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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2765-20**

HAROLD M. HOFFMAN,
individually and on behalf
of those similarly situated,

Plaintiff-Appellant,

v.

PURE RADIANCE, INC.,

Defendant-Respondent.

Submitted March 9, 2022 – Decided May 31, 2022

Before Judges Gilson and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Docket No. L-7229-20.

Harold M. Hoffman, appellant pro se.

Olshan Frome Wolosky LLP, attorneys for respondent
(Scott Shaffer, on the brief).

PER CURIAM

Plaintiff Harold Hoffman, an attorney representing himself, filed a proposed class action alleging that defendant Pure Radiance, Inc. had engaged in consumer fraud by falsely marketing a hair growth product. Plaintiff appeals from an order granting summary judgment to defendant and dismissing with prejudice his claims under the Consumer Fraud Act (the Act), N.J.S.A. 56:8-1 to -227. Because plaintiff did not show he suffered an ascertainable loss, we affirm.

I.

We discern the facts from the record and view them in the light most favorable to plaintiff. See Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014). In November 2020, defendant had placed an advertisement in the New York Post for Re-Nourish, a topical hair-restoration product (the Product). Defendant had claimed that the Product would regrow "a thick, full head of hair, even after years of balding." Defendant also claimed that the Product was "the world's first and only hair loss solution that revives dead hair follicles" and regrows hair "in just 30 days." The advertisement had displayed a before-and-after image of the back of a man's head. The before picture showed a balding head and the after picture showed a full head of hair and no bald spots.

On November 20, 2020, plaintiff saw defendant's newspaper advertisement, placed an order, and paid \$108.90 to purchase the Product. After purchasing the Product, plaintiff conducted research on the Product and its efficacy and concluded that defendant's claims in its advertisements were "misrepresentations of material fact." That same day, plaintiff filed a proposed class action alleging defendant violated the Act. It is undisputed that plaintiff did not receive or use the Product before filing his lawsuit against defendant.

In his complaint, plaintiff alleged defendant's conduct constituted an "unconscionable commercial practice," "deception," "fraud," "misrepresentation," and "knowing concealment" in violation of the Act. Plaintiff did not allege violations of common-law fraud. Plaintiff also did not allege that the Product was harmful or that he had used, examined, or tested the Product. On November 25, 2020, five days after placing his order and filing his action, plaintiff received the Product.

In January 2021, defendant filed an answer to plaintiff's complaint and as an affirmative defense asserted that plaintiff had received a full refund of the purchase price and all fees he paid to defendant. Plaintiff does not dispute that he received the refund.

In February 2021, defendant moved for judgment on the pleadings or, in the alternative, for summary judgment. In support of that motion, defendant submitted two certifications, along with various documents. Defendant also submitted a statement of uncontested material facts. The trial court adjourned defendant's motion and plaintiff filed a certification in opposition to the motion. In his certification, plaintiff stated that he purchased the Product because he had been balding for years and he was "intrigued by" defendant's claim that the process could be halted and reversed by using the Product. He expressly denied defendant's claim that he had purchased the Product for the purpose of bringing a lawsuit. Plaintiff also stated that he decided to file the lawsuit only after purchasing the Product and "conducting fact research concerning the product and its efficacy." Plaintiff did not support his certification with any citations to documents or evidence.

The trial court did not hear arguments on the motion. Instead, on March 30, 2021, the trial court issued an order and written opinion granting defendant's motion and dismissing plaintiff's complaint with prejudice. The court analyzed defendant's motion both as a motion to dismiss for failure to state a claim upon which relief can be granted and as a summary-judgment motion. The court concluded that plaintiff (1) lacked standing to bring a claim under the Act; (2)

had not established an ascertainable loss; (3) could not bring a claim under the prior-substantiation theory; (4) failed to plead facts establishing any "wrongful acts" by defendant or any ascertainable loss to plaintiff; and (5) failed to plead specific facts establishing fraud. Moreover, the trial court reasoned that plaintiff failed to file the proper response to defendant's statement of material facts and did not dispute defendant's statement of material facts with citations to the record. Finally, the trial court reasoned that it was appropriate to dismiss the complaint with prejudice because any attempt to amend the complaint would be futile.

Plaintiff moved for reconsideration but on May 12, 2021, the trial court denied plaintiff's motion. Plaintiff now appeals from the trial court's March 30, 2021 order dismissing his complaint with prejudice.

II.

On appeal, plaintiff argues that the trial court erred in summarily dismissing his complaint with prejudice. He maintains that he properly pled all elements of claims under the Act. In that regard, he contends that defendant engaged in fraud to induce the purchase of the Product in violation of the Act, the Product's purchase price constitutes his ascertainable loss, and he properly showed causation between defendant's unlawful conduct and an ascertainable

loss from his purchase of the Product. Plaintiff also asserts that he has standing to bring claims under the Act because he paid defendant for the Product. Finally, plaintiff argues that he did not allege a lack-of-substantiation claim against defendant and, therefore, his complaint should not be dismissed on that ground.

Having conducted a de novo review of the record and the applicable law, we hold that plaintiff did not show that he had suffered an ascertainable loss. Accordingly, we affirm the order dismissing plaintiff's complaint on that ground and do not reach the other issues relied on by the trial court.

We analyze the issue of ascertainable loss as a motion for summary judgment in accordance with Rule 4:46. Defendant filed both a motion to dismiss under Rule 4:6-2(e) and a motion for summary judgment. Rule 4:6-2 provides that if a motion to dismiss relies on matters outside the pleadings, "the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given . . . reasonable opportunity to present all material pertinent to such a motion." Here, defendant submitted two certifications in support of its motion and plaintiff submitted a certification in support of his opposition.

Appellate courts review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13

(2021). Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)). "An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). An allegation is not enough to defeat summary judgment; the non-moving party "must produce sufficient evidence to reasonably support a verdict in its favor." Invs. Bank v. Torres, 457 N.J. Super. 53, 64 (App. Div. 2018), aff'd and modified by 243 N.J. 25 (2020); see also Sullivan v. Port Auth. of N.Y. & N.J., 449 N.J. Super. 276, 279-80 (App. Div. 2017) (explaining that "bare conclusions" lacking "support in affidavits" are "insufficient to defeat [a] summary judgment motion").

To state a claim under the Act, a private litigant must allege specific facts that, if proven, would establish: "(1) unlawful conduct by the defendant[]; (2)

an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss." Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 113 (App. Div. 2009) (quoting Dabush v. Mercedes-Benz USA, LLC, 378 N.J. Super. 105, 114 (App. Div. 2005)).

An unlawful practice, as defined by the Act, is "any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation . . . in connection with the sale or advertisement of any merchandise" Lee v. Carter-Reed Co., 203 N.J. 496, 521-22 (2010) (alteration in original) (quoting N.J.S.A. 56:8-2). An ascertainable loss is a loss that is "quantifiable or measurable;" it is not "hypothetical or illusory." Id. at 522 (quoting Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248 (2005)). "Examples of an ascertainable loss are an out-of-pocket loss, and the replacement cost of a defective product." Ibid. (internal citations omitted). "To establish causation, a consumer merely needs to demonstrate that he or she suffered an ascertainable loss 'as a result of' the unlawful practice." Ibid. (quoting N.J.S.A. 56:8-19).

In his complaint, plaintiff alleges that his ascertainable loss was the \$108.90 that he paid for the Product and receiving a product that was different

from the one promised by defendant. Plaintiff does not allege that the Product is harmful and in his certification in opposition to the summary judgment motion he did not challenge that he did not use the Product before filing his complaint. Plaintiff also did not state he ever intended to use the Product. Under those undisputed facts, the purchase price could only be an ascertainable loss if plaintiff can show that he did not get what he paid for. See Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 558 (2009) (reasoning a lost benefit of a bargain amounts to an ascertainable loss). In other words, to establish ascertainable loss under the Act, plaintiff must be able to demonstrate that he used the Product and it did not produce hair growth as advertised. Just as importantly, plaintiff has not explained how he would demonstrate that the Product does not perform as advertised. Consequently, plaintiff's claim of loss is purely hypothetical. See Thiedemann, 183 N.J. at 248 (evidence of loss must be presented with "some certainty demonstrating that it is capable of calculation" although not "in all its particularity" to avoid summary judgment). Therefore, the material facts on the record for summary judgment did not show that plaintiff suffered an ascertainable loss as required under the Act. See N.J.S.A. 56:8-19.

Plaintiff argues that he need not use the Product to state a claim under the Act. That may be true in some instances, but plaintiff must still demonstrate an

ascertainable loss. Plaintiff has conceded that he is relying on the purchase price as his ascertainable loss. Therefore, plaintiff must demonstrate that the Product did not perform as advertised. That proof must come from either plaintiff's use of the Product or from other evidence demonstrating that the Product does not perform as advertised.

In his certification in opposition to summary judgment, plaintiff offered no evidence that he could establish that the Product did not perform as advertised. In other words, plaintiff simply wants to assert that the advertisement must be presumed to be false. Proof of an ascertainable loss cannot be based on unsupported assumptions about the Product; rather, there must be evidence that the Product does not perform as advertised. "[W]hen 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 [Act's] unlawful practice, summary judgment should be entered in favor of defendant" Thiedemann, 183 N.J. at 238.

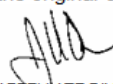
We recognize that defendant filed its motion before there was any discovery. Nevertheless, in opposing defendant's summary-judgment motion, plaintiff did not produce evidence that the Product failed to perform as advertised or state that he intended to produce such evidence during discovery.

Instead, plaintiff made a few factual assertions in his certification which did not present competent proof demonstrating he suffered an ascertainable loss or respond to the statement of material facts offered by defendant and dispute them with citations to the record. Accordingly, dismissal with prejudice was appropriate.

Finally, we clarify that we express no view on whether defendant's claims about the Product are accurate. It may well be that the Attorney General could bring claims under the Act. It also could be that another private party, who could demonstrate ascertainable loss and causation, could bring a viable claim under the Act. Plaintiff, however, failed to show an ascertainable loss and failed to demonstrate that he could show an ascertainable loss through discovery. Therefore, it was appropriate to grant summary judgment dismissing plaintiff's claims under the Act.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION