cannot recover for their emotional harm. Am I correct on that?

MR. DINELLI: That's correct, Your Honor.

THE COURT: Okay. However, we do have an issue here regarding consequential damages. And as I read your motion papers, what you're asserting is under two cases -- and really, the New Jersey one is the more important one, under Gupta, 422 N.J. Super. 136, you're asserting that these therapy bills are not an ascertainable loss under the Consumer Fraud Act, correct?

MR. LAFFEY: That is correct, Your Honor.

THE COURT: All right. But in Gupta and in the federal case you cite, the case was dismissed because they had no ascertainable loss, right?

1 MR. LAFFEY: That's true.

2 THE COURT: Well in this case they have an
3 ascertainable loss separate and apart from these
4 damages, right?

5 MR. LAFFEY: Arguably.

6 THE COURT: Well they paid for it, didn't
7 they? Isn't that -- I mean, if they prove it. I'm
8 saying --

9 MR. LAFFEY: Yes.

10 THE COURT: -- the case isn't going to be
11 dismissed on this motion.

12 MR. LAFFEY: No.

13 THE COURT: Okay. So having said that, then
14 under our Supreme Court case, D'Agostino, 216 N.J. 168,
15 they make a distinction between -- let me get the page
16 number. They make a distinction, don't they between an
17 ascertainable loss and damages sustained, don't they?

18 MR. LAFFEY: Honestly, Judge, I'm not
19 familiar with that case.

20 THE COURT: Okay. Well for purposes of my
21 review of it, I think D'Agostino, the Supreme Court
22 talks about two distinct claims, what is an authorita -
23 - what's an ascertainable loss and what's damages
24 sustained in their opinion. It's also mentioned in the
25 dissent. But in the opinion -- and the reason why I

1 find this motion interesting is even if I were to agree
2 with the defendants that this is not an ascertainable
3 loss, why wouldn't it still be damages sustained under
4 the Consumer Fraud Act. And that's what gets
5 troubling. And that's what they talk about in
6 D'Agostino.

7 I can, I can agree with you and say it's not
8 an ascertainable loss. What's, what's the impact on
9 the lawsuit? I mean, why are we making this motion is
10 what I'm asking. Do you understand?

11 MR. LAFFEY: Well the reason I'm making this
12 -- made this motion, Judge, is because we were hoping
13 to avoid the inevitable expert discovery on the issue
14 of their emotional damages and which is related to
15 this, and which is related to other things in their
16 lives. And that, that is the reason for this motion --

17 THE COURT: Well I --

18 MR. LAFFEY: -- at this time.

19 THE COURT: Well what I'm suggesting is, in
20 reading this case, I don't see how that doesn't come
21 in, even if I granted your motion. It's still damages
22 sustained, which is a separate category of the statute.
23 And that's what's troubling. I mean, I'm reading --
24 and I had to read the case twice myself. But I'm
25 reading 56-8-19 (phonetic), which is what they cite in

1 D'Agostino, the statute.

2 The beginning of it says, "Any person who
3 suffers any ascertainable loss of monies ... and it
4 lists the requirements. But then at the end it says,
5 "And any action under this section, the Court shall, in
6 addition to other appropriate legal or equitable
7 relief, award threefold the damages sustained by any
8 person and interest." It doesn't limit it to the
9 ascertainable loss. And that's what D'Agostino talks
10 about.

11 UNIDENTIFIED: Your Honor, I don't see where
12 they cited D'Agostino. And so -- apparently nobody
13 briefed it. But the way this judge agreed, the way I
14 understand Your Honor read it, the threshold
15 requirement is you have to have ascertainable damages.
16 --

17 THE COURT: Yes, that's how --

18 UNIDENTIFIED: -- If they have those, then
19 they can treble it at the end.

20 THE COURT: Well no, no, they have to have an
21 ascertainable loss. And in Gupta, and I believe it's
22 Billings (phonetic), the case that was cited by you,
23 not you, by the defendants, the reason those cases were
24 dismissed is because they had no ascertainable loss.
25 Federal court said you don't have an ascertainable

1 loss. You can't use your emotional distress as an
2 ascertainable loss.

3 Gupta says the same thing. Gupta says, in
4 page 149, "Plaintiff's claim that they have
5 sufficiently pled ascertainable loss by seeking damages
6 in the amount of the cost of a trip to India to undergo
7 a purification ritual. However, what they are seeking
8 is not the cost of a cure for an alleged spiritual
9 injury that cannot be categorized as either a loss of
10 monies or property."

11 So they didn't have an ascertainable loss
12 because they were given vegetable samosas after they
13 didn't -- after they found out that they had meat
14 samosas. What I asked counsel initially, and I'm
15 asking you the same question, regardless of the therapy
16 bills, at this point plaintiff has put forth an
17 ascertainable loss. Whether they prove that or not is
18 one thing. But they have an ascertainable loss. I --
19 you know, they paid for this service and they didn't
20 get -- they didn't recoup it in any manner.

21 So the question I'm raising is what's
22 accomplished by this motion.

23 UNIDENTIFIED: Accomplished by the motion is
24 the plaintiffs have listed over a dozen -- I think
25 actually two dozen potential health care practitioners

1 and there's voluminous medical records, and they all
2 relate to so-called psychic injury or emotional harm.
3 And these medical expenses are completely derivative of
4 that harm, which is not an ascertainable loss under New
5 Jersey law.

6 So although the plaintiff may be able to go
7 forward and easily prove whether or not they paid for
8 the particular programs, which I tell you, you know, is
9 at most \$1000 or \$2000. I think (Indiscernible) and in
10 the hundreds for some of the others.

11 THE COURT: Well that's what, that's what
12 their damages sustained are. They're conceding that
13 they're not entitled to emotional distress damages.
14 They're not asking for those.

15 MR. LAFFEY: Your Honor, if I may?

16 THE COURT: Yeah.

17 MR. LAFFEY: And I apologize that I am not
18 familiar with the D'Agostino case. --

19 THE COURT: Well I'm going to give -- I'll
20 give the parties an opportunity to address it, --

21 MR. LAFFEY: Thank you.

22 THE COURT: -- not this very minute. But I
23 mean, I, I read it twice and that was the conclusion I
24 came to when I read it, because I was shepardizing some
25 of these cases. And as I'm reading it, not that it

1 matters for the record, but I also asked Mr. Russo to
2 read it last night because it was a warm day yesterday
3 and I wanted to make sure that I was not missing
4 something. He tends to agree. But I'm going to give
5 counsel an opportunity. I know -- I mean, my intent is
6 not to spring it on you and then make a ruling.

7 MR. LAFFEY: Oh, I understand, Judge.

8 THE COURT: I'm raising it because, as I read
9 that case, I'm asking to myself okay, I could agree
10 with you that it's not an ascertainable loss, but I
11 don't know what it's done to the case. --

12 MR. LAFFEY: Right.

13 THE COURT: -- And I agree with Mr., Mr.
14 Landria (phonetic). I don't believe plaintiffs are
15 asserting an emotional distress claim. In fact,
16 they've said in their papers they realize they can't
17 raise that. So what they're talking about is whatever
18 their bills are. So I don't know that you need 12
19 people to come in to say this is what the bill is. I
20 don't know. I'm not -- that's between the parties.
21 But they're not asserting a, a -- an emotional distress
22 claim.

23 MR. LAFFEY: Well they would still --

24 UNIDENTIFIED: But the problem is, for
25 example, Hiam (phonetic) Levin (phonetic) has got

1 probably more bills than anyone. He never mentions the
2 nudity exercise. So --

3 MR. LAFFEY: Yeah, Judge, --

4 THE COURT: Well then you want to get into
5 causal relation, that's, that's fine.

6 UNIDENTIFIED: Well but that -- we're doing
7 that for a component of damages that they're not
8 legally entitled to obtain. And we're going to have to
9 deal with all this additional evidence and all these
10 additional doctors and records on something that is
11 derivative of a non-ascertainable loss, which they
12 can't recover anyhow.

13 THE COURT: Well see, that's where we have a
14 bit of a disagreement. While I may agree with you that
15 it's not an ascertainable loss, I still believe it's
16 damages sustained. So I'm going to allow counsel --
17 excuse me, pardon me -- to take a look at that case and
18 do their own research. And we'll carry this motion for
19 two weeks. I'm not going to just spring it on you and
20 rule. I think the case stands for that proposition.
21 And I'll allow the parties to review it and provide
22 supplemental paperwork.

23 But before we do that, let me ask the
24 plaintiffs here a question that I find, you know --
25 what I just read from Gupta, --

1 MR. DINELLI: Yes.

2 THE COURT: -- that they were not permitted
3 the cost of the cure for an alleged spiritual injury
4 that they claim was caused by the samosas. So what --
5 what's different in this case? You're saying that we
6 had to get this therapy treatment because of what Jonah
7 did to us. --

8 MR. DINELLI: Your --

9 THE COURT: -- Gupta is saying we had to go
10 get spiritually cleansed because you gave us meat. So
11 --

12 MR. DINELLI: Your Honor, I think they're
13 very different.

14 THE COURT: Okay.

15 MR. DINELLI: The Gupta case, I believe is
16 best conceived as a case about a faulty piece of
17 merchandise, that merchandise being the samosa. What
18 happened there, as Your Honor is fully aware, is that
19 the plaintiffs believed they had ordered vegetarian
20 samosas. They got meat samosas. So what the
21 defendants did wrong and what violated the CFA was they
22 provided improper samosas. They made the samosas
23 wrong.

24 This is just like the Carr (phonetic) case
25 that we cited, the Thiamin (phonetic) from the New

1 Jersey Supreme Court, in which the Court discussed what
2 sorts of damages might be available on account of a
3 fault -- something was wrong with the Mercedes cars.
4 The question was what are the plaintiffs entitled to
5 get as a result of that.

6 The Court there discussed the fact that if
7 they were required to fix that damage, they'd be
8 entitled to recover as ascertainable loss. Of course,
9 they didn't pay that because the warranty covered it.

10 Gupta is a faulty merchandise case. Our case
11 is a shoddy services case. We think Cox (phonetic) and
12 the line of cases that follow Cox directly answer the
13 question of what constitutes an ascertainable loss when
14 the alleged conduct is a shoddy service as opposed to a
15 piece of merchandise.

16 We briefed those cases and we showed that in
17 all of those cases, when someone is hired to do
18 something, like fix a kitchen, if what they do is, that
19 is damage it, then what the plaintiff gets is, among
20 other things, the cost of repair. And that's been the
21 law for 20 years. We believe our case is like the Cox
22 case and not the Gupta case.

23 MR. LAFFEY: If I may, Judge. The difference
24 between that line of cases and this case is that in all
25 of those cases -- and Gupta addresses that -- this

1 issue. Those were damage to property. And under,
2 under normal contract law, the measure of damage to
3 property is the cost to repair it.

4 The act provides for recovery for damaged
5 property. That's why repair costs are permitted as an
6 ascertainable loss. Gupta makes it clear that cost to
7 repair something other than property is not an
8 ascertainable loss.

9 MR. DINELLI: Your Honor, I would disagree
10 with that.

11 THE COURT: I, I -- I'm well aware of that.
12 So what --

13 MR. DINELLI: Nothing in Cox says that its
14 holding is limited to damage to property. Cox was
15 about a kitchen. There was another case about a pool
16 system. There was another case about an HVAC system.
17 Those cases were about property. But the issue here is
18 that there were services involved. In our case the
19 services were provided directly to the plaintiffs.
20 What was being worked on were the plaintiffs
21 themselves.

22 Those services damaged the plaintiffs
23 themselves. So, under Cox, the people who provided
24 those shoddy services in violation of the CFA, have to
25 pay to repair -- excuse me -- the damage they did.

1 THE COURT: Well let me ask you this while
2 we're doing this. And it's not -- I mean, you're not
3 going to get a ruling today. But suppose Gupta
4 ingested the samosa and became ill, would they be,
5 would they be entitled to get their medical bills?

6 MR. DINELLI: That's unanswered by that
7 question -- I mean, by the case.

8 THE COURT: I know it's not. That's why I'm
9 asking you, would it have changed the case if they were
10 ill as opposed to a spiritual cleansing?

11 MR. DINELLI: I don't know the answer to
12 that. I can tell --

13 THE COURT: Because it seems to me, I --

14 MR. DINELLI: -- I can tell you, I can tell
15 you one metaphor we were discussing over lunch before
16 the hearing that might be illuminating, Your Honor.

17 THE COURT: Okay.

18 MR. DINELLI: If someone, for example,
19 provided an exercise machine and they said this is
20 going to strengthen your back, and instead, what it did
21 was cause you to have a slipped disc. I think we would
22 think that one form of ascertainable loss would be the
23 medical expenses incurred to fix the damage done by, in
24 that case, a piece of fault merchandise.

25 THE COURT: Well but wouldn't that be a

1 product liability case in a tort action, --

2 MR. DINELLI: Well it might be.

3 THE COURT: -- which speaks to my other
4 question, is why were (sic) there no tort action here
5 if we felt that what they did was junk science and was
6 almost tantamount to a malpractice case. How come
7 that's not in this?

8 MR. DINELLI: Well, Your Honor, we have lots
9 of reasons why we chose to bring the case we did, as
10 I'm sure you're aware. But what we did bring was a
11 case that requires proof of, of violation and
12 ascertainable loss -

13 THE COURT: Okay.

14 MR. DINELLI: -- and causal connection.

15 THE COURT: Well let's carry this, because I
16 would like the parties to look at D'Agostino and to see
17 whether or not I have the right interpretation. And
18 then I won't have to address this rather novel issue
19 about fixing a human being, and whether that's
20 recoverable under the Consumer Fraud Act, since I
21 haven't been, I haven't been able to find anyone. But
22 I understand the distinction, but I'm not comfortable
23 yet. And I don't have to make that ruling yet. So
24 let's take a look at -- it's -- the one I'm referring
25 to is D'Agostino v Maldonado. It's 216 N.J. 168,

1 Supreme Court 2013.

2 MR. DINELLI: Thank you, Your Honor. If
3 you're going to continue this, I would love the
4 opportunity to be at the next hearing. I do have a
5 vacation coming up. I'm wondering if I might be able
6 to look at the calendar.

7 THE COURT: Oh, all right. Well we can do --
8 I mean, this is -- I don't, I don't see any time
9 pressure on this motion. I don't see anything that --
10 is anybody -- is this going to affect what somebody
11 does over the next three weeks, the ruling on this? I
12 don't think so. So what's -- the next motion day would
13 be June 6th, right? June 6th okay?

14 MR. DINELLI: That's fine with me, Your
15 Honor.

16 THE COURT: No, no, Counsel is not available
17 in two weeks. Two weeks is, is May 23rd.

18 MR. LAFFEY: I'm, I'm okay with June 6th.

19 THE COURT: Are you okay with June 6? All
20 right.

21 Counsel, are you all right with June 6th?

22 UNIDENTIFIED: I believe so, Your Honor.

23 THE COURT: All right. And I'll try to do
24 the same thing. I'll do it in the afternoon since
25 you're calling in front the west coast. It seems the

1 afternoon works well.

2 UNIDENTIFIED: That's much better. I really
3 appreciate that. Thank you, Your Honor.

4 THE COURT: No problem.

5 MR. DINELLI: And, Your Honor, are you going
6 to give us a date for the submissions if you'd like?

7 THE COURT: I mean, I -- how -- I mean, I
8 would hope I can get them in a couple of weeks. I
9 mean, --

10 MR. DINELLI: Sure.

11 THE COURT: Are we -- I'm carrying the motion
12 to June 6th. I mean, I don't need them tomorrow. I
13 have other motions that I'm going to do on the 23rd.
14 So why don't you have them here by -- oh, that's right,
15 you're going to be out.

16 Have them here -- why don't we have them here
17 by like the, the -- May 28th. It's really -- it's just
18 that one case. I -- maybe you'll find something else.
19 I didn't find anything else. But I didn't really -- I
20 will concede I did not at depth, to see where this was
21 cited. I'm just asking you to read the case and see
22 what your respective conclusions are on that. So why
23 don't we make May 28th be the submissions?

24 MR. DINELLI: Letter brief, okay.

25 THE COURT: Well letter brief is fine. I

1 just want -- yeah, I mean, you're just going, you're
2 just going to see whether or not -- the issue that I
3 want addressed is whether or not ascertainable loss is
4 distinct from damages sustained. That's the issue.

5 MR. LAFFEY: Yes, sir, I understand.

6 THE COURT: Okay, all right? All right,
7 thank you all very much.

8 All right, off the record.

9 (Recess)

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CERTIFICATION

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3 I, Mary Nelson, the assigned transcriber, do
4 hereby certify the foregoing Transcript of Proceedings
5 in the Hudson County Superior Court, Law Division, on
6 May 9, 2014 and recorded on CD from 4:14 to 4:32, is
7 prepared in full compliance with the current Transcript
8 Format for Judicial Proceedings and is a true and
9 accurate compressed transcript of the proceedings as
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A.O.C. No. 219

Dated: 5/22/14

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