

October 1, 2011

I. CONSUMER FRAUD ACT

Fees Awardable Under Consumer Fraud Act Even Absent a Showing of Ascertainable Loss

In *Perez v. Professionally Green and Swim-Well Pools, Inc.*, 2011 WL 4834843, (N.J. Super. A.D. Oct. 13, 2011), plaintiffs, Alex and Cathy Perez, contracted with Swim-Well to install a pool at their residence. Plaintiffs subsequently contracted with defendant Professionally Green, LLC, to perform paving and landscaping around the pool, and defendant VCA Sons, Inc., to construct a fence to enclose the pool.

After construction disputes arose among the parties, plaintiffs filed a complaint against defendants alleging, among other things, a cause of action for consumer fraud. One of the consumer fraud claims against Swim-Well was based on the allegation that Swim-Well's contract with plaintiffs did not include the start and end dates for construction of the pool. Plaintiffs alleged they suffered an ascertainable loss by losing the use of the pool for the summer.

Plaintiffs moved for partial summary judgment against Swim-Well and the other defendants seeking a judgment that those defendants violated the CFA and that plaintiffs suffered an ascertainable loss caused by the violations. Swim-Well opposed the motion and filed a motion to dismiss some of the CFA claims, but did not move to dismiss the CFA claim based on the absence of a start and end date in the contract.

The trial judge granted partial summary judgment to plaintiffs on the CFA claim that alleged Swim-Well and Professionally Green did not include start and end dates in their contracts. The judge stated that if a CFA plaintiff proves both an unlawful practice and an ascertainable loss an award of treble damages and attorneys' fees was required; however, in this case the judge found that a question of fact remained as to whether the Defendants' failure to include start and completion dates in the contracts caused an ascertainable loss by the Plaintiffs and therefore should be decided by the jury at trial.

Following the close of plaintiffs' proofs at trial, Swim-Well moved for an involuntary dismissal of the CFA claim arguing that plaintiffs failed to establish they suffered an "ascertainable loss" caused by the "technical violation" of failing to include start and end dates in the contract. The trial judge granted the motion, finding that plaintiffs failed to establish a prima facie showing of an ascertainable loss.

Plaintiffs filed a post-trial motion seeking counsel fees and costs pursuant to the CFA. The trial judge denied their application. The judge rejected plaintiffs' argument that *Weinberg v. Sprint Corp.*, 173 N.J. 233 (2002), permitted recovery of attorneys' fees and costs when the issue of ascertainable loss is dismissed as a matter of law. The judge ruled that *Pron v. Carlton Pools, Inc.*, 373 N.J. Super. 103 (App.Div.2004), was dispositive of the counsel fee issue, quoting the following language from *Pron*:

[W]here the defendant obtains a motion for involuntary dismissal at the end of the plaintiffs' case for failure to prove an ascertainable loss, and the defendant is not required to present its defense to the plaintiff's claim, and the factfinder, whether judge or jury is not called upon to decide whether an ascertainable loss has been proved, plaintiff is not entitled to recover attorneys' fees.

On appeal the court was required to decide whether a plaintiff who proves a technical violation of the CFA and demonstrates a triable issue of ascertainable loss on a summary judgment motion, but fails to present sufficient proofs to avoid an involuntary dismissal at the close of his or her proofs at trial, has standing to recover attorneys' fees.

Swim-Well argued that *Weinberg and Pron* required that to have standing under the CFA, a plaintiff must establish a prima facie case that is ultimately decided by the factfinder. The court rejected that argument stating that in *Weinberg* the Supreme Court reasoned that "if [a] plaintiff ultimately loses on his damage claim but does prove an unlawful practice under the [CFA,] [t]he [CFA's] remedial purposes are promoted thereby and the Legislature's requirement of ascertainable loss for a private cause of action is respected." The court's interpretation of *Weinberg* did not require a CFA plaintiff to overcome the double hurdle of surviving both a summary judgment and a motion for involuntary dismissal to demonstrate a bona fide claim of ascertainable loss. As such, the court reversed the 2010 order denying plaintiff's application for attorneys' fees and costs and remand for further proceedings consistent with its opinion.

II. GENERAL LITIGATION

The Third Circuit Adopts the Later-Served Rule Allowing Each Individual Defendant Thirty Days to File a Notice of Removal Beginning When that Particular Defendant is Served

In *Delalla v. Hanover Insurance*, ___ F.3d ___, 2011 4823483 (3d Cir. Pa), Delalla and NMD were sued by Product Partners, LLC in a trademark dispute. NMD held a liability insurance policy issued by Hanover Insurance. Hanover retained Joseph Oberlies of Connor Weber & Oberlies to represent both Delalla and NMD. Oberlies negotiated a settlement of the trademark dispute. Subsequently, Delalla and NMD filed suit against Hanover, Oberlies, and Connor Weber & Oberlies alleging legal malpractice and other related claims under New Jersey law. Delalla and NMD served Hanover with the Complaint on April 14, 2009. Oberlies and his law firm, however, were not served until April 23, 2009.

On May 15, 2009, more than thirty days after Hanover was served but less than thirty days after the Law Firm Defendants were served, the Law Firm Defendants filed a notice of removal. Although Hanover had not filed a notice of removal within thirty days of being served, it joined in the Law Firm Defendant's notice of removal.

Delalla and NMD filed a motion to remand the action to New Jersey state court on the basis that the notice of removal was not timely, having been filed more than thirty days after Hanover was served. The trial court judge denied the motion to remand, finding that the removal was timely under the later-served rule. The case was transferred to the Eastern District of Pennsylvania where it was dismissed. Delalla and NMD appealed.

On appeal, the Third Circuit was faced with a question that has become the subject of a deep circuit split: Does the first-served defendant's thirty-day clock run for all subsequently served defendants (the first-served rule), or does each defendant get his own thirty days to remove after being served (the later-served rule)?

In construing the thirty day limitation, the majority of courts of appeals have adopted what has been called the later-served defendant rule. Under the later-served rule, each defendant individually has thirty days to file a notice of removal beginning when that particular defendant is served.

On the other side of the split are the Circuits, which have adopted variations of what has been called the first-served defendant rule. Under the first-served rule, in order to successfully remove a state court case, any defendant that seeks to file a notice of removal must do so within thirty days of the date of service for the first-served defendant.

The Third Circuit joined the majority of courts and adopted the later-served rule. In doing so, the court examined the wording and construction of the statute. The court noted that Section 1446(a) provides that "[a] defendant or defendants" may initiate the removal process by filing a notice of removal. Section 1446(b) then sets out the rules governing each notice of removal that may eventually be filed, providing that "[t]he notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant...." 28 U.S.C. § 1446(b).

Recognizing that the two provisions must be read together in order to give effect to congressional intent regarding the procedure for removal, the court attempted to resolve the use of the phrase "defendant or defendants" in subsection (a) and the use of the singular "defendant" in subsection (b). The court provided "Given that § 1446(a) explicitly affirms the possibility of multiple notices of removal, the only reasonable reading of § 1446(b) is that the subsection applies individually to each notice of removal that might potentially be filed by each removing "defendant." The court found that to hold otherwise would create tension between subsections (a) and (b). Therefore, the plain text of § 1446(b) pointed toward the later-served rule.

The court also found that the later-served rule is more equitable than the first-served rule noting that under the later-served rule, each defendant has an equal amount of time in which to decide whether or not to file a notice of removal. While under the first-served rule, the time a defendant has to file a notice of removal is a function of when that defendant is served. Consequently, a

later-served defendant may be denied his or her right to file a notice of removal and to convince his or her more reluctant co-defendants to join in removal merely because the removing defendant was not served earlier.

Finally, the court rejected that argument that the first-served rule should be adopted because it represents the strictest reading of section 1446 (b). The court noted that while it is certainly true that removal statutes generally should be construed strictly, the Supreme Court in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999) declined to adopt the strictest construction of a removal statute where the language of the statute and congressional intent point toward a more lenient interpretation.

III. EMPLOYMENT LAW

Under the NJLAD, Non-Physical Handicaps Require an Ample Amount of Medical Proof in Order to be Considered a Disability.

In *Russo v. Chico*, 2011 WL 4901357 (D.N.J. October 14, 2011), an unpublished opinion, Plaintiff, Lori Russo, brought an action against defendants, Chico's FAS, Inc., d/b/a Chico's WhiteHouse/Black Market ("Chico's") and Elizabeth Medeiros ("Medeiros") in New Jersey state court alleging violations of the Conscientious Employee Protection Act ("CEPA"), and the New Jersey Law Against Discrimination ("NJLAD"), Defendants removed the action to federal court, alleging jurisdiction pursuant to 28 U.S.C. § 1332(a).

Plaintiff was hired as a Store Manager at Chico's WhiteHouse/Black Market in March 2008. Medeiros became Plaintiff's District Manager in December 2008. Their first in-person encounter occurred at Plaintiff's store in January 2009, during which Medeiros immediately confronted Plaintiff for violating various store policies, motivating Plaintiff to request a transfer out of Medeiros's district. Plaintiff's request for a transfer was denied. Medeiros issued Plaintiff a Record of Associate Contact ("ROAC"), dated January 20, 2009, listing various performance issues to be addressed by Plaintiff.

Medeiros issued Plaintiff another ROAC on March 11, 2009, for "failure to meet the job responsibilities of a Store Manager" since February 21, 2009, including not reaching the store's sales goals for February, missing a meeting, and failing to ensure that sales associates took required meal breaks. On April 15, 2009, Plaintiff received an overall rating of "requires improvement" on a performance evaluation for the period spanning her hire date through January 31, 2009.

Plaintiff's employment was terminated on July 24, 2009. The reason for Plaintiff's termination was "violating company policies," specifically, changing the information on the time records of sales associates. Laura Coletti ("Coletti"), a Regional Sales Manager for Chico's, approved the termination of Plaintiff's employment..

Plaintiff alleged that she had a disability, Attention Deficit Hyperactivity Disorder (“ADHD”), a subset of Attention Deficit Disorder (“ADD”). Medeiros was unaware of Plaintiff's ADD until March 2009, when Plaintiff, Medeiros, and two co-workers were at a café and Plaintiff, in response to a “rude comment about Attention Deficit Disorder” made by one of the co-workers, stated that she happened to be one of those people that have Attention Deficit Disorder and was “really offended.” Plaintiff alleged that Medeiros would then say things to her such as: “What's wrong with your brain?”, “Does your brain even work?”, and “Can you even read?” It was Plaintiff's “perception” that after Medeiros discovered that Plaintiff has ADD, Medeiros made the decision that Plaintiff could not do her job.

Defendants contended that Plaintiff had not established the first element of her prima facie case because she had demonstrated neither that she has a disability within the meaning of the NJLAD, nor that the defendant employer knew of the disability. The court agreed finding that while ADD and other psychiatric disorders can constitute a disability under the NJLAD, Plaintiff was unable to prove that she was “disabled.” Plaintiff provided copies of her psychiatrist's records, which indicated she was treated for ADD; however, the records are not authenticated by Plaintiff's treating psychiatrist, and were therefore inadmissible. The court held that Plaintiff's unauthenticated psychiatrist's records and own admission of having ADD did not satisfy her burden of demonstrating that she was disabled within the meaning of the NJLAD at the time of her termination.

The court also found that Plaintiff did not show that Defendants knew of her alleged disability. Plaintiff testified that her ADD did not interfere with her work performance. She further testified that she: (1) “didn't feel that [she] needed to provide Chico's with any documentation that [she] had attention deficit disorder. That did not affect [her] job ability”; (2) “wasn't trying to come on as a disabled person”; (3) did not provide Chico's any documentation of having ADD or ask for any accommodation; and (4) never asked for any leave time due to her ADD.” The court found that these admissions indicate that Defendants had no basis to perceive Plaintiff as being disabled, even accepting as true Plaintiff's assertion that Medeiros heard Plaintiff say in March 2009 that Plaintiff has ADD.

Therefore, the Court held that Plaintiff did not meet the first element of her prima facie case for unlawful discharge under the NJLAD.

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