SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CAMDEN COUNTY
DOCKET NO.: L-3697-94
A.D. # _____

DAWN ROBINSON AND, THE CLASS,

Plaintiff,

vs.

THORN AMERICAS, et al.,

Defendants.

TRANSCRIPT
OF
MOTION HEARING

Place: Camden County Superior Court
101 S. 5th Street
Camden, New Jersey 08103

Date: January 24, 1997

BEFORE:

HON. E. STEVENSON FLUHARTY, J.S.C.

TRANSCRIPT ORDERED BY:

ROBERT D. RHOAD, ESQ. (Dechert Price & Rhoads

APPEARANCES:

EZRA D. ROSENBERG, ESQ. (Dechert Price & Rhoads)
Attorney for the Plaintiff

DONNA SEIGEL MOFFA, ESQ.
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I N D E X

THE COURT: Okay. This is three and four. This is the Robinson versus Thorn Americas. We have a motion for summary judgment by Robinson and we have a cross-motion for summary judgment by Thorn Americas. The docket number is 1-03697-94. Counsel can enter their appearances, please.

MS. MOFFA: Good morning, Your Honor. I'm Donna Seigel Moffa from the Tomar firm, on behalf of the plaintiff Dawn Robinson and the Class.

MS. RODRIGUEZ: Lisa Rodriguez, from the firm of Chimicles, Jacobson and Tikellis, on behalf of Dawn Robinson and Class.

MS. CHANOW-DYKSTRA: Lisa Chanow-Dykstra, on behalf of Dawn Robinson and the Class.

MR. ROSENBERG: Ezra D. Rosenberg, from Dechert Price & Rhoads, on behalf of the defendant.

THE COURT: Sit down and relax. The first thing I note here is some suggestion that there's no case scheduling order in this case. Judge Weinberg never entered one?

PLAINTIFF'S COUNSEL: That's correct.

MR. ROSENBERG: That's correct, Your Honor.

THE COURT: Okay. I also note that you folks joined me on an occasion, September 3rd of '96, and as is my usual practice I suggested to counsel that you work it out and submit to me a proposed form of order with respect to the discovery and I find, lo and behold, that nobody ever did that.

Obviously, I don't calendar these things. I rely on counsel -- let me know if you haven't been able to work it out or to submit to me a proposed form of order if you have. So, since you didn't do that you're leaving it up to me. I trust there is really no further discovery needed at this late date, right?

MS. RODRIGUEZ: That's correct, Your Honor.

THE COURT: Is that correct?

MR. ROSENBERG: Well, Your Honor, --

MS. RODRIGUEZ: There has been no expert discovery, and there was a --

THE COURT: All expert discovery shall be completed within 30 days from this date.

MS. RODRIGUEZ: Thank you.

THE COURT: Put together an order. That will be it. All other discovery is barred.

MR. ROSENBERG: Your Honor, we have an outstanding request for production of documents as to --

THE COURT: Well, do whatever you have to do under the law. I'm not dealing with that. I'm saying that all discovery is barred except for expert reports, and they'll be furnished and exchanged within 30 days from this date. And, anybody that doesn't furnish or exchange the reports within 30 days from this date they will be barred from testifying. At the time of trial they'll make a motion. Put that in the order. How's that?

MS. MOFFA: Your Honor, I would assume too that to the extent that formally served requests have not been fully complied with any motions could be filed --

THE COURT: Make whatever --

MS. MOFFA: -- within that time?

THE COURT: -- motions you want, --

MS. MOFFA: Okay.

THE COURT: -- but all discovery is now closed --

MS. MOFFA: Okay.

THE COURT: -- except for the expert. Am I making myself clear, because I don't want to hear anymore about this?

MS. MOFFA: Yes, Your Honor.

THE COURT: For future reference, and those that are listening, when I rely on counsel to do something I do think I have a right to rely on counsel to do it, and if you can't do it let me know you can't do it and then I will do it for you as I just did now, and it took less than 30 seconds.

All right. Back to work. That problem is solved. This is a motion for summary judgment by the plaintiff as to liability on certain counts of the complaint. The plaintiff represents a Class of New Jersey consumers who entered into rent to own agreements with the defendant since -- since April of 19 of 1988, that's April 19th of 1988.

The action alleges violation of New Jersey Consumer Protection laws. At the outset the Court notes Plaintiff's

Exhibits 21, 22, 23 and 24 appear to be newspaper articles, and as such are not competent legal evidence under Rule 1:6-6 unless, of course, there may be something contained therein that might be admissible as an exception of the Hearsay Rule under 803(b)(1).

Defendant claims -- oh, the defendant's claim of alleged discovery violations by the plaintiff have no relevance at this time. Defendant has rights for discovery violation, if any exist, and if they choose not to seek court assistance in that regard they cannot complain in an effort to block a motion for summary judgment.

The defendant seems to suggest that the previous findings by Judge Weinberg in Gallagher versus Crown had no application to the matter of Robinson versus Thorn America. The argument seeming to be that they could not in any way, shape or form have been binding on Thorn America. The inference I think being that Thorn America wasn't involved in that previous determination and, therefore, couldn't be bound in any way. Well, if this is the argument then obviously counsel is dead wrong.

I've reviewed a lot of depositions in connection with this matter, and I found that Dawn versus Robinson was one of the cases dealt with on October 20th, 1995 and Thorn was represented by Michael Vassalotti, of Brown Connery. He introduced Mr. Dennis Dove, is it? I sometimes can't read my

own writing. D-O-V-E?

MR. ROSENBERG: I'm not sure, Your Honor. I think there was a lawyer named Dodds involved.

THE COURT: Okay -- who had been admitted pro hac vice in the Robinson versus -- in the Robinson case, and -- and so, therefore, they were there. They argued and any findings that were made by Judge Weinberg, assuming I choose to adopt them, would be binding on Thorn.

Now, what Thorn seeks to do is the same thing Crown sought to do the last time and that was to re-litigate that which was previously decided by Judge Weinberg.

Counsel for Thorn argues that Judge Weinberg did not find rent to own agreements were covered by R-I-S-A, RISA, and this is just not so. Judge Weinberg specifically stated, and I quote, "It is my opinion that the rent to own is another similar type instrument and, therefore, is controlled within the scope of the language of RISA." Based upon that finding he denied the motion for summary judgment.

Now, in Green versus Continental Rails 292 New Jersey Super 241 the Law Division in 1994 held that rent to own agreements are covered by the RISA, and the basis of the decision in Green in my humble opinion was contrary to what counsel argues; it was that remedial legislation is to be liberally construed to accomplish its social purposes. The literal terms give way to the spirit of the legislation and the

words of the enactment may be expanded according to the manifest purposes of the statute.

It is appropriate to look beyond the forum to identify the substance of the transaction. The substance of these agreements requires that they be viewed as sales agreements and not leases. The customers are entitled to protection of RISA so they can clearly understand the cost of the intended inquisitions and that, in my opinion, was the logic and reasoning behind the finding of the Green case, totally contrary to what was argued by counsel.

The issue is primarily one of public policy, obviously. Should the agreements be interpreted as leases, strictly as leases, which would give way form over substance or should they be realistically considered sales agreements? I choose, as I indicated, to follow Judge Weinberg's lead that the case was argued extensively, and he put some considerable thought into it, and I do not intend to re-litigate that issue once again.

I think Judge Alterman's opinion is well-reasoned and seems to comport with the general public policy of the state in holding that rent to own agreements are covered by RISA.

Now, in the case of Gallagher versus Crown counsel for Crown admitted that it had not complied with RISA. So, in that particular case this Court didn't have to make detailed findings with respect to any violations of RISA, because

counsel, as I say, frankly admitted they hadn't even complied with it, the basis being that it wasn't applicable, but they frankly, admitted they didn't comply with it. In the present case, however, counsel argues that even if RISA applies that there are material disputes of fact with respect to alleged violations.

With respect to the argument concerning down payment, the customers, it's argued, do not make a down payment. They don't pay a down payment. With respect to fees, officials fees, it's argued the customers don't pay officials fees.

It is claimed "That separate charges are set forth." It's claimed that there is a dispute with respect to cash price and time price differential, but the fact is that no cash price has set forth so that's a violation, and no prime -- no price -- no time price differential is set forth so this too is a violation.

The issue is not what the cash price should be, but rather whether one is set forth at all. So that's a violation, and, likewise, the time price differential, once again, none is set forth so, therefore, it would be a violation. And, the issue is not what it should be, but if none is set forth then obviously there is a violation.

It's interesting to note that Thorn argues that the time price differential cannot include amounts attributable to this -- and I'm quoting now from counsel, because it's rather

critical -- "The time price differential cannot include amounts attributable to this bundle of values, speaking of inter alia, delivery and maintenance. Well, these two items are advertised as free, and if there are charges for the same they certainly aren't free so that's an admission that there is a deceptive practice under CFA in that particular connection." So, this too would be a violation in the failure to set forth any cash price and any time price differential.

The Court notes, although counsel for Thorn argues that there is no need to comply with RISA and there are questions of fact re compliance of RISA, at another point in the argument they freely admit that they have not made the technical disclosures, and they characterize it as "technical disclosures, required by RISA," and I'm quoting that.

So, they have admitted, therefore, at one point in their argument that they haven't complied. But, be that as it may, I do find specifically as a matter of fact that RISA has been violated in that there was a failure to set forth a cash price. There was the failure to set forth the time price differential. The late fees were violations, because they were $5 without regard to the amount of delinquency or period of delinquency, and RISA limits the late fees to an amount not to exceed $5 for each installment or $5, whichever is less and default must be for ten days.

And, the Court notes the "late fees" charged by the

defendant do not comply with RISA. So it doesn't matter what the defendant calls the fees, they are in reality late fees, and they don't comply so that's another area of violation.

The Court makes no finding as to any other alleged violations under RISA, but with respect to Count One, obviously since I made specific findings of the failure to comply with RISA there would be a summary judgment granted on that count.

With respect to consumer fraud, the plaintiff alleges the defendant has violated the Consumer Fraud Act. Defendant argues if RISA applies then the Consumer Fraud Act cannot, because the defendant's conduct would be regulated by RISA and if so regulated the Consumer Fraud Act cannot apply.

And, it is true in some instances where there are sufficient regulations the Courts have held that the Consumer Fraud Act doesn't apply. The defense, of course, cited Dalleman, D-A-L-L-E-M-A-N, which is clearly distinguishable from the present case, doesn't even stand for the proposition as suggested. It's a situation involving the public, and I'm not going to go into detail with respect to that other than to observe that it's clearly distinguishable.

Likewise, with respect to the insurance industry, hospital industry and second mortgages, there are cases, yes, that do indicate that those industries are so heavily regulated that the Consumer Fraud Act would have no application.

But, once again, with respect to Green versus Continental Rentals the Court did held -- did hold in particular with specificity that rent to own agreements do violate the Consumer Fraud Act per se. So, that's authority for that particular proposition.

The defendant has argued that the delivery, maintenance, repair and costs are costs to be included in pricing, and they specifically said delivery, maintenance and repair. And, if this is so, then, of course, they admit there's a violation of the Consumer Fraud Act, because these items are advertised as "free". And, to that extent the newspaper articles would be admissible under 803(b)(1).

Now, if they're supposed to be free as they are advertised then obviously charging for them would be false and misleading in every regard. And, obviously it would be intentional, but even if it wasn't intentional it would still fit within the Consumer Fraud Act, because it would be false and misleading, and it would be unconscionable commercial practice, deception, fraud, false pretense and misrepresentation, and none of those require proof of intent.

The fact that the defendant may have acted in good faith, of course, is unimportant. It is the capacity to mislead which is important. Certainly, if admitting -- certainly, advertising something is free when, in fact, it's being charged for, that does have the capacity to mislead.

So, with respect to Count Two, I'm granting summary judgment in that regard based upon the previous opinion of Green versus Continental which finds as a fact that the violation of -- that the Consumer Fraud Act is violated by the rent to own agreements and was a violation per se, and also I'm granting it because of the so-called free items which the defendant admits in their brief that they want to charge for. So he can't have it both ways. So, summary judgment is granted as to Count Two.

With respect to Count Three I'm denying summary judgment on that particular count.

With respect to Count Four, the illegal penalties, I previously made note of the fact that the late charges of $5 do not comport with RISA, and I set forth all the reasons why they don't, so that too would be a violation, and I grant summary judgment on Count Four.

The cross-motions obviously are denied. And, that's where I sit. You may proceed, sir.

MR. ROSENBERG: Thank you, Your Honor. And, I know Your Honor has acknowledged that Your Honor has dealt with this case before, and I'm not going to belabor the record. I just did want to address a few points that Your Honor made.

Our discussion of Judge Weinberg's decision was not that we were not a party to the denial of the motion for summary judgment; in fact, in our brief we said we were. Our

point there was that his decision was in the context of a denial of a motion for summary judgment and, therefore, could not be considered law of the case, but simply left open these issues for possible --

THE COURT: That could never be --

MR. ROSENBERG: -- pre-litigation.

THE COURT: -- the law of the case. The law of the case has to be promulgated by the Appellate Division. I'm never bound by a judge of equal status. And, everybody keeps arguing law of the case, law of a case. It just doesn't apply.

MR. ROSENBERG: We agree, Your Honor, and that was our point, and that was solely what our point --

THE COURT: You just kept on saying it can't be law of the case.

MR. ROSENBERG: The main point I want to make today, if I can, Your Honor, is the Singer case, which is a New Jersey Supreme --

THE COURT: I've read it.

MR. ROSENBERG: -- Court case, and it's our position that that case stands squarely for the proposition that even if you have -- and in Singer you had a situation where there was a real retail purchase. There was a purchase of an item. There was an obligation to pay the full purchase price of the item. There was even a stated interest rate, and it was going to be paid over time.

Nevertheless, in that case the Supreme Court said you can't shoehorn that into RISA, and you can't shoehorn into RISA, because the interest rate, the time price differential is not capable of pre-computation, and that given the flexibility of the Singer plan to try to shoehorn it into RISA would do away with that flexibility. And, it's our position certainly that our case presents an even more compelling situation for not being under RISA than in the Singer case.

THE COURT: I'm frank to admit your argument was dynamite. I like particularly your legislative history approach. I thought it was excellent.

MR. ROSENBERG: I appreciate that, Your Honor.

THE COURT: I mean that seriously. I even explained it to my law clerk. Didn't I? And, I said it was most persuasive, but I'm not going to re-litigate the whole thing. It's all done and finished and we're not --

MR. ROSENBERG: I appreciate it, --

THE COURT: -- going through it a second time.

MR. ROSENBERG: -- and I'm not going to belabor the record for that point. I do want to address just --

THE COURT: Well, when are you going to take it up? I mean this thing --

MR. ROSENBERG: We're going to take it up this week, Your Honor.

THE COURT: Good

MR. ROSENBERG: Obviously --

THE COURT: It ought to be dealt with and be put to rest once and for all.

MR. ROSENBERG: Obviously Your Honor's not in a position to certify this under the rules, --

THE COURT: No, of course not.

MR. ROSENBERG: -- but we will move for leave to appeal.

THE COURT: This is certainly one that should be dealt with, no question about it.

MR. ROSENBERG: Of the issues that --

THE COURT: How come nobody ever moved in Crown?

MR. ROSENBERG: I can't speak for them. Your Honor, I've only been in this case for two month, and I've --

THE COURT: That's no excuse, obviously. But you might be the one that's responsible for that excellent legislative argument, are you?

MR. ROSENBERG: Yes, I am. Thank you.

THE COURT: No. I mean that, seriously, and that wasn't presented previously.

MR. ROSENBERG: I appreciate that.

THE COURT: Very good. Very well done.

MR. ROSENBERG: On the one kind of new point that Your Honor made on the Consumer Fraud Act and the violation --

they put the price of the air-conditioning into the cost of the car.

MR. ROSENBERG: But we're not charging anything --

THE COURT: That's all. It happens every day.

MR. ROSENBERG: That's only done in the context of being forced to shoehorn into a statute that does not fit.

THE COURT: Okay.

MR. ROSENBERG: And, the last point that I would want to make, which I don't think Your Honor has addressed, has to deal with our argument that it is unfair to a constitutional point, but also under --

THE COURT: I don't deal with constitutional arguments, because you didn't make the Attorney General a party to the litigation under the rules, and, therefore, I don't deal with it.

MR. ROSENBERG: Well, Your Honor, first, part of our argument was not constitutional, but based squarely on settled New Jersey juridical principles of fairness that if there is decision of first impression that construes a statute in such a way that the person effected could not have known that that statute is -- that construction is not made retrospectively and --

THE COURT: But that's a matter for those that sit on high. They'll deal with the prospective or retrospective effect and so forth. As a humble trial judge I don't get

folks either, but I got plenty of copies.

MR. ROSENBERG: I have --

THE COURT: I can give you folks a copy and then we don't have to have a problem with you calling ask asking where the order is. We don't send out orders without envelopes. There's a court rule on that.

MS. MOFFA: Thank you, Your Honor.

THE COURT: And, we don't make copies when we don't have copies. There's a court rule on that.

MR. ROSENBERG: Your Honor, I have an extra copy here.

THE COURT: Let me have it.

MS. MOFFA: Your Honor?

THE COURT: Yes.

MS. MOFFA: Could I address one point just for --

THE COURT: Sure. By all means.

MS. MOFFA: -- clarification purposes?

THE COURT: I didn't foreclose you at all. I just wanted to hear him first.

MS. MOFFA: Okay.

THE COURT: I felt he was the primary looser. You lost something though.

MS. MOFFA: That's what I want to talk about. I wanted to make sure I had a clear understanding of the reasoning with regard -- it appears that the denial reaches to

any issues that dealt with whether the -- whether the interest charged was in excess of the rate established by the Criminal Usury State.

THE COURT: Yes.

MS. MOFFA: And, with regard to that I wanted to have a clear understanding of the basis for departing from the precedent set forth in Green and the Burney case and the Foote case as to regard to delineating which portion of the price is interest and which part of the price is the cash price. In particular, a review of the fact that, as you noted, the delivery, the maintenance, those are free, they can't be subtracted from the time price differential, and as was noted -- I believe it was in the Burney court -- the cost of ter -- the benefit of terminability is actually a benefit of buying over time which is what interest always is. When-- whenever --

THE COURT: Yes.

MS. MOFFA: -- somebody makes money off of interest it's the difference between the cash price and whatever fees they're actually saying they're charging for and the time price. You have a time price differential here that has been calculated and calculations that are not disputed by the defendants except with the definition of what goes in what category, but once you have adopted the other Court's approaches to what should be considered in an interest category

then they do not dispute our calculations, and the calculations show that uniformly the interest rate far exceeds the 30 percent of the Criminal Usury Statute.

THE COURT: Well, I didn't, frankly, feel comfortable in dealing with the alleged Usury argument in this particular case, because by applying RISA, and I said that there was a failure to indicate a time price differential, and I said I failed to indi -- that there was a failure to indicate the cash price, and I found too that the late charges were violated RISA.

I didn't think it was really fair to not in some way give them some rights with respect to that issue as to whether it was all interest or not. Now, I recognize that there were some cases that say the difference between this and this, obviously, that what's leftover is interest.

MS. MOFFA: Right.

THE COURT: Well, if I'm -- I just didn't feel comfortable with it, quite frankly, that's all, and that's why I didn't -- I denied it, didn't make any specific findings of fact for a good reason. I didn't want --

MS. MOFFA: Right.

THE COURT: -- to make any findings of fact. But I didn't feel sufficiently comfortable to grant a summary judgment on that particular issue.

MS. MOFFA: Without some evidence of

what -- what the --

THE COURT: Well, I wasn't sure, you know. I read all your material, --

MS. MOFFA: Uh-huh.

THE COURT: -- and, of course, I read where they claim what you say is hearsay, but all you did was a mathematical calculation which obviously anybody can do, --

MS. MOFFA: Right.

THE COURT: -- that it doesn't require expert testimony. But, I didn't feel comfortable with it, because of the -- you know, the right to perhaps try to show. But, see, I said that what they were doing was violating the Consumer Fraud Act by shooting themselves in the foot by saying --

MS. MOFFA: Right.

THE COURT: -- these things are in here. Well, if I'm going to --

MS. MOFFA: Right. I understand.

THE COURT: -- do that to them, then I can't take away the right to let them put those things in there.

MS. MOFFA: And tell you what they are so that they can --

THE COURT: And tell me what they are.

MS. MOFFA: Okay. I understand your reasoning.

THE COURT: I couldn't do both things, at least not comfortably, --

MS. MOFFA: Uh-huh.

THE COURT: -- and so that's why I didn't do it. I penalized them. I said they violated the Consumer Fraud Act, because what they said was in this price thing --

MS. MOFFA: Uh-huh.

THE COURT: -- is the maintenance, the delivery, and all that sort of thing. Well, if I'm going to say that and use that against them, then I think in fairness they ought to have a right to try to show what that is.

MS. MOFFA: Okay. I understand your reasoning.

THE COURT: Now, if they hadn't said that --

MS. MOFFA: Uh-huh.

THE COURT: -- then I wouldn't be in that position.

MS. MOFFA: Right. Well, they --

THE COURT: In Crown they didn't say that.

MS. MOFFA: Correct. Right.

THE COURT: So Crown was distinguishable, notwithstanding, I don't know, somebody -- no. I think it was you. You said that -- you opened your argument in an effort to intimidate me -- I thought that was interesting -- by suggesting that plaintiff's counsel was of the mind that I would just blindly follow Crown and not give you a fair hearing, but you felt quite contrary -- quite confident in the fact that I would give you a fair hearing, see.

MR. ROSENBERG: There was really no intent to

intimidate Your Honor.

THE COURT: Well, whatever it was, I thought it was interesting. I can appreciate good lawyering, and that's a good way to approach it. I mean, when you're facing a judge who has already decided the very same issues, like, two months ago, you've got a heavy oar to pull, see.

MR. ROSENBERG: We gave --

THE COURT: That's a good way to do it.

MR. ROSENBERG: We gave a lot of thought to that sentence, Your Honor.

THE COURT: But whether you said it or you didn't really doesn't make a whole lot of difference, because, unfortunately, I do these things the way they're supposed to be done; maybe not right according to you, but I think you agree with me 100 percent, don't you?

MS. MOFFA: Absolutely, Your Honor.

THE COURT: Well, that's good. So, you see the argument in Crown, they didn't in Crown make that argument, and that's why I could deal with Crown differently than I could deal with this one. But the minute they made that argument, and then I'm saying to them, okay, you want to make that argument, fine, I'm taking that argument and I'm hanging --

MS. MOFFA: Accepted it, right.

THE COURT: -- you with it.

MS. MOFFA: Right. Right.

THE COURT: Well then I got to give him a right to deal with it.

MS. MOFFA: Right. Okay.

THE COURT: And that's --

MS. MOFFA: I understand.

THE COURT: -- where I was not comfortable.

MS. MOFFA: Okay.

THE COURT: All right.

MS. MOFFA: Thank you, Your Honor.

THE COURT: Did you get a copy of your -- yes, I gave it to you. I'll be interested to see how it's dealt with, because we have here a very clear situation of public policy versus the strict construction of dissention. It's that simple.

MR. ROSENBERG: Agreed, Your Honor.

THE COURT: And, it's interesting that I am following a public policy pain, because it may be argued that I'm a strict instructionalist judge, which most of the time I am. They've.all gotten their copies so this just gets filed.

MR. ROSENBERG: Your Honor, --

THE COURT: The only thing that good about certainty is uncertainty.

MR. ROSENBERG: Thank you, Your Honor, for hearing us today.

THE COURT: Right. Take care.

PLAINTIFF'S COUNSEL: Thank you, Your Honor.

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CERTIFICATION

I, JANET BARBIERI, the assigned transcriber, do hereby certify the foregoing transcript of the tape-recorded proceedings is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Jan 30, 1997
DATE

Janet Barbieri
JANET BARBIERI AOC #131

SUPERIOR COURT OF NEW JERSEY
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HON. E. STEVENSON FLUHARTY, J.S.C.

TRANSCRIPT ORDERED BY:

DONNA SIEGEL MOFFA, ESQ. (Tomar, Simonoff)

APPEARANCES:

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THE COURT: The first one for argument would be Robinson v. Thorn. That's that big huge thing. Thank you. Counsel, enter their appearances.

(Discussion off the record)

THE COURT: Do you want to enter your appearances please?

MS. MOFFA: Certainly, Your Honor. Donna Siegel Moffa from the Tomar, Simonoff law firm on behalf of plaintiff and the class.

MR. ROSENBERG: Ezra D. Rosenberg from Dechert, Price & Rhoads on behalf of the defendant.

THE COURT: Sit down, have a seat. I'll give you my preliminary determination, and then I'll listen to you. This is Robinson v. Thorn Americas, Inc., Docket Number L-3697-94. Mr. Robinson, how are you? I note you're just getting here, right?

MR. ROBINSON: Good morning, sir.

THE COURT: You're just getting here, sir?

MR. ROBINSON: I'm here, sir.

THE COURT: Oh, all right. I just noticed you walked in here at 13 minutes after nine; is that right?

MR. ROBINSON: Right.

THE COURT: Thank you, sir. Have a seat and relax. This is a motion for summary judgment by the plaintiff seeking to establish a damage formula to utilize in fixing, quote, "the

ascertainable loss," unquote, under Count 2 of the second amended complaint. The formula proposed is 40 percent of all rental payments collected by the defendant in New Jersey during the class period plus all late fees, penalty fees, and reinstatement fees collected during the same period. Summary judgment was entered on January 24th, 1997 under Count 2 based on the fact that the defendant had engaged in unconscionable commercial practices. The Court found that the New Jersey Retail Installment Sales Act did apply and that the contract in fact violated the New Jersey Retail Installment Sales Act and in that the defendant failed to set forth the time price differential and the cash price. Late fees imposed were also in violation of the act. Defendant also charged for delinquency, maintenance, and repair which was advertised as free.

According to the defendant's affidavit, the quote, "cash price," unquote, is 60 percent of the rent over the rent-to-own price. In other words, it's 60 percent of the rent-to-own price. The total rent-to-own price is the weekly or monthly rental times the number of rentals, rental payments as described in the contract plus the purchase option price. Defendant's own expert submitted an affidavit, Exhibit 4, by Mr. Weil, W-E-I-L, indicating that 40 percent part of the rent-to-own is made up of the time price differential which can be allocated as follows. He attempts to allocate it, although the

contract never allocated it, and the buyers were never alerted to it, but he assesses 34 percent to the flexibility options, 5 percent to the interest, and 1 percent to the delivery and repair costs which total the 40 percent differential between the total cost and the 60 which he said was the actual price. This information even if true wasn't set forth as I noted in the contract that was presented to the plaintiffs. The 40 percent of course is what the plaintiff contends is the ascertainable loss.

The opposition, despite the findings of the Court, they attempt to take those findings and put their own spin on them. And they of course take what Mr. Weil says and they attempt to put their spin on that, and they try to allege and argue that the statutes were only technically violated and so forth. All of that is history. The determination has been made as a matter of law that the defendants in fact violated the Consumer Fraud Act. They violated the retail installment sales contract. Defendant argues that damages have to be calculated on an individual basis, and the defendant argues that the plaintiff is not being fair by arguing that the Consumer Fraud Act mandates an individual -- and they argue the plaintiff is not being fair. They argue that the Consumer Fraud Act mandates an individual analysis of damages.

Now, as far as the Court's concerned, the agreement -- I mean the formula as proposed by the plaintiff is factually

supportable and it is fair and reasonable. The defendants of course -- if they were to be permitted to be successful in connection with the allegation that the individual damages have to be allocated on an individual basis, I think that involves some 78,000 people. Obviously, that flies in the face of the very purpose of a class action suit in the first place. The defendant of course seeks to decertify the class because the damages they argue must be calculated individually as opposed to some formula, and as I indicated, that would result in 78,000 individual cases, all of which would probably be within the jurisdiction of the Special Civil Part. But that's of no moment other than that clearly demonstrates why there was a need for and why the original judge did in fact certify the class because there were common questions of law, and the damages could be ascertained on a reasonable basis that would be fair to the class and would have a reasonable relationship to the damages suffered.

The cases of course clearly indicate that the damages need not be calculated with mathematical certainty so long as the formula proposed is reasonable, and the Court, as I've said I think more than once, does find in fact that the formula is reasonable because it is based upon the figures that have been submitted to the plaintiffs by the defendants vis-a-vis the difference between the total price and the cash price, the differential being 40 percent and that differential being made

up of items that were not delineated in the retail installment sales contract. It also included items which were misrepresented in the sales pitch that was made by the defendant to the plaintiffs, namely that delivery and maintenance and all that sort of thing was absolutely free. Defendants themselves admit that's not so.

Oh, yes. The defendant endeavors to raise some question of fact concerning the findings of the Court as it relates to interest. What the Court said and did is a matter of record. The reasons why the Court said and did what it did is a matter of record. It has nothing whatsoever to do with the finding that the Retail Installment Sales Act applied and was violated and the Consumer Fraud Act likewise applied and was violated. Trebling damages obviously is mandatory. The Court does not have discretion in that area.

Therefore, subject to argument of counsel, it is the finding of the Court that the formula as proposed is fair and reasonable. Sir, I will hear you.

MR. ROSENBERG: Thank you, Your Honor. I'd like to begin if I may, Your Honor, with what I think is the essential flaw of both the plaintiff's position --

THE COURT: Please bear in mind I read every word of everything you wrote.

MR. ROSENBERG: I understand that, and then I would just emphasize a few points.

THE COURT: It's all right.

MR. ROSENBERG: Number one is that the Consumer Fraud Act, contrary to plaintiff's position, does set a proximate cause standard for damages. And because of that proximate cause standard for damages, it is necessary for there to be an individualized analysis, and I would refer Your Honor specifically to the language of the Court in the Meshinsky case.

THE COURT: What you suggest, sir, would therefore preclude class actions in every single Consumer Fraud Act case.

MR. ROSENBERG: Absolutely not, Your Honor.

THE COURT: You don't think so. Okay.

MR. ROSENBERG: In fact, every one of the cases both at the Appellate Division level and the Supreme Court that certified consumer fraud class actions predicted that after liability is adjudicated as in this case, there may be the need to decertify or to have some sort of individualized handling of damages. So the two are not -- do not contradict each other. And Meshinsky talks about the particularized proximate cause, and that is an exact quote at 110 N.J. at page 473, "Plaintiff must establish the extent of any ascertainable loss, quote, 'particularly proximate to misrepresentation or unlawful act.'" The Chattin case at the Appellate Division specifies proximate cause and even the Truex case upon which plaintiff so heavily relies says at 219 N.J.Super, Footnote 3, "The damages must be

proximately caused by the violation."

THE COURT: Well, you're suggesting that I didn't find that the 40 percent differential was not proximately caused by the fraud of the defendant.

MR. ROSENBERG: Your Honor --

THE COURT: Obviously, it was because you never disclosed to the particular purchaser those specific items. You never told them what the interest was. In fact, you told them that the delivery and maintenance would be free, and as far as the flexibility, you didn't tell them what that was, and so there is the damage that was proximately caused by your misrepresentation and your violation of the Consumer Fraud Act. It was totally unconscionable.

MR. ROSENBERG: But, Your Honor, we have raised material issues of fact as to whether or not there's proximate cause. Number one, did plaintiff actually rely on the alleged omission?

THE COURT: Yes. Well, under the Consumer Fraud Act, I'm sure you're quite familiar with the fact that reliance is not an element, and I just finished a 17-day trial in that particular area, sir. Did a lot of research on it.

MR. ROSENBERG: Your Honor --

THE COURT: And the act so says it, and the cases so say it.

MR. ROSENBERG: That's right, Your Honor. They say

it only to the extent of proving liability. They go on in the next sentence to say, "However, for damages, proximate cause and reliance are important." I agree, Your Honor, that for purposes of liability, the act itself specifies that reliance is not an element, but that's not the same question as to damages, and we're dealing with damages. And the question of reliance is important, and plaintiff herself has testified that she knew that she could purchase this home entertainment center for $1,000 at the same time that she knew, if she were to enter into the rent-to-own contract and pay all of the rentals through the full rent-to-own, it would cost her $1,700. That's in the record. It's also in the record that the contract specified the periodic payments that would be made for rentals and the full rental price. So questions of fact are raised as to reliance. Questions of fact are also raised as to even if she had this information, whether she would have entered into the transaction. She said she knew the information, but she wanted that home entertainment center now. That's a question of fact.

A very important question of fact is raised in conjunction with the TILA cases, the truth-in-lending cases that we cited, which are cases that deal with the precise sort of violation which Your Honor has said that my client has committed, a failure to provide information as to credit alternatives to the consumer. And in those cases, they also

use a proximate cause standard, and they say there the proximate cause standard is can the plaintiff prove that he or she would have been able to find a better deal elsewhere? And there's sufficient facts in the record here to show that that's not so. We've raised facts as to value, the value that each of these -- that this plaintiff received and necessarily entailing an individualized analysis as to each of the class members that precludes summary judgment in that manner.

Your Honor, as to the advertising violation, the advertising violation only went to delivery and maintenance. There's not a scintilla of evidence in this record that plaintiff has come forward to show that she relied on an advertisement that talked about delivery maintenance.

Your Honor, we respectfully submit that there is an abundant amount of evidence here that precludes summary judgment on that issue before we get to whether or not there should be an aggregate formula. In terms of the aggregate formula, Your Honor, it is undisputed that that, quote, "cash price," end quote, is the cash price for buying the item off the floor. Plaintiff admits that. That's clear on the record. That is also clear that we have put forward evidence from our experts not as Your Honor said that that 40 percent is made up of a time price differential. That is not what Mr. Weil says. That is what plaintiff says Mr. Weil says. Mr. Weil --

THE COURT: Sir, let me just suggest to you I don't

accept what is said by people. I check it myself. I looked at his affidavit. I saw specifically the paragraph where he allocated it as I suggested that he did. If you and I differ on that, it was Exhibit 4, and I forget the paragraph number, but he specifically broke it down 34, 5, and 1.

MR. ROSENBERG: He did break it down, but he didn't say that's the time price differential. He said in fact that's part of the cash price.

THE COURT: That's the flexibility option, the interest --

MR. ROSENBERG: That's right.

THE COURT: -- and the delivery and repair cost.

MR. ROSENBERG: Absolutely.

THE COURT: That's all I said he said.

MR. ROSENBERG: As I read what --

THE COURT: Don't mislead what I said he said.

MR. ROSENBERG: Your Honor, most respectfully, I'm not trying to mislead. I tried to take notes. If I'm inaccurate, I'm inaccurate.

THE COURT: Okay. I just want to be sure the record's clear on what I said, sir.

MR. ROSENBERG: But what Mr. Weil said is that the cash price, for purposes of trying to compute a finance charge, should be made up of the retail cash price -- that's the 60 percent -- the value of delivery and service and maintenance

which I think --

THE COURT: Which you said incidentally was free.

MR. ROSENBERG: Your Honor --

THE COURT: You did, didn't you?

MR. ROSENBERG: We said in the advertisements that free delivery, free maintenance, or no charge -- and in fact, there was no further charge.

THE COURT: Yes, sir.

MR. ROSENBERG: Every consumer paid exactly that which was advertised and not a cent more, but Mr. Weil talked about the retail price, the value of maintenance and repair, and he placed a value on the flexibility options which he said together constituted the cash price for purposes of RISA. And the difference between that and the rent-to-own price in this one plaintiff's case was 5 percent. And on that basis, we submit there has to be a sort of individualized analysis of every class member that precludes summary judgment.

THE COURT: Yes, sir.

MR. ROSENBERG: Your Honor, unless Your Honor has any further questions of me --

THE COURT: I have none.

MR. ROSENBERG: Thank you.

THE COURT: Did you wish to say anything?

MS. MOFFA: No, Your Honor.

THE COURT: Very well. Thank you very much.

MS. MOFFA: Thank you, Your Honor.

MR. ROSENBERG: Thank you, Your Honor.

THE COURT: Yes, sir. Have a good day.

(Discussion off the record)

THE COURT: I'm sorry. Oh, I never told you. Yes. Well, it's granted, granted. All right. Let's see.

MS. MOFFA: And defendant's motion is denied.

THE COURT: Pardon?

MS. MOFFA: And defendant's motion to decertify is denied.

THE COURT: Oh, yes, yes, yes, absolutely.

C E R T I F I C A T I O N

I, KATHLEEN NAZAROK, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Camden County Superior Court on September 12, 1997, Tape No. 2A, Index 11:21-26:27, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate record of the proceedings.

KATHLEEN NAZAROK, #134
DIANA DOMAN TRANSCRIBING

9/24/97
DATE