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WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

**SUPERIOR COURT OF NEW JERSEY**

**LAW DIVISION – BERGEN COUNTY**

***Prepared by the Court***

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| MOHAMED ELSAID,  Plaintiff,    v.  NY BAGEL ENTERPRISES, INC.,  JOSEPH SMITH and DENNIS MASON,  Defendants. | Civil Action  **OPINION**  **L – 7968-11** |

MOHAMED ELSAID, Plaintiff *Pro Se*.

KLAFTER & MASON, LLC (Gary I. Mason, Esq., appearing), on behalf of the Defendants, NY BAGEL ENTERPRISES, INC., JOSEPH SMITH and DENNIS MASON.

1. **PROCEDURAL HISTORY**

The Complaint in this matter was filed in the Special Civil Part, Bergen County, on June 14, 2011. The Defendants filed an Answer and Counterclaim on August 9, 2011, and moved to transfer the matter to the Law Division, which motion was granted by Order entered September 2, 2011. Plaintiff filed a Voluntary Petition in the U.S. Bankruptcy Court for the District of New Jersey on June 21, 2012. An Order was entered in the Law Division dismissing the Plaintiff’s Complaint without prejudice due to the bankruptcy. A Discharge of Debtor was entered on July 13, 2012. By Order filed August 24, 2012, the Complaint was restored in the Law Division and thereafter proceeded to a bench trial, all parties having waived a jury. The Plaintiff, Mohammed Elsaid (“Elsaid”), and the Defendants, Dennis Mason (“Mason”) and Joe Smith (“Smith”), testified.

1. **FINDINGS OF FACT**

Elsaid is a disaffected prospective franchisee of Defendant, New York Bagel Enterprises, Inc. (“NY Bagel”); NY Bagel is New Jersey corporation which operates a bagel franchise business; Mason is an independent contractor selling franchises on behalf of NY Bagel and other franchisors; and Smith is the sole principal of NY Bagel. Elsaid seeks the return of $9,300 he paid NY Bagel for a franchise. Defendants Counterclaim demands contractual damages in the amount of $20,200 in addition to the costs of suit and attorney’s fees.

The Plaintiff, Elsaid, testified that he came upon the NY Bagel franchise on a website, filled out a contact form, and was contacted by Mason. Elsaid filled out a NY Bagel application, after review of which Mason advised him that he was “OK” for a NY Bagel franchise. Mason also told Elsaid that $30,000 down was required for the franchise, and when Elsaid responded that he only had $15,000, Mason replied that they would get him a loan for the rest. Mason demanded “certified” funds for the $15,000, and Elsaid obtained a bank check for $9,300, tendering a personal check for $5,700, the balance of the $15,000, both of which were made payable to NY Bagel.

Elsaid and his wife signed a franchise agreement with NY Bagel on March 25, 2011, at which signing he met Smith for the first time. However, according to Elsaid, his wife became nervous about the deal, went to the bank, and withdrew money from the checking account, resulting in the personal check for $5,700 being dishonored.

On the next day, March 26, 2011, Elsaid called Mason, told him the deal was cancelled, and asked for the return of his money. Mason replied that the deal would continue despite the dishonored check and that Elsaid should call Mason’s Las Vegas loan company for financing. Elsaid nevertheless continued to maintain that he wanted to cancel the transaction and receive his money back.

On cross examination, Elsaid acknowledged that he knew he was signing a franchise contract, but that he did not have the agreement to review until he signed it on March 25, 2011. Elsaid stated that Mason told him “they” would help him get a loan to fund his obligations under the franchise agreement, that “they” had had “worse that you two hundred times and we will get you the loan.” Elsaid said he made no independent attempts to get financing because of Mason’s representation that “they” would get him a loan.

Smith testified that he is president and sole member of NY Bagel, and that Mason is an independent contractor whose contract with NY Bagel calls for Mason to receive a commission of 30% of the initial franchise fee of $30,000. Smith’s first contact with Elsaid was when he met Elsaid and his wife on March 25, 2011, for the signing of the franchise agreement. He lunched with them, and Elsaid and his wife signed the franchise documents and gave him two checks, the bank check for $9,300 and the other for $5,700. He testified that Elsaid never told him that Elsaid was cancelling the transaction.

Mason testified that he is an “outside” franchise broker and has worked with Smith and NY Bagel for 4 to 5 years, over which time he has brought more than 100 franchisees to NY Bagel. The lead sheet on Elsaid indicated he came to Mason through “betheboss.com”, that Elsaid had called on January 10, 2011, and represented that he had $50,000 in cash. Mason spoke to Elsaid on January 17, 2011, and received his application on January 26, 2011. On February 3, 2011, Elsaid told Mason he had applied to Chase for a loan and would know in a few days, and on March 8, 2011, Elsaid called and said he had been approved for the loan. Mason met Elsaid at the Parsippany NY Bagel store on March 9, 2011, and on March 12, 2011, Elsaid told Mason he had $10,000 in cash, to which Mason replied that he needed $15,000 and that Elsaid could sign a note for the rest.

Elsaid called on March 21 and told Mason he had the money, and on March 25, 2011, Elsaid and his wife signed the franchise agreement documents with Smith.

Mason testified that the NY Bagel application was used to qualify franchise prospects and that had Elsaid disclosed his debt on the application, he would not have qualified for the franchise. He also maintained that Elsaid did not try to get out of the deal; rather, that after his wife took the money from their bank account, Elsaid told Mason he still was going forward with the deal.

On the other hand, Mason acknowledge that Elsaid’s wife called Mason numerous times cancelling the deal and demanding a refund, as appears from Mason’s email of May 10, 2011, to Elsaid. In that email Mason also stated, “The moment she wrote a check to NY Bagel Enterprises, Inc., it became ***our*** money. …Until the $5,700 is replaced we will not be discussing refunds. … If this matter persists I will have no choice but to turn this matter over to ***our*** attorney” [emphasis added]. Mason signed the email “Dennis Mason Franchise Department”.

Smith testified that NY Bagel paid the $9,300 to Mason immediately upon the Elsaids’ signing of the NY Bagel franchise agreement as Mason thereby had earned his 30% commission. According to Smith, NY Bagel received no other benefit from the Elsaid transaction as it neither received any further money, Elsaid never notified him or NY Bagel of the cancellation of the deal, nor obviously did Elsaid become a NY Bagel franchisee.

Elsaid testified credibly that once his wife became disenchanted with the NY Bagel deal, he notified Mason that he wanted to cancel the transaction and demanded the return of his $9,300, and that Mason continually encouraged and mollified him, telling him that “they” would get him the loan necessary to complete the purchase of a NY Bagel Franchise.

Mason was not a credible witness. It was plain to the Court that his sole goal was to extract from Elsaid at least his 30% commission of the $30,000 franchise fee, seeing to it that the necessary dollar amount was presented in good funds. Mason also presented himself to Elsaid as an agent, officer, and/or employee of NY Bagel rather than as an independent contractor, as further evidenced by his signing his email “Dennis Mason Franchise Department” and making reference therein to “our attorney”.

Smith portrayed himself as mostly detached from the process of soliciting Elsaid as a franchisee or dealing with Elsaid’s many attempts to extricate himself and recover his money.

Smith’s testimony was facile and not credible.

Received into evidence along with other items were the NY Bagel Enterprises, Inc., Franchise Agreement, and “Exhibit F” thereto, paragraph 25 of which contemplates the refund of the Franchise Fee. “In the event Franchisees, Franchisor, or agents for either party are unable to obtain financing on behalf of Franchisees, Franchisor shall refund the initial Franchise Fee under the following conditions:

1. Franchisees have not misrepresented in any way the financial Franchise Application submitted to Franchisor;
2. Franchisee are creditworthy and meet the credit standards of Lender(s);
3. Franchisees have three Denial Letters” from three different Lenders;

Franchisees have agreed and consented to all conditions and provisions for financing stipulated by the Lender and other avenues of financing available to Franchisees, as stipulated by Franchisor. Should any of the provisions, stated above, be in violation, Franchisor shall have the sole option but not the obligation to refund the initial Franchise Fee less expenses, resell Franchisees Protected Territory and upon such resale refund the initial Franchise Fee less expenses or not to consent to any refund. Franchisees have asserted, guaranteed and certified that they both have exceptional credit with credit scores in excess of 690 and have voluntarily agreed to same by the signing of this Addendum and Franchise Agreement. Franchisees acknowledge that they were also told by agent of Franchisor that they must have the initial application fees as requested by various lenders and have reasserted that they currently have such monies for that use.”

When Elsaid met with Mason’s refusal of his demand for a refund because he had not met the “three denial letters” condition contained in para. 25 (c), he submitted rejection letters from the required number of prospective lenders, including an email from Mason’s recommended Seed Capital, located in Las Vegas, a lender listed on “NY Bagel Café & Deli Approved Lender List”.

Despite all of Elsaid’s efforts to cancel the transaction and obtain a refund, Mason and Smith and NY Bagel refused to return his money.

After hearing and considering the testimony of the parties, who were the only witnesses, and judging their credibility or lack thereof, the Court had no difficulty concluding by a preponderance of the credible evidence that the dealings of Mason and Smith with Elsaid were dedicated totally to the extraction of the $9,300 which Mason and Smith claimed was the commission earned upon Mason succeeding in obtaining the Elsaid’s signatures on a NY Bagel franchise agreement. Anything that might have occurred thereafter would have been a bonus in their eyes. Elsaid received nothing in return for his money from Mason, Smith, or NY Bagel. At best, the parties’ attempt at a transaction failed; at worst, the events testified to constituted a scheme to separate Elsaid from $9,300.

1. **CONCLUSIONS OF LAW**

**A. New York Bagel Enterprises Franchise Agreement.**

The New York Bagel Enterprises Franchise Agreement is subject to the New Jersey Franchise Practices Act, N.J.S.A. 56:10-[1](http://www.gannlaw.com/OnlineApp/ResearchTools/Main/link_cross_ref.cfm?c_book_code=29&c_group_code=11&c_ref_no=256!210!11&h_ref_no=256!210!11&book_code=29&group_code=11&ref_no=256!210!11&m_page=1&m_page_ord=0&category=ALAW&curr_page=0&curr_para=0&curr_spara=0) et seq., which provides in pertinent part:

**Unlawful practices.** It shall be a violation of this act for any franchisor, directly or indirectly, through any officer, agent or employee, to engage in any of the following practices:

1. To require a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this act. …
2. To provide any term or condition in any lease or other agreement ancillary or collateral to a franchise, which term or condition directly or indirectly violates this act.

Here, in violation of N.J.S.A. 56:10-1(a), the New York Bagel Enterprises Franchise Agreement required Elsaid to assent to a term that relieved NY Bagel from liability imposed by the Franchise Act. Specifically, NY Bagel required Elsaid to bear the financial loss in the event Elsaid could not proceed with the terms of the franchise agreement, despite NY Bagel’s misrepresentations regarding its intentions and abilities to assist Elsaid in procuring a loan.

The New York Bagel Enterprises Franchise Agreement is also subject to the Federal Trade Commission Franchise Rule, 1[6 CFR Part 436](http://www.google.com/url?sa=t&rct=j&q=franchise%20act%20federal%20trade%20commission&source=web&cd=1&cad=rja&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.ftc.gov%2Fbcp%2Ffranchise%2F16cfr436.shtm&ei=K1H0UKDoNOuN0QH5nYAY&usg=AFQjCNGDi7kNXTfZUv0y8F_d_Sf-iy0kEA), which provides in pertinent part:

“it is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act:…(a) For any franchisor to fail to furnish a prospective franchisee with a copy of the franchisor's current disclosure document, as described in subparts C and D of this part, at least 14 calendar-days before the prospective franchisee signs a binding agreement with, or makes any payment to, the franchisor or an affiliate in connection with the proposed franchise sale.”

Section 436.2

The disclosure document referred to in the Franchise Rule requires the franchisor to explain pivotal provisions in the franchise agreement in plain English so as to protect a potential franchisee from victimization. Items included in the document include information about the franchisor’s other business activities, prior litigation and financial status of the franchise.

Here, NY Bagel rushed Elsaid to sign the franchise agreement within the period of the lunch meeting. The failure of NY Bagel to present the franchise agreement and relevant disclosure document to Elsaid fourteen days prior to the date of Elsaid’s signature constitutes a violation of the Federal Trade Commission Franchise Rule.

The Court finds Elsaid timely if not immediately demanded a refund of his initial deposit and then when refused made several attempts to satisfy the financing rejection requirements of NY Bagel’s Addendum to the Franchise Agreement Exhibit “F”. His requests for financing were rejected by Seed Capital, BankAmericard, Wells Fargo Bank, TD Bank, and he appears not to have qualified for financing from many of the proposed lenders on NY Bagel’s “Approved Lender List.”

This Court finds that, based on the violations of the Franchise Practices Act and the Federal Trade Commission’s Franchise Rule, the contract between Elsaid and NY Bagel is void. In addition, Elsaid satisfied the requirements of NY Bagel’s refund requirements.

**B. The Consumer Fraud Act**

The Franchise Agreement may also be analyzed under the New Jersey Consumer Fraud Act. New Jersey Courts have interpreted the language of the Consumer Fraud Act, N.J.S.A. 56:8-1, to apply to franchise agreements. [Morgan v. Air Brook Limousine, 211 N.J. Super. 84, 96 (Law Div. 1986)](http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=get&search=211+N.J.+Super.+84%2520at%252096). In Morgan, the sole issue before the Court on cross motions for summary judgment was whether the Consumer Fraud Act applied to a franchise relationship. The Court held that the Consumer Fraud Act did apply to such relationships because “a franchise or business opportunity venture is ‘merchandise’ within the intendment of the Act.” The Court reasoned that “a franchise is offered for sale to the general public as any other merchandise is. No special qualifications or experience are required except having sufficient funds for the down payment.” Further, the Court deemed that a franchisee qualifies as a “consumer” within the province of the Consumer Fraud Act.

“To state a claim under the [New Jersey Consumer Fraud Act], a private plaintiff must show (1) a violation of the Act; (2) that suffered an ascertainable loss as a result of the unlawful conduct; and (3) a causal relationship between the unlawful practice and the loss sustained by plaintiff.” [Szczubelek v. Cendant Mortg. Corp., 215 F.R.D. 107, 121 (D.N.J. 2003)](http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=get&search=215+F.R.D.+107%2520at%2520121)**.**

Here, NY Bagel’s representatives violated the Consumer Fraud Act by inducing Elsaid to enter the franchise agreement with promises of helping Elsaid procure a loan to pay the required fees. This representation constituted a fraudulent misrepresentation, explicitly prohibited by the New Jersey Consumer Fraud Act, 56:8-2**.** Elsaid raised the few funds he possessed for a down payment on the franchise and suffered a loss when NY Bagel did not refund those moneys upon its failure to perform its end of the bargain. Elsaid’s loss was a direct result of Mason and Smith’s unlawful conduct. Here,as in Morgan, the business opportunity presented by NY Bagel to Elsaid was “merchandise” within the intendment of the Consumer Fraud Act and thus the franchise agreement between the parties is subject to the sweep of the Act.

While the Consumer Fraud Act applies to the franchise agreement and facts at issue, this Court cannot award the statutorily created remedy of treble damages because Elsaid did not assert the Consumer Fraud Act in his complaint. To award treble damages in such a case would violate notions of procedural due process. See [R. Wilson Plumbing & Heating, Inc. v. Wademan, 246 N.J. Super. 615, 617 (App.Div. 1991)](http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=le&search=246+N.J.+Super.+615%2520at%2520617)(holding that while proofs in a case may sustain a cause of action, a trial court may not enter *judgment* against a party for a violation of the Consumer Fraud Act that is “conceived by the judge only after submission of the case to him for decision.”). Thus, Elsaid’s remedy is limited to those funds he paid in anticipation of obtaining a NY Bagel franchise.

1. **CONCLUSION**

For the foregoing reasons, this Court finds that the contract between NY Bagel and Elsaid is void and will enter Judgment in favor of the Plaintiff and against the Defendants, NY Bagel, Mason and Smith, jointly, severally, and individually. The relief sought in the Counterclaim is denied with prejudice.

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**Hon. Alexander H. Carver, III**