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L&K DENTAL P.A., and DONG HYUN : APPELLATE DIVISION  
LEE, : DOCKET NO:A-662-11T2  
: :  
Plaintiffs-Appellants, :  
: :  
Vs. : Civil Action  
: :  
TRANSNATIONAL COMMUNICATIONS : On Appeal From:  
INTERNATIONAL, : Superior Court,  
: Law Division: Bergen County  
Defendant-Appellee, : Docket No.: BER-L-9555-09  
: :  
RECEIVABLE MANAGEMENT SERVICE : Sat Below:  
a/k/a/ GLOBAL COLLECTION COMPANY, : Hon. Estela M. De La Cruz,  
and RDS SOLUTIONS, : J.S.C.  
: :  
Defendants. :  
: :  
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**BRIEF AND APPENDIX OF DEFENDANT-APPELLEE  
TRANSNATIONAL COMMUNICATIONS INTERNATIONAL**

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**PRELIMINARY STATEMENT**

The Defendant-Appellee Transnational Communications International ("TNCI") respectfully submits this Brief and Appendix in opposition to the appeal filed by the plaintiffs-appellants ("Appellants"). Pursuant to this Court's Order entered on March 19, 2012, the scope of this appeal is limited to the trial court's August 26, 2011 order denying Appellants' motion for reconsideration of the July 7, 2011 order imposing sanctions against them in the amount of \$20,948.

**PROCEDURAL HISTORY & FACTUAL BACKGROUND**

Appellants, a dentist and his professional dental practice, filed their Complaint on October 30, 2009 alleging three (3) causes of action arising from the simple installation of Internet and telephone service at the their business office, and TNCI's attempts to collect the debt after Appellants terminated the service: Count One based on alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), Count Two based on alleged violations of the New Jersey Consumer Fraud Act ("NJCFCA"), and Count Three based on the intentional infliction of emotional distress. (Pa0002).

In lieu of answering, defendants TNCI and Receivable Management Services ("RMS") each filed a motion to dismiss

Appellants' Complaint for failure to state a claim pursuant to R. 4:6-2(e). (Pa0020).

Pursuant to an Order entered on March 19, 2010, the trial court dismissed Count One of the Complaint as to TNCI, dismissed Count Two of the Complaint to RMS, and dismissed Count Three to both RMS and TNCI. (Pa0130).

Thereafter, TNCI filed a Counterclaim against plaintiff-appellant L&K Dental, P.A. ("L&K") for breach of contract to recover amounts due arising out of L&K's failure to pay for the installation of Internet and telephone service. (Pa0138).

By Order entered on August 13, 2010, the Court granted Appellants' motion to amend their Complaint to add a new party and to clarify their claims. (Pa0214). On or about August 20, 2010, Appellants filed their Amended Complaint naming RDS Solutions ("RDS") as an additional defendant, and adding two (2) new causes of action against TNCI; namely, breach of contract, and breach of fiduciary duty. (Pa0218).

On December 3, 2010, the trial court granted RMS' motion for summary judgment dismissing Appellants' Amended Complaint asserting a claim under the FD CPA. (Pa0437).

On December 18, 2010, TNCI filed a motion for summary judgment to dismiss all counts of Appellants' Amended

Complaint. The trial court granted TNCI's motion by Order entered on January 25, 2011. (Pa0757).

On January 28, 2011, TNCI filed a motion for sanctions against Appellants and their counsel for engaging in frivolous litigation in violation of R. 1:4-8. (Pa0767). In response, Appellants cross-moved for sanctions on February 10, 2011. (Pa0902).

On February 11, 2011, TNCI filed a motion for summary judgment on the Counterclaim. Also, on February 18, 2011, RDS filed a motion for summary judgment. (Pa0969). On March 8, 2011, Appellants filed a cross-motion for summary judgment to dismiss TNCI's Counterclaim. (Pa1146).

On April 5, 2011, the trial court entered an Order and 17-page decision disposing of the 5 motions filed between January 28, 2011 to March 8, 2011: TNCI's motion for sanctions was denied without prejudice as premature; Appellants' cross-motion for sanctions was denied with prejudice; TNCI's and Appellants' respective motions for summary judgment on the Counterclaim were both denied without prejudice; and RDS's motion for summary judgment was granted in part and denied in part. (Pa1226). As a result of the April 5, 2011 Decision and Order, the only remaining claims left in the case were TNCI's Counterclaim

for breach of contract, and Appellants' claim against RDS for breach of contract.

On May 9, 2011, the trial court entered an order voluntarily dismissing TNCI's Counterclaim and the remaining counts of Appellants' Complaint against RDS. (Da1).

On May 13, 2011, TNCI renewed its request for sanctions against Appellants and their counsel pursuant to R. 1:4-8 by filing a new motion. (Da3). In support, TNCI submitted the Certification of its counsel itemizing the time and billing entries for which reimbursement was sought and providing copies of invoices issued to TNCI. (Pa1419).

On July 1, 2011, the trial court issued a written decision awarding TNCI \$20,948 in sanctions against Appellants only. (Pa1306). On July 7, 2011, the trial court issued an Order Entering Final Judgment (the "Final Judgment") in favor of TNCI and against Appellants in the total amount of \$20,948. (Da6).

On July 26, 2011, Appellants filed a motion for reconsideration of the Final Judgment. (Pa1317). The trial court denied the reconsideration motion by Order entered on August 26, 2011. (Pa1462).

By Consent Order entered on October 4, 2011, Appellants deposited the sum of \$20,948 with the Superior

Court of New Jersey Trust Fund in exchange for TNCI's agreement to withhold execution of the Final Judgment.<sup>1</sup> (Pa1464)

On October 7, 2011, Appellants filed a Notice of Appeal of the trial court's Final Judgment as well as all other pretrial rulings granting summary judgment dismissing their claims. (Pa1495). On October 20, 2011, the Appellants filed an Amended Notice of Appeal. (Pa1507).

On February 27, 2012, TNCI filed a motion to dismiss the appeal as being untimely filed outside of the 45-day period provided by R. 2:4-1(a). Appellants opposed the motion in a separate brief filed on March 7, 2012.

By Order dated March 16, 2012, the Court granted TNCI's motion to dismiss in part and denied the motion in part, declaring that "[T]he appeal is limited to consideration of the order denying plaintiff's motion for reconsideration, since the appeal was filed within 45 days of that order." (Da7).

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<sup>1</sup> On October 9, 2011, TNCI filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the District of Massachusetts (Boston) under Case No.: 11-19595 (WCH). By Order entered on January 4, 2012, the Bankruptcy Court approved TNCI's retention of LoFaro & Reiser, L.L.P. as its appellate counsel. The automatic stay of 11 U.S.C. §362(d) does not apply to this motion or to TNCI's collection of the sanctions award.



### STANDARD OF REVIEW

At the trial level motions for reconsideration are governed by R. 4:49-2. Appellants, as the proponent of reconsideration, were required to "state with specificity the basis on which it [reconsideration] is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." R. 4:49-2.

"'[R]econsideration is a matter within the sound discretion of the [c]ourt, to be exercised in the interest of justice.'" Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). Therefore, any error by the trial court in granting or denying a motion for reconsideration is reviewed under the "abuse of discretion" standard. Del Vecchio v. Hemberger, 388 N.J. Super. 179, 189 (App. Div. 2006). An abuse of discretion occurs when the trial judge's "decision [was] made without rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." United States ex rel. USDA v. Scurry, 193 N.J. 492, 504 (2008) (assertion in original) (internal quotation marks omitted).

A motion for reconsideration should not be made merely because a party is dissatisfied with the court's decision.

Ibid. "[A] litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." Dario v. Dario, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Nor should a motion for reconsideration "serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 1987) (citing Cummings, 295 N.J. Super. at 384. Instead,

"[R]econsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence. . . ."

Cummings, 295 N.J. Super. at 384 (quoting D'Atria, 242 N.J. Super. at 401).

If a litigant seeking reconsideration "wishes to bring new or additional information to the [c]ourt's attention which it could not have provided on the first application, the [c]ourt should, in the interest of justice (and in the exercise of sound discretion), consider the evidence."

D'Atria, 242 N.J. Super. at 401-402 (internal citations

omitted). However, a motion for reconsideration is properly denied if it is based on unraised facts known to the movant prior to entry of judgment. See Del Vecchio, 388 N.J. Super. at 188-89 (affirming denial of motion for reconsideration that was premised upon an investigation that occurred after the first motion had been denied, but could have taken place before then).

#### LEGAL ARGUMENT

##### THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR RECONSIDERATION

The trial court issued an 11-page written decision on July 1, 2011 setting forth the factual basis for imposing sanctions against the Appellants. (Pa1306). That decision was memorialized in the Final Judgment entered on July 7, 2011. (Da6).

In moving for reconsideration of the Final Judgment, it was incumbent upon Appellants to present the trial court with "a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." R. 4:49-2. However, a careful review of the record below reflects that Appellants neglected to do so. In fact, on the Final Judgment the trial court specifically noted that "Nothing submitted causes court to

disturb the July 1, 2011 ruling as required by R. 4:49-2." (Da6).

In the context of this appeal, it is now incumbent upon Appellants to demonstrate that the trial court abused its discretion in denying their motion for reconsideration. More specifically, Appellants must demonstrate that the trial judge's "decision [was] made without rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." United States ex rel. USDA v. Scurry, 193 N.J. at 504 (assertion in original) (internal quotation marks omitted). Based on the record below, Appellants simply cannot meet this high burden. Accordingly, their appeal should be denied.

It is abundantly clear that Appellants' reconsideration motion amounted to nothing more than a blatant attempt to cure what they perceived as defects in the motion record so that they could benefit in a subsequent appeal. For example, in responding to the reconsideration motion, TNCI highlighted the fact that when Appellants' first opposed TNCI's underlying May 13, 2011 sanctions motion they:

. . . initially took no issue with the amount of the legal fees sought by TNCI when their counsel filed their opposition to either of the two sanctions motions. Now, however,

plaintiffs have mounted an "after the fact" challenge to the fee award premised on the misguided notion that TNCI's R. 1:4-8 notice was deficient as relating to the claims for breach of contract and breach of fiduciary duty.

(Pa1453).

It is undisputed that Appellants' reconsideration motion was the first time they raised any objection to the amount of sanctions that TNCI sought in its May 13, 2011 motion filing. (Pa1325).<sup>2</sup> However, as this Court declared in Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, a reconsideration motion cannot "serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." 398 N.J. Super. at 310. Therefore, the trial court properly rejected the new evidence that Appellants improperly sought to introduce by their reconsideration motion.

The trial judge adequately explained the basis of her sanctions fee award in the 11-page written opinion rendered on July 1, 2011. (Pa1306). This included a recitation of R. 1:4-8 which governs applications for sanctions, its' Safe Harbor provision, and her conclusion that TNCI satisfied the rule by serving the requisite written notice to

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<sup>2</sup> Conspicuously absent from Appellants' initial pleadings filed in opposition to the underlying sanctions motion is any challenge to the amount of fees sought by TNCI. (Pa1246 - Pa1260).

Appellants' counsel. (Pa1311). In fact, the trial judge dedicated 4 pages of discussion detailing the lode-star standards governing an award of counsel fees and their application to the facts and circumstances presented in the instant matter.

The trial judge's factual determinations were based on her ability to observe the conduct exhibited by Appellants and their counsel throughout the entire course of the litigation, including numerous oral arguments on contested motions. In fact, the trial judge concluded that sanctions were justified based on the "overall baseless nature of plaintiffs' claims presentation and trial tactics," which she also characterized as "frivolous, relentless and meritless claims." (Pa1312 - Pa1316). Specifically, the trial judge found that \$20,948 in sanctions was justified because:

The entries billed and proposed for attorney's fees award have been carefully reviewed and the following is the Court's assessment of same. Counsel has billed a total of \$20 1 402.50 in fees and claims \$967.38 in disbursements. The applicant attorney has further certifies that he voluntarily discounted the January 71 2011 invoice by \$1,000. Counsel has amply described the tasks performed for the defendant client that were necessitated by plaintiffs and plaintiffs' counsel due to the frivolity and worthlessness of their

claims and applications during the course of this litigation. None of the entries billed are found to be excessive or unnecessary given the challenges presented by plaintiffs.

\* \* \*

The overall baseless nature of plaintiffs' claims presentation and trial tactics further had the effect of taking Mr. Reiser's attention from work on other clients' files to constantly address, respond, argue orally or defend the issues in this case. None of the billing is excessive and it is all found to have been triggered by plaintiffs' relentless attempts to accuse and amend to add additional claims against this defendant, all of which were dismissed by the Court, or reluctantly, by plaintiffs. The Court therefore concludes that \$20,402.50 in legal fees plus \$546 in disbursements is reasonable and was necessary to address the frivolous, relentless and meritless claims presented by plaintiffs.

(Pa1314 - Pa1316). (Emphasis added).

In their reconsideration motion, Appellants failed to cite a single controlling case which they claimed the motion judge overlooked or erred in interpreting. As TNCI highlighted in its opposition to the reconsideration motion:

When plaintiffs responded to the sanctions motion on or about June 2, 2011, they submitted a Brief and the Certification of Francis Liu, one of their lawyers. Those pleadings

constitute the complete motion record presented by the plaintiffs. Mr. Liu's eight-paragraph Certification served the limited purpose of attaching the same underlying documents which plaintiffs previously submitted to the Court when they opposed TNCI's summary judgment motion. Conspicuously absent from their original opposition pleadings is: (i) their objection to a single attorney time entry submitted by TNCI's counsel; (ii) any claim alleging a deficiency with TNCI's safe harbor letter; or (iii) any claim that the proceedings were tainted by the imprimatur of the New Jersey Supreme Court. These new arguments appear only in the recently filed Certifications of Dr. Lee and his lawyer Mr. Kimm. In other words, it was only after the Court issued its ruling that the plaintiffs and their lawyers saw fit to raise these new arguments.

(Pa1453, n1).

Lastly, Appellants ask this Court to give credence to their far-fetched claim that the trial court proceedings were tainted by disclosures made by TNCI's counsel as part of his Certification submitted in support of TNCI's request for attorneys' fees, including Mr. Kimm's prior disciplinary record. (PB20). This is nothing but a red herring, especially considering that Appellants never asserted these arguments in response to TNCI's sanctions motion filed on May 13, 2011. (Pa1246 - Pa1260). Once again, Appellants resorted to using their reconsideration motion as the vehicle to introduce new arguments not



previously advanced. Their intent and motive were blatantly obvious - they wanted to expand the motion record for a subsequent appeal. Such conduct should not be countenanced.

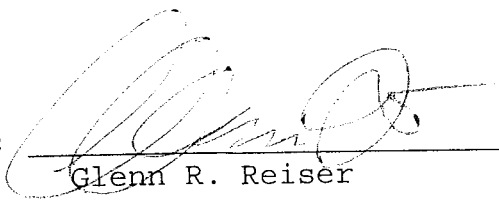
Simply put, Appellants have not met their burden in demonstrating that the trial court abused its discretion in denying their motion for reconsideration. The trial judge correctly determined that Appellants engaged in frivolous litigation throughout the entire case, and awarded an appropriate amount of fees and costs. The reconsideration motion was merely a "second bite at the apple," and the trial judge properly denied it based on Appellants' failure to satisfy their burden under R. 4:49-2. Accordingly, their appeal should be denied.

**CONCLUSION**

For the foregoing reasons and authorities cited, this Honorable Court should deny Appellants' appeal of the trial court's denial of their motion for reconsideration of the Final Judgment awarding sanctions in favor of TNCI.

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By: \_\_\_\_\_

  
Glenn R. Reiser

Dated: March 21, 2012