DONG HYUN LEE and, L&K DENTAL, P.A., Plaintiffs-Appellants, v. RECEIVABLE MANAGEMENT SERVICES a/k/a GLOBAL COLLECTION COMPANY; TRANSNATIONAL COMMUNICATIONS INTERNATIONAL; and RDS SOLUTIONS, Defendants-Respondents.

DOCKET NO. A-0662-11T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2012 N.J. Super. Unpub. LEXIS 2343

September 27, 2012, Submitted
October 17, 2012, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-9555-09.

COUNSEL: Kimm Law Firm, attorneys for appellants (Michael S. Kimm and Francesco A. Savoia, on the briefs).

LoFaro & **Reiser,** L.L.P., attorneys for respondent Transnational Communications International (**Glenn** R. **Reiser,** on the brief).

Respondents Receivable Management Services and RDS Solutions have not filed briefs.

JUDGES: Before Judges Simonelli and Koblitz.

OPINION

PER CURIAM

Plaintiffs Dong Hyun Lee (Lee) and L&K Dental, P.A. (L&K)[1] appeal from the August 26, 2011 Law Division order, which denied their motion for reconsideration of the July 6, 2011 final judgment requiring plaintiffs to pay defendant Transnational Communications International (TNCI) frivolous litigation sanctions in the amount of $20,948.50.[2] We affirm.

1 We shall sometimes refer to Lee and L&K collectively as plaintiffs.

2 By order dated March 16, 2012, we limited this appeal to the August 26, 2011 order. Thus, we will not address plaintiffs' arguments in its merits and reply briefs, which relate to a January 25, 2011 order that granted summary judgment to TNCI and dismissed plaintiffs' claims against TNCI for violating the Fair Debt Collection Practice [*2] Act (FDCPA), *15 U.S.C.A. § 1692 to § 1692p*, and the New Jersey Consumer Fraud Act (CFA), *N.J.S.A. 56:8-1 to -195*, and for the intentional infliction of emotional distress.

The record reveals the following. TNCI claimed that plaintiffs owed $1,931.78 for telephone and internet services TNCI rendered to L&K. Plaintiffs never paid TNCI; instead, on October 30, 2009, they filed a complaint against TNCI and other defendants, alleging a violation of the FDCPA, the CFA, and the intentional infliction of emotional distress.

TNCI filed a motion to dismiss pursuant to *Rule 4:6-2(e)* for failure to state a claim on which relief could be granted. In a March 19, 2010 order, plaintiffs voluntarily dismissed the FDCPA and intentional infliction of emotion distress claims against TNCI, and Judge De La Cruz denied TNCI's motion as to the CFA claim.

Thereafter, in a March 26, 2010 letter, TNCI advised plaintiffs that the CFA claim was frivolous and interposed in bad faith, and the complaint violated *N.J.S.A. 2A:15-59.1* and *Rule 1:4-8* "because [it] was presented for an improper purpose, such as to harass, cause unnecessary delay, and/or cause a needless increase in the cost of litigation." TNCI demanded [*3] that plaintiffs dismiss the CFA claim with prejudice within twenty-eight days. TNCI also stated that it would not seek frivolous lawsuit sanctions if plaintiffs dismissed the CFA claim with prejudice and the parties exchanged mutual releases.

Plaintiffs did not dismiss the CFA claim; instead, they filed an amended complaint adding claims against TNCI for breach of contract and breach of fiduciary duty. On December 10, 2010, TNCI filed a summary judgment motion to dismiss the amended complaint. In a January 25, 2011 written opinion and order, Judge De La Cruz granted the motion and dismissed the amended complaint with prejudice. The judge found that Lee lacked standing as to the breach of contract claim because he had signed the contract with TNCI in his capacity as president of L&K; L&K's breach of contract claim lacked merit because it had received telephone and internet services from TNCI for four months and did not pay for them; the CFA claim lacked merit because plaintiffs received services from TNCI, did not pay for them, and thus could not demonstrate an ascertainable loss; and TNCI owed no fiduciary duty to plaintiffs because they had a clearly contractual relationship and there [*4] was no special agency relationship.

On January 28, 2011, TNCI filed a motion for frivolous litigation sanctions. On February 10, 2011, plaintiffs filed a cross-motion for frivolous lawsuit sanctions. In an April 5, 2011 written opinion and order, Judge De La Cruz denied TNCI's motion without prejudice, finding it was premature, and denied plaintiffs' cross-motion with prejudice.

On May 13, 2011, TNCI filed a second motion for frivolous litigation sanctions, seeking $20,402.50 for attorneys fees and $967.38 for costs incurred since the March 26, 2010 letter. Plaintiffs did not challenge the reasonableness of the fee TNCI sought or dispute that TNCI complied with *Rule 1:4-8(b)*.

In a July 1, 2011 written opinion and order, Judge De La Cruz granted TNCI's motion. The judge found that the March 26, 2010 letter was a "safe harbor letter" that complied with *Rule 1:4-8(b)*, and plaintiffs should have withdrawn the CFA claim because they suffered no ascertainable loss and TNCI had offered to settle the claim. In determining the reasonableness of the fee TNCI sought, the judge analyzed TNCI's attorney's affidavit of services and billing records, and applied *R.P.C. 1.5* and the principles set forth [*5] in *Rendine v. Pantzer, 141 N.J. 292, 661 A.2d 1202 (1995)*. The judge found the $20,402.50 fee was reasonable, and the tasks TNCI's counsel performed "were necessitated by plaintiffs and plaintiffs' counsel due to the frivolity and worthlessness of their claims and applications during the course of this litigation[;]" however, she reduced the costs to $546. She concluded that plaintiffs' claims were "baseless," and the fees and costs TNCI incurred were "reasonable and . . . necessary to address the frivolous, relentless and meritless claims presented by plaintiffs."

On July 26, 2011, plaintiffs filed a motion for reconsideration, raising new arguments -- that TNCI had not provided a safe harbor letter as to the breach of contract and breach of fiduciary duty claims; TNCI failed to demonstrate it incurred fees and costs for the CFA claim; and TNCI's counsel's improper conduct "poisoned and tainted the proceedings."[3] Judge De La Cruz denied the motion, concluding that "[n]othing submitted causes [the] court to disturb the July 1, 2011 relief, as required by [*Rule] 4:49-2*." This appeal followed.

> 3 We decline to address plaintiffs' contentions on appeal relating to these new arguments. *Cummings v. Bahr, 295 N.J. Super. 374, 384, 685 A.2d 60 (App. Div. 1996)*. [*6] In any event, plaintiffs' contention that TNCI's counsel's improper conduct swayed Judge De La Cruz lacks sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

"A trial judge's decision to award attorney's fees pursuant to *Rule 1:4-8* is addressed to the judge's sound discretion, and will be reversed on appeal only if it 'was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or

inappropriate factors, or amounts to a clear error in judgment.'" *McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498, 17 A.3d 816 (App. Div. 2011)* (citations omitted) (quoting *Masone v. Levine, 382 N.J. Super. 181, 193, 887 A.2d 1191 (App. Div. 2005))*.

In addition, we have held that

> Reconsideration itself is a matter within the sound discretion of the [c]ourt, to be exercised in the interest of justice[.] It is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion, but 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 [*7] consider, or failed to appreciate the significance of probative, competent evidence.
>
> [*Palombi v. Palombi, 414 N.J. Super. 274, 288, 997 A.2d 1139 (App. Div. 2010)* (citations and internal quotation marks omitted).]

A party is not permitted to use a motion for reconsideration as a basis for presenting facts or arguments that could have been provided in opposition to the original motion. *Cummings, supra, 295 N.J. Super. at 384 (App. Div. 1996)*. We will not disturb a trial judge's denial of a motion for reconsideration absent an abuse of discretion. *Id. at 389*. We discern no abuse of discretion in Judge De La Cruz's grant of TNCI's motion for sanctions, and denial of plaintiffs' motion for reconsideration.

A party may apply for frivolous litigation sanctions by "describ[ing] the specific conduct alleged to have violated" the rule against frivolous litigation. *R. 1:4-8(b)(1)*. Prior to making such an application, the party seeking sanctions must provide the other party with a notice that must:

> (i) state that the paper is believed to violate the provisions of [*R. 1:4-8*], (ii) set forth the basis for that belief with specificity, (iii) include a demand that the paper be withdrawn, and (iv) give notice, except [*8] as otherwise provided herein, that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand.
>
> [*R. 1:4-8(b)(1)*.]

Failure to conform to the *Rule's* procedural requirements will generally result in a denial of the request for a counsel fee sanction. *See State v. Franklin Sav. Account No. 2067, 389 N.J. Super. 272, 281, 913 A.2d 73 (App. Div. 2006)*. Judge De La Cruz properly found that TNCI complied with *Rule 1:4-8(b)(1)*.

Litigation is considered frivolous when it is "commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury" or if the party "knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *N.J.S.A. 2A:15-59.1(b)*. A motion for sanctions under *Rule 1:4-8* will be denied where the pleading party had an objectively reasonable and good faith belief in the merit of the claim. *See First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 433, 918 A.2d 666 (App. Div. 2007)*; [*9] *K.D. v. Bozarth, 313 N.J. Super. 561, 574-75, 713 A.2d 546 (App. Div.), certif. denied, 156 N.J. 425, 719 A.2d 1023 (1998)*; Pressler & Verniero, *Current N.J. Court Rules*, comment 2 on *R. 1:4-8* (2012). However, litigation may become frivolous, and therefore sanctionable, by continued prosecution of a meritless claim, even if the initial pleading was not frivolous. *DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 227-28, 230, 745 A.2d 561 (App. Div. 2000)*. This is because the "requisite bad faith or knowledge of lack of well-groundedness may arise during the conduct of the litigation." *United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 390, 971 A.2d 434 (App. Div.), certif. denied, 200 N.J. 367, 982 A.2d 455 (2009)* (citations and internal quotation marks omitted). In such cases, the party seeking sanctions would only be entitled to fees and/or costs incurred from the time the litigation became frivolous, rather than from the beginning of the litigation. *DeBrango, supra, 328 N.J. Super. at 230*.

The litigation in this case was clearly frivolous because plaintiffs' CFA claim had no merit whatsoever. To have standing under the CFA, a plaintiff "must produce evidence from which a factfinder could find or infer that the plaintiff suffered an actual loss." [*10] *Thiedemann v. Mercedes-Benz U.S.A, LLC, 183 N.J. 234, 248, 872 A.2d 783 (2005)*. Further, to assert a claim under the CFA, the plaintiff must demonstrate that the defendant's unconscionable business practice caused an ascertainable loss. *See Lee v. Carter-Reed Co., L.L.C., 203 N.J. 496, 521, 4 A.3d 561 (2010)* (holding that "[a] consumer who proves (1) an unlawful practice, (2) an ascertainable loss, and (3) *a causal relationship between the unlawful conduct and the ascertainable loss*, is entitled to legal and/or equitable relief, treble damages, and reasonable attorneys' fees" (emphasis added) (internal quotation marks and citation omitted)).

Plaintiffs suffered no loss. Thus, they knew or should have known that the CFA claim had no reasonable basis in law or equity, and could not be supported by a good faith argument for an extension, modification or reversal of existing law. *N.J.S.A. 2A:15-59.1(b)*. Their CFA claim was frivolous, and therefore sanctionable.

Even if plaintiffs had an initial objectively reasonable and good faith belief in the merit of the CFA claim, the litigation became frivolous, and therefore sanctionable, when they continued prosecuting a meritless claim after receiving the March 26, 2010 letter. [*11] Accordingly, Judge De La Cruz properly granted TNCI's motion for frivolous lawsuit sanctions, and properly denied plaintiffs' motion for reconsideration.

Affirmed.