

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4135-09T1

NICK DeBENEDETTO,
on behalf of himself and
those similarly situated,

Plaintiff-Appellant,

v.

DENNY'S, INC.,

Defendant-Respondent.

Argued November 9, 2010 - Decided January 11, 2011

Before Judges Payne, Baxter and Koblitz.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-6259-09.

Andrew R. Wolf argued the cause for appellant (Galex Wolf, L.L.C.); Michael J. Quirk (Williams Cuker Berezofsky) of the Pennsylvania bar, admitted pro hac vice, and Stephen Gardner (Center for Science in the Public Interest) of the Texas bar, admitted pro hac vice, attorneys; Mr. Wolf, Mr. Gardner, Mr. Quirk and Henry P. Wolfe, on the briefs).

Scott Elder (Alston & Bird, L.L.P.) of the Georgia bar, admitted pro hac vice, argued the cause for respondent (Mr. Elder and Jane Thorpe, of the Georgia bar, admitted pro hac vice, and Porzio, Bromberg & Newman, P.C., attorneys; Lauren E. Handler, of counsel and on the brief; Heather B. Siegelheim, on the brief).

PER CURIAM

Plaintiff Nick DeBenedetto appeals from an April 23, 2010 Law Division order that dismissed his second amended complaint pursuant to Rule 4:6-2(e) because the pleading failed to state a claim upon which relief may be granted. Plaintiff's second amended complaint alleged that meals he purchased from defendant, Denny's, consisting of ham, bacon, sausage and hash browns, contained excessive levels of sodium that Denny's failed to disclose. Plaintiff alleged that if consumers had been aware of the high sodium content, they would not have purchased those meals, and the failure to disclose the sodium content therefore violated the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -181.

Notably, plaintiff's second amended complaint alleged that the sodium levels in the meals defendant served were two to three times greater than the maximum daily sodium intake recommended by the Centers for Disease Control. Nonetheless, neither plaintiff nor the putative class he claimed to represent asserted any physical injury or harm as the result of defendant's failure to disclose the sodium content.

In a written opinion, Judge Happas concluded that although framed as a CFA violation, the gravamen of plaintiff's second amended complaint was a products liability claim for

which the New Jersey Products Liability Act (NJPLA), N.J.S.A. 2A:58C-1 to -11, established a sole and exclusive remedy. The judge found that although plaintiff argued otherwise, the complaint itself included allegations that excessive levels of sodium are dangerous, that such levels cause an increased risk of bodily harm, and that Denny's failed to warn of those risks. Recognizing these allegations as a products liability claim, which would require plaintiff to allege physical injury under the PLA, see N.J.S.A. 2A:58C-1(b)(2), the judge dismissed the complaint with prejudice because in the absence of proof of the physical injury the PLA requires, plaintiff had failed to state a claim upon which relief can be granted.

Relying on Sinclair v. Merck & Co., Inc., 195 N.J. 51, 66 (2008), In re Lead Paint Litigation, 191 N.J. 405, 408-09 (2007), and McDarby v. Merck & Co., Inc., 401 N.J. Super. 10, 98 (App. Div. 2008), appeal dismissed, 200 N.J. 282 (2009), the judge held that a plaintiff may not avoid the physical injury requirements of the PLA by presenting his cause of action as a CFA claim. For that reason, having afforded plaintiff the opportunity to amend his complaint, the judge dismissed the second amended complaint with prejudice for failure to state a claim upon which relief could be granted.

On appeal, plaintiff maintains the PLA does not

apply, he presented a viable cause of action under the CFA, and the judge committed reversible error when she concluded otherwise. He also points to Lee v. Carter-Reed Co., L.L.C., 203 N.J. 496, 531 (2010), which was decided after the judge rendered her April 23, 2010 opinion. There the Supreme Court reversed the Law Division's refusal to certify the matter as a class action. Id. at 534. In the course of its opinion, the Court discussed the potential viability of the plaintiff's CFA claims concerning the dietary supplement Relacore, which the defendant marketed as a product to reduce weight, lessen anxiety and elevate mood. Id. at 504. The Court observed that if the "promised benefits of Relacore" were "based on untruths and disseminated through false advertising," id. at 527, the plaintiffs would be able to establish a violation of the CFA, id. at 528.

Plaintiff's reliance on Lee is misplaced. As we have observed, the claims made by the plaintiff class in Lee v. Carter-Reed concerned affirmative acts of misrepresentation for which a CFA cause of action lies. Id. at 526. Here, in contrast, plaintiff points to no such affirmative misrepresentation. Instead, his claim is limited to a failure to disclose the sodium content. Therefore, nothing in the Court's opinion in Lee lends any support to plaintiff's argument

that Judge Happas was incorrect when she held that plaintiff's cause of action was a PLA claim for failure to warn; plaintiff could not establish the physical injury required by the PLA; and that labeling his cause of action as a CFA claim would not enable him to avoid the inadequacies of a PLA cause of action because the PLA subsumes the CFA. We therefore reject defendant's arguments arising under Lee v. Carter-Reed.

After appellate oral argument, pursuant to Rule 2:6-11(d), plaintiff submitted a letter brief drawing our attention to Dean v. Barrett Homes, Inc., ____ N.J. ____ (2010), decided by the Supreme Court on November 15, 2010. In Dean, the Court considered whether the "economic loss rule" would be applied to a claim arising out of the purchase of a home that had been constructed with an allegedly defective exterior finishing system. (slip op. at 11-12). The Court held that because the economic loss rule applied, the plaintiff was precluded from recovering damages for the harm the defects in the exterior finishing system caused to the product itself. Id. at 24.

In its opinion, the Court noted the economic loss rule was implemented to draw the line between contract and tort remedies, and precludes a claim under the PLA when the "only claim is for damage to the product itself." Id. at 12. The Court concluded that under the PLA it was irrelevant whether the plaintiffs had

a contract remedy, because the PLA was not intended to be "a catch-all remedy" when "ordinary contract remedies . . . were lost or unavailable." Id. at 26. Also, the PLA was not "designed to transform a contract-like claim, that is a claim that the product itself in some fashion fails to operate as it should, into a tort claim." Ibid.

Plaintiff relies on the Court's language, that the PLA was not "designed to transform a contract-like claim" into a tort claim, to support his argument that the trial judge erred by transforming his contract-like claim, the CFA claim, into a PLA claim, and therefore the decision of the trial court should be vacated. Plaintiff also relies on Dean to support his argument that the PLA does not apply to claims for pure economic loss; instead those claims are governed by the CFA, the U.C.C., or other contractually-based statutes. He contends that because his CFA claim was for only economic loss, the judge should not have "transformed" his claim into a PLA claim, and instead, should have permitted it to be heard under the CFA. Last, plaintiff maintains that the holding of Dean is "directly relevant to the primary issue" in this appeal.

We do not agree. As defendant correctly argues, Dean does not address the core issue in this appeal, namely, whether a claim asserted under the CFA is actually a product liability

claim and, therefore, subject to the exclusive remedy provisions of the PLA. Indeed, as defendant also correctly notes, the Court in Dean "does not ever mention" the key decisions in Lead Paint, supra, Sinclair, supra, and McDarby, supra, "all of which address that issue and squarely reject [plaintiff's] argument." The omission of any discussion of those three opinions is a strong indication that Dean has no bearing on the present appeal.

The Supreme Court did not hold in Dean that any defective product claim escapes the exclusive remedy provisions, and the physical injury requirements, of the PLA merely because the plaintiff fashions the claim as one seeking recovery only for "economic loss." Instead, the Court's opinion was more narrowly focused. The Court held that not every claim where "the product . . . failed to perform as expected" comes within the purview of the PLA, id. at 27, and therefore the plaintiffs' claim for damages that the "[product] caused to itself," id. at 28, was excluded. It was in this context that we must analyze the Court's statement that the PLA was not intended to be "a catch-all remedy" when "ordinary contract remedies . . . were lost or unavailable." Id. at 26. The Court's opinion in Dean simply recognizes that the type of claim being asserted by the plaintiff homeowners should proceed as a contract case with

contractual remedies, not as a tort case with PLA remedies. Id. at 27-28.


Nothing in the Court's opinion in Dean abrogates, or in any way modifies, the PLA's long-understood requirement that a plaintiff alleging a product is defective or dangerous must also allege "harm," N.J.S.A. 2A:58C-1(b)(3), which is defined as "(a) physical damage to property . . . ; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) loss of consortium . . . ," N.J.S.A. 2A:58C-1(b)(2) (emphasis added). Nor does the opinion in Dean alter the Court's prior holding in Sinclair, supra, 195 N.J. at 65, that claims for "'harm caused by a product' are governed by the PLA 'irrespective of the theory underlying the claim'" (quoting N.J.S.A. 2A:58C-1(b)(3)). We therefore conclude that the Supreme Court's opinion in Dean does not disturb the holdings of Sinclair, Lead Paint and McDarby, which squarely address the issues raised in plaintiff's appeal.

Having carefully considered all of plaintiff's arguments in light of the record and applicable law, we are satisfied that plaintiff's arguments lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(A) and (E). We affirm substantially for the reasons expressed by

Judge Happas in her comprehensive and well-reasoned written opinion of April 23, 2010.¹

Affirmed.

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


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¹ On January 17, 2010, the New Jersey Legislature enacted N.J.S.A. 26:3E-17, which becomes effective on January 17, 2011. The statute requires restaurants to disclose the calorie content of foods they sell, but does not require them to disclose the sodium content. An earlier version of the legislation, which the Legislature chose not to enact, would have required restaurants to also divulge the sodium content. See S-2905, 213th Leg., (June 15, 2009). Thus, while N.J.S.A. 26:3E-17 is not dispositive of the issues raised in plaintiff's appeal, the enactment of that statute sends a strong signal that the public policy of this State does not require a restaurant to disclose the sodium content of the food its sells.