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FILED

FEB 10 2015

HUDSON COUNTY, LAW DIVISION

Boruch Cheim Levine, Jo Boruch Bella Levin, Plaintiffs.	HUDSON COUNTY, LAW DIVISION
CIVIL ACTION	
ORDER GRANTING PLAINTIFFS'	
Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, Alan Downing Life Coaching LLC, Defendants.	**JUDGMENT**

Levin, Bella Levin, and Jo Bruck, on motion returnable December 19, 2014 for a partial summary judgment order.

The Court having considered the motion and good cause appearing;

It is on this 10th day of Feb 2015 hereby:

1. It is a misrepresentation in violation of the CFA, in advertising or selling

2. It is a misrepresentation in violation of the CFA, in advertising and selling

3. It is a misrepresentation in violation of the CFA, in advertising or selling

4. The Eighth Affirmative Defense be struck

5. The Ninth Affirmative Defense be struck

~~6. The Twelfth Affirmative Defense be struck.~~

7. The Fourteenth Affirmative Defense be struck.

~~8. The Fifteenth Affirmative Defense be struck.~~

FURTHER ORDERED that a copy of this order be served on all parties within seven days.

Honorable Peter F. Dalio, III, A.J.S.C.

✓ opposed

___ unopposed

See statement of reasons dated 2/10/15 and colloquy on the record on 2/5/15.

#2A

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FILED

FEB 10 2015

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

Michael Ferguson, Benjamin Unger, Sheldon Bruck, Chaim Levin, Jo Bruck, Bella Levin,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO. L-5473-12
Plaintiffs,	
	Civil Action
JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, Alan Downing Life Coaching, LLC,	ORDER ~~GRANTING~~ DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AS TO ALL PLAINTIFFS
Defendants.	

This matter having been opened to the Court by Michael P. Laffey, Esq. and Charles S.

2015;

ORDERED that Defendants' Motion for Summary Judgment as to all Plaintiffs is hereby Denied ~~granted~~ in its entirety. PSB

FURTHER ORDERED that a copy of this order be served on all parties within 7 days of the date herein.

Dated: Feb. 10, 2015 J.S.C.

Approved

See Statement of Reasons dated 2/10/15 PSB and colloquy on the record on 2/5/15

SUPERIOR COURT OF NEW JERSEY

COUNTY OF HUDSON

MICHAEL FERGUSON, BENJAMIN UNGER, CHAIM LEVIN, JO BRUCK, BELLA LEVIN,

v.

JONAH (JEWS OFFERING NEW ALTERNATIVES FOR HEALING F/K/A JEWS OFFERING NEW ALTERNATIVES TO HOMOSEXUALITY), ARTHUR GOLDBERG, ALAN DOWNING, ALAN DOWNING LIFE COACHING LLC,

FILED

FEB 10 2015

PETER E. BARRY

CIVIL ACTION

STATEMENT OF REASONS FOR THE COURT'S FEBRUARY 10, 2015 ORDERS

STATEMENT OF REASONS

This matter arises from a consumer fraud action filed on behalf of plaintiffs Michael Ferguson, Benjamin Unger, Chaim Levin, Jo Bruck, and Bella Levin ("plaintiffs") against defendant, Jews Offering New Alternatives for Healing ("JONAH"). For a complete factual history of this case, please refer to the court's February 5, 2015 opinion regarding plaintiffs' motion to exclude expert testimony.

Before the court are summary judgment motions filed by both parties.

On November 21, 2014, plaintiffs filed a motion for partial summary judgment. Specifically, plaintiffs request that summary judgment be granted as to the following: it is a misrepresentation or violation of the CFA, in advertising or selling conversion therapy services, (1) to claim that homosexuality is a mental illness, disease, disorder, or equivalent thereof; (2) to use the word "change" as including a mere change of label or merely suppressing same-sex attraction while continuing to experience homosexual desire; which discussing claims of sexual orientation change, treat gay as synonymous

without so specifying; (3) to include specific "success" statistics when there is no factual basis

and Thirteenth Affirmative Defenses be struck.

program are precluded by signed consent forms; (2) alleged misrepresentations regarding

scientific dispute; (5) the alleged misrepresentations regarding the efficacy of sexual orientation

Plaintiffs' request for declaratory relief cannot be granted.

I.

Rule 4:46-2(c) provides that a court shall render summary judgment only when "the

there is a genuine issue as to a material fact, the court views the facts in the light most favorable

also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

litigant should have the opportunity for full exposure of its case. See Velantzas v. Colgate-

former discovery will not alter the result." Minola v. Kushner, 303 N.J. Super. 504, 507 (App.

II.

As an initial matter, the court notes that certain arguments were disposed of at oral

argument on February 5, 2015. First, JONAH conceded that its Fourteenth Affirmative Defense,

because Mr. Heffner is not a defendants and plaintiffs do not seek to hold JONAH vicariously liable for his actions. JONAH's Ninth Affirmative Defense relating to the affidavit of merit requirement embodied in N.J.S.A. 2A:53A-26 is inapplicable for the same reasons. JONAH's request that the court preclude declaratory and injunctive relief is denied as premature, but may be requested again at the conclusion of trial.

III.

The CFA was enacted in 1960 "'to combat the increasingly widespread practice of defrauding the consumer.'" Weinberg v. Sprint Corp., 173 N.J. 233, 247 (2002) (quoting Cox v. Sears Roebuck & Co., 138 N.J. 2, 14 (1994)). Originally, the power to enforce the CFA was vested exclusively with the Attorney General but, in a 1971 amendment, the Legislature supplemented the statute with a private cause of action. See id. at 248; D'Agostino v. Maldonado, 216 N.J. 168, 183 (2013).

The private cause of action operates to "(1) compensate the victim for his or her actual loss; (2) punish the wrongdoer through the award of treble damages; and (3) attract competent counsel to counteract the 'community scourge' of fraud by providing an incentive for an attorney

(quoting Weinberg, supra, 173 N.J. at 249).

The CFA requires the proof of three elements: (1) an unlawful conduct by defendant; (2) an ascertainable loss; (3) causal relationship between the unlawful conduct and the ascertainable loss. D'Agostino, supra, 216 N.J. at 184. Unlawful conduct can be established through affirmative acts or omissions or any of the violations specified under N.J.S.A. 56:8-2, irrespective of intent. Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 245 (2005); see also D'Agostino, supra, 216 N.J. at 184 (explaining that CFA "establishes a broad business ethic applied to balance the interests of the consumer public and those of the sellers" (citation and internal quotation marks omitted)).

Plaintiffs contend that JONAH engaged in unconscionable practices, deception, fraud, false promises, and misrepresentations in rendering its services. Insofar as these motions are concerned, the litigants do not contest the second and third elements. Rather, the threshold issue

[illegible] JONAH committed unlawful conduct; specifically, whether JONAH made actionable misrepresentations regarding homosexuality and the efficacy of its SOCE therapy program.

The CFA prohibits the use of misrepresentations in connection with the sale, advertisement, or provision of services. N.J.S.A. 56:8-2. The CFA specifically provides that:

> [T]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the [illegible] that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]
>
> [Id.]

Merchandise, as defined under the CFA, includes "any . . . services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c). "One who makes an affirmative misrepresentation is liable even in the absence of knowledge of the falsity of the misrepresentation, negligence, or the intent to deceive." Gennari v. Weichert Co. Realtors, 148 N.J. 582 (1997). Notably, plaintiff is not requestiong that the court conclude JONAH actually [illegible] misrepresentations. Rather, plaintiffs ask this court to find that certain statements [illegible] misrepresentations are precluded, non-actionable, or true facts rather than misrepresentations.

Plaintiffs argue that, as a matter of law, the following qualify as misrepresentations under the CFA: (1) describing homosexuality as a mental illness, disease, disorder, or equivalent thereof; (2) using the word "change" as including a mere change of label or merely suspending [illegible] and (3) including [illegible]

JONAH argues that the following alleged misrepresentations are contradicted by undisputed evidence: (1) homosexuality is unhealthy; (2) homosexuality is "loathsome;" and (3) homosexuality is a mental disorder. JONAH also argues that the alleged misrepresentations are non-actionable opinions or puffery. Alternatively, JONAH argues that this action is improper as [illegible] societal issues that are subject to scientific dispute.

as to the efficacy of JONAH's program are precluded by signed consent forms with a "no

judgment in its favor is appropriate because the alleged misrepresentations conflict with

does not implicate First Amendment rights.

A.

N.J. 146, 171, 199 A.2d 809, 823 (1964). For the reasons discussed in its evidentiary opinion,

homosexuality is not a mental disorder, but is instead a normal variation of human sexuality.

The court does not take judicial notice of all studies cited in Plaintiffs' brief because it [illegible] researchers agree that homosexuality is not a disorder, there is no general consensus as to the causes of homosexuality. A finding as to the causes, however, is not necessary to take judicial notice of fact that homosexuality is not a mental disorder. Thus, any representations made to the contrary would qualify as a misrepresentations under the CFA.

B.

According to JONAH, statements characterizing homosexuality as unhealthy are not misrepresentations because these statements are supported by evidence from the CDC. Plaintiffs reply that JONAH mischaracterizes the statements at issue. Rather, the Complaint alleges that JONAH [illegible] that gay people "generally have or will contract HIV/AIDS." See Complaint ¶ 61. The court has already concluded that this issue bears no relevance to the [illegible] expert testimony relating to the potential harms of homosexual activity by Dr. Diggs. Should plaintiffs attempt to introduce such evidence at trial, the court reserves the right to consider [illegible] allowing recall of Dr. Diggs for rebuttal testimony.

C.

JONAH asserts that it never misrepresented that it is loathsome to be homosexual, as [illegible] deposition testimony confirms. Plaintiffs counter that JONAH seizes on the word "loathsome" and misunderstand the description itself. This formalism ignores the fact that JONAH [illegible] gay people" asserting they were "ashamed, disordered, physically [illegible] inadequate, incapable of happiness, etc." Plaintiffs will argue at trial that JONAH made all of these statements and that the overall effect was to communicate that homosexuality is loathsome, and thus in need of treatment via its conversion therapy services. JONAH replies that what Plaintiffs describe does not fit within the definition of "loathsome," which indicates disgust or repulsion.

This issue also bears little relevance to plaintiffs' proffers, with the exception of the [illegible] characterization of the term loathsome as disordered. Whether such statements qualify as "loathsome" is a disputed fact, and should be left to the jury's determination. The fact that

services does not warrant summary judgment as to all plaintiffs

D.

continuation of homosexual desire. Plaintiffs argue that, as a matter of law, it is a violation of the CFA to use commonplace words while distorting their meaning in a misleading way, without disclosing that distorted meaning. JONAH counters that this cannot form the basis of a CFA

comports with the mental health profession's understanding; the use of the word change

the word change was misleading.

To constitute consumer fraud the business practice in question must be misleading and stand outside the norm of reasonable business practice in that it will victimize the average consumer. New Jersey Citizen Action v. Schering–Plough Corp., 367 N.J. Super. 8 (App. Div. 2003). "The fact that the [statement was] literally true does not mean [it] cannot be misleading to the average consumer." Smajlaj v. Campbell Soup Co., 782 F. Supp. 2d 84, 98 (D.N.J. 2011); see also Miller v. American Family Publishers, 284 N.J. Super. 67, 77 (Ch. Div. 1995) (upholding

this to argue that change is not a guarantee of the "greatest possible change." Indeed, being "made different" could mean simply diminishing same sex attraction or changing one's identification. The court is convinced that an average juror could find "change" to mean choosing not to act on homosexual desires, and instead acting only on heterosexual desires

anyone can choose to disengage from." See JONAH's History, JONAH, available at

misleading to consumers.

If a merchant that does not track success rates or establish a procedure to confirm its

success statistics in advertising and selling of services when client outcomes are not tracked and records are not maintained.

F.

efficacy of JONAH's program. JONAH also argues that the integration clause included in the agreements bars claims of any misleading statements other than those included in the consent [illegible] Additionally, JONAH argues that Plaintiffs cannot establish that Plaintiffs had an actual knowledge that there were no guarantees.

It is well settled under New Jersey law that a written instrument does not immunize CFA claims. Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 377 (App. Div. 1960) ("[A] party to an agreement cannot, simply by means of a provision in the written instrument create an absolute defense to a subsequent action based on fraud in the inducement to contract"). Even where the writing is integrated, the parol evidence rule does not operate to preclude parol proof of fraud in the inducement because such evidence [illegible] guarantee clause is not a bar to plaintiffs' claims.

Furthermore, the disclaimer, or even plaintiffs' knowledge of "no guarantee," is not [illegible] were capable of changing sexual orientation when, in fact, JONAH's program was ineffective. The disclaimer does not inform consumers about the efficacy of JONAH's program. Accordingly, the mere presence in materials distributed to plaintiffs is not a basis for summary judgment because JONAH's no guarantee [illegible] is related to the issue of whether [illegible] change means a diminishment of sexual orientation or a change in identity, the [illegible]

G.

JONAH's cross-motion for summary judgment asserts that certain of the alleged misrepresentations, particularly those relating to the efficacy of its program, are not actionable under the CFA because they are mere puffery. JONAH lists several statements it contends are classic examples of puffery. See JONAH's Brief in Support of its Motion for Summary [illegible] contend that puffery includes statements representing homosexuality as a mental disorder. In fact, the majority of the statements it cites are irrelevant to the proffers plaintiffs intend to prove. JONAH would be hard-pressed to argue that statements such as its "program is effective in changing homosexuality" or "its program and JONAH in general are scientifically proven to be

effective" are "pure" puffery. See Black's Law Dictionary (9th ed. 2009) (defining puffing as "[t]he expression of an exaggerated opinion — as opposed to a factual misrepresentation — with the intent to sell a good or service."). This argument is not an adequate basis for summary judgment as to all plaintiffs.

H.

JONAH requests that this court grant summary judgment in its favor because this action improperly seeks to resolve societal issues subject to scientific dispute. It cites Acuna v. Turkish, 192 N.J. 399 (2007) for the proposition that since plaintiffs' CFA claims require resolution of a divisive social issue about which there is no consensus, this court should dismiss this case as non-justiciable. Specifically, JONAH contends that it is disputed whether homosexuality is a mental disorder and whether SOCE in general is effective.

Acuna is inapplicable. The issue in Acuna was whether or not an obstetrician-gynecologist had a legal duty to inform a pregnant patient that an embryo is an existing, living human being and that court's grant of Summary Judgment in favor of the defendant, the New Jersey Supreme Court found that plaintiff did not provide support for creating the legal duty she sought to impose on doctors. Id. at 416 ("[t]he instructions that plaintiff would have us mandate obstetricians to give are certainly not the medical professional norm within this State. . . . [p]laintiff has not pointed out whether even a small minority of physicians currently give such instructions. . . . [p]laintiff cannot find support for creating the legal duty she seeks to impose on doctors in either this State's law or federal law."). The Court went on to conclude that

> [w]e need not reach the constitutional arguments raised by defendants and amici who claim that we both unduly burden a woman's right to self-determination and a violation of a physician's First Amendment free speech right to compel a . . . arguments because we cannot find that New Jersey's common law imposes a legal duty on a physician to give the instructions sought by plaintiff.
>
> [Id. at 419.].

Therefore, the language in Acuna discussing the "raging debate" on the issue of abortion amounts to nothing more than dicta and has no bearing on this court's decision. See id. at 419

Furthermore, even if Acuna were applicable, this issue is now moot for two reasons.

the efficacy of SOCE in general. Plaintiffs are not required to prove that sexual orientation is fixed or unchangeable. Plaintiffs must prove only that JONAH's practices were ineffective, and that the representations JONAH made to the contrary were false.

I.

reasons. Plaintiffs' complaint does not attempt to limit JONAH's religious expression relating to its belief that sexual orientation is changeable. Nor does it attempt to restrict an individual's ability to self-determine their sexuality through restricting access to SOCE. Rather, plaintiffs'

sexual orientation.

Furthermore, the alleged misrepresentations do not pose religious questions. The critical

limitlessly protect any act done in the name of religious practice. McTernan v. City of York, Penn., 577 F.3d 521, 532 (3d Cir. 2009). The alleged statements at issue, regarding homosexuality as a *mental* disorder, are statements with a medical or scientific, rather than religious, basis. Freedom of religion and expression do not protect against such statements. See United States v. Article of Device..., Dr. Hubbard's Electrometer, 333 F. Supp. 357, 362 (D.D.C. 1971) (issuing an injunction against commercial speech where "false scientific claims permeate[d] the writings" and which were "not even inferentially held out as religious, either in their expression or content."). As a result, the First Amendment is not a sufficient basis for summary judgment.

A genuine issue of material fact exists, however, regarding JONAH represented homosexuality as a "mental disorder" or as "disordered" within the context of JONAH's religious belief. As the court has already found, describing homosexuality as a mental disorder

represented homosexuality not as a mental disorder, but as "disordered" and prohibited by its religion. First Amendment protections would be applicable in this latter situation. Consequently, JONAH's Twelfth Affirmative Defense is not stricken.

IV.

For the foregoing reasons, Plaintiff's motion for partial summary judgment on the following: (1) it is a misrepresentation in violation of the CFA, in advertising or selling conversion therapy services to describe homosexuality, not as being a normal variation of human sexuality, but as being a mental illness, disease, disorder, or equivalent thereof; (2) it is a misrepresentation in violation of the CFA, in advertising or selling conversion therapy services to include specific "success" statistics when there is no factual basis for calculating such statistics; (3) JONAH's Eighth Affirmative Defense is stricken; (4) JONAH's Twelfth Affirmative Defense is stricken; and (5) JONAH's Fourteenth Affirmative Defense is Stricken.