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PROCEDURAL HISTORY

This action was started on August 12, 2004 in the Monmouth County Chancery Division, General Equity Part, by way of a Verified Complaint (Pa5-15) and application for an order to show cause with temporary restraints. (Pa1-77) A First Amended Verified Complaint which named an additional business entity of the Martins was filed on August 23, 2004. (Pa16)

On August 12, 2004 the Honorable Alexander D. Lehrer, P.J.CH., granted plaintiff-appellant Mateus Gontijo's application for an order to show cause with temporary restraints. This Order entered certain restraints against defendant-respondents Andrea and Ronaldo Martins and their defendant businesses pending a September return date on the Order to Show Cause. (Pa61-67)

On August 19, 2004, defendant-respondents Andrea and Ronaldo Martins filed a motion seeking to dissolve the temporary restraints issued on August 12, 2004. (Pa78-130) This application was granted in part and denied in part and the matter was simultaneously transferred to the Law Division. (Pa193)

On September 30, 2004, counsel for defendant-respondents Andrea and Ronaldo Martins, Angela Dalton, Esq. of the Bowe & Fernicola law firm made an emergent telephone application to the Court. Ms. Dalton advised that it appeared her clients, Andrea and Ronaldo Martins, knowingly subverted Judge Lehrer's Order of August 23, 2004, that $45,000 from the closing of 378 West Colombus Avenue be held in escrow. (Pa183-184) This application was granted by the Honorable Louis Locascio, J.S.C. (Pa202-204)

On or about October 8, 2004, the actions of defendant-respondents Andrea and Ronaldo Martins necessitated yet another emergent telephone application to the Court. This application involved general counsel and the fraud division of Fleet Bank. (Pa205-223) (Pa235-237) This

application was granted and resulted in the securing of the funds the Martins attempted to abscond with. (Pa295-298)

After defendant-respondents Andrea and Ronaldo Martins attempted to knowingly subvert the August 12, August 23 and September 30, 2004 Orders of the Court, by attempting to abscond from the jurisdiction with the funds ordered to be held in escrow, the Bowe & Fernicola law firm filed a motion to be relieved as counsel for the Martins. This application was filed on or about October 6, 2004. The motion also included a request to vacate the prior court orders which required funds be held in escrow pending the conclusion of the litigation. (Pa131-166)

On or about November 1, 2004, plaintiff cross-moved to maintain the status quo of Judge Locascio's September 30th Order (requiring the entire $92,000 from the sale of the property held in escrow), to hold the Martins in contempt of court, and for reimbursement of the counsel fees associated with having to deal with the Martins' attempt to abscond from the jurisdiction in violation of the standing orders of the court. (Pa167-239)

Late in the afternoon on January 13th, the day before the scheduled oral argument, counsel for the Martins copied plaintiff's counsel on a fax letter to the court wherein they advised they were withdrawing their motion to be relieved as counsel. The letter also attempted to submit an 11th hour certification from Andrea Martins which, 3½ months after the fact, attempted to explain away their actions. Plaintiff had no reasonable opportunity to respond to this. Furthermore, Judge O'Hagan advised at the oral argument he never received the submission and did not consider it. As such, any attempt by defendant-respondent to include it as part of the appellate record would be in violation of appellate procedural rules and plaintiff-appellant strenuously objects. *See, e.g., Barry M. Dechtman, Inc. v. Sidpaul Corp.*, 89 N.J. 547 (1982); *County of Bergen v. Borough of Paramus*, 79

N.J. 302 (1979); *State v. Wright*, 221 N.J.Super. 123, 130 n. 2 (App.Div.1987); *Cumberland Farms Inc. v. Moffett*, 218 N.J.Super. 331, 335- 336.

On January 14, 2004, Judge O'Hagan, after finding the Martins did indeed knowingly and intentionally violate the aforementioned court orders, nevertheless granted in part the motion which sought vacate the prior court orders. Judge O'Hagan also took no action with respect to the Martins' actions, including denying the request that plaintiff-appellant Mateus Gontijo be reimbursed any of the over $6000 in counsel fees he incurred as a result of the actions of the Martins in seeking to abscond in violation of the orders. (Pa253-256)

Plaintiff-appellant Mateus Gontijo now brings the instant interlocutory appeal for the following relief:

- To reinstate the September 30, 2004 order of Judge Locascio that the entire proceeds from the sale of the Martins' Long Branch rental property (approximately $92,000) be held in escrow *pendente lite*;
- For reimbursement of the over $6000 in counsel fees he had to incur as a result of the Martins knowing attempt to subvert the August 12, August 23 and September 30, 2004 Orders of the Court, by attempting to abscond from the jurisdiction with the funds ordered to be held in escrow.

STATEMENT OF FACTS

For the last seven years Plaintiff-Appellant Mateus Gontijo has worked as a hard wood floor installer. The labor is back breaking and intensive. For the last seven years Mateus' hours have consistently been 8:00 a.m. to 8:00 p.m., at least six days a week. (Pa37-41)

From this work Mateus managed to save some money. In early July, 2004, his brother alerted him to an investment opportunity whereby they would together buy a bakery business in the capitol of Brazil, Brasilia. The plan was for Mateus to wire his brother about $34,000 which would be used to purchase this bakery business. (Pa37-41)

To effectuate this wire transfer, on July 19, 2004, Mateus went to a business in Long Branch called EZ-Tech Solutions which is owned by defendant Celi Zarrate. EZ-Tech Solutions, together with the rest of the defendants, agreed to wire $33,571.00 to a designated bank account in Brazil held by the person selling the business to Mateus and his brother. Mateus was assured the monies would be deposited in the Brazilian bank account with two days. Two days came and went and the money never left the United States. In fact, to this day, nearly $34,000.00 of Mateus' life savings has been neither wired to Brazil nor returned to Mateus. (Pa37-41)

Given the early stage of this litigation the complete relationship among all the parties is unclear. However, what is known is that EZ-Tech Solutions is owned by defendant Celi Zarrate. (Pa43-44) EZ-Tech Solutions has a relationship with defendants Ronaldo Jose Martins and Andrea Carla Martins, husband and wife, who are the principals and alter ego of defendant Brazil Travel. The facts demonstrate that EZ-Tech Solutions collects the wire deposits and then is supposed to see to it they are deposited in the designated bank account. (Pa37-41) (Pa43-44)

In fact, on August 5, 2004, at the request of defendants Ronaldo Jose Martins and Andrea

Carla Martins, an e-mail they sent was published in a local newspaper concerning this situation. Among other things, defendants Ronaldo Jose Martins and Andrea Carla Martins admit:

> ***We are informing our clients and agents that we will be closed temporarily due to an internal administration error, resulting in a very large monetary deficit in our financing department.***
>
> ***
>
> ***We are conscious of the disturbances that this situation is causing to our clients and we lament how you have been affected.***
>
> ***
>
> ***I, Ronaldo Jose Martins, President of Inter Meso, assure that shortly the situation will be resolved and that all of the transactions will be repaired without prejudice to our clients.***

(Pa13-15) (emphasis added)

As indicated in this published e-mail, defendant-respondents Andrea and Ronaldo Martins, and Brazil Travel owe a lot of money to a lot of people, including plaintiff-appellant Mateus Gontijo. As of at least September 29, 2004, they both had an ownership interest in a real estate property in Long Branch known as 378 West Colombus Avenue, Long Branch, New Jersey. At the time this action was filed, this was their only real asset and only tangible connection to New Jersey. (Pa45-59) At all pertinent times, they admitted they intended to sell this property to address these debts. (Pa40) In reality, the facts have demonstrated that defendant-respondents Andrea and Ronaldo Martins sought to sell this property as soon as possible and abscond to Brazil leaving their debt to plaintiff behind.

Mateus Gontijo retained the undersigned counsel on or about August 9, 2004. Counsel immediately recognized that despite their assurances to plaintiff– including those they requested be

published in a local newspaper (Pa13-15), it appeared they had no real intention of voluntarily returning his $34,000 to him. Instead, the facts demonstrated they were in the process of liquidating their assets and "high tailing it out of Dodge" before the law caught up with them. It was clear that if swift action was not taken to stop the sale of the Long Branch property and/or have the proceeds placed in escrow pending the conclusion of the litigation, their would be little if any chance Mateus Gontijo would ever recover his $34,000.

As such, 3 days after being retained, this action was started via a Verified Complaint (Pa5-15) and application for an order to show cause with temporary restraints to stop the sale of the Long Branch property, freeze the defendants' assets and escrow the monies plaintiff lost pending further order of the court. (Pa1-77) On August 12, 2004 The Honorable Alexander D. Lehrer, P.J.CH., granted this application. This Order entered the following temporary restraints as to defendants Ronaldo and Andrea Martins and their defendant businesses pending a September return date on the Order to Show Cause:

> 1) Ordered them to immediately deposit $40,000 with the firm of Lynch Martin to be held in escrow- that is $34,000 for plaintiff's out of pocket loss and the balance for attorney fees to date;
>
> 2) enjoined and restrained them from transferring or selling anything in excess of $5000, including but not limited to enjoining them from selling 378 West Colombus Avenue in Long Branch;
>
> 3) immediately required them to serve a copy of this Order, together with a copy of the Verified Complaint, on all actual or prospective buyers of any real estate owned by any of them, including but not limited to 378 West Colombus Avenue.

(Pa61-67) In so ordering Judge Lehrer applied the Crowe v. De Gioia standard, finding a likelihood plaintiff would succeed on the merits and irreparable harm (i.e., defendants absconding with plaintiff's $34,000) if the restraints were not entered. By so ruling Judge Lehrer agreed the Martins

were in the process of absconding to either Brazil or Florida with plaintiffs' $34,000. Judge Lehrer further found that once this property is sold and defendants take the cash out of the jurisdiction, plaintiff would have little if any hope of ever getting his $34,000 back from them. (Pa23-35) (Pa61-67)

On August 19, 2004, defendant-respondents Andrea and Ronaldo Martins filed a motion on 2 days notice seeking to dissolve the temporary restraints issued on August 12, 2004. (Pa78-130) Defendants made a number of arguments in support including, but not limited to:

- that Andrea Martins had nothing to do with plaintiff's $34,000 having been taken from him;
- that Ronaldo Martins had no financial interest in 378 West Colombus Avenue and;
- that there was no personal liability for either Andrea or Ronaldo Martins

These are the same exact argument they made to Judge O'Hagan on the motion in question. In fact, the brief on the first application is largely a copy of the latter. (*Compare Pa78-85 with Pa135-140*) Judge Lehrer flat out rejected all these arguments, again applying the Crowe v. De Gioia standard. However, Judge Lehrer Ordered that the sale of 378 West Colombus Avenue may go forward but that defendants must deposit $45,000 of the proceeds of that sale in an escrow account of their attorney pending final resolution- that is, about $33,000 for the plaintiff's actual out of pocket loss and the balance to reimburse attorney fees incurred to date. (Pa193) (Pa123-130)

Judge Lehrer's application of the likelihood of success prong of Crowe v. De Gioia was forceful and strong. He clearly found plaintiff's $34,000 was wrongfully taken from him and that defendants Ronaldo and Andrea Martins both bore responsibility. In fact, in response to the argument it would be unlikely plaintiff would succeed on the merits of proving Andrea Martins was liable, Judge Lehrer found:

> THE COURT: This is outrageous. These – you know what? People come to this country and work like dogs. I have a lot of respect for immigrants in this country. That's what makes this country great. They work like dogs. They save money to send to their families, and then somebody is preying on them? That's outrageous.
>
> MS. DALTON: And certainly the Martins fit within your Honor's description.
>
> THE COURT: No they don't. They – they chose to become absentee managers of a company and let everybody do what they wanted while they were in Florida. They're not [innocent] at all. They have a responsibility.

(Pa124-125) Furthermore, in applying the Crowe v. De Gioia standard, the Court found a likelihood that plaintiff would be entitled to recover his attorney fees in connection with getting his $34,000 back. This was based on two applicable fee shifting statutes: 1) *N.J.S.A.* 56:8-2, *et seg.,* The New Jersey Consumer Fraud Act ("CFA") and; 2) *N.J.S.A.* 12A:4A-305(5) "Liability for late or improper execution or failure to execute payment order". (Pa111-121) (Pa123-130)[1]

As stated, Judge Lehrer's Order dissolving the restraints entered on August 12 provided:

> The Defendants Shall deposit $45,000 with their closing attorney for the property located at 378 West Colombus Place, Long Branch, NJ which is scheduled to close on 8/27/04. The prior restraints entered by this Court shall be satisfied by said deposit.

(Pa193) (emphasis added) Of particular note is that the restraints entered via the order of August 12 were not to be dissolved until the monies were placed in escrow. That is, Judge Lehrer made escrow

[1]It is plaintiff-appellant's position that after this hearing on August 23rd it was implicitly understood by the court and all parties that plaintiff would in fact be paid back his actual out of pocket loss- $34,000-and would be reimbursed the attorney fees he had to incur to recover this money (approximately $10,000 at that time) from the proceeds of this sale. That is, that the case would settle for this amount. Indeed, the Martins had always accepted responsibility and assured Mateus he would be paid back from this sale. (Pa40) (Pa14) As such, plaintiff was quite taken aback when counsel for the Martins took a hard stance, "no pay" position after the motion because it was so contrary to what he had been assured all along. (Pa244-247)

of the $45,000 a condition precedent to the dissolution of the August 12 restraints.[2]

Understanding the history and course of conduct of the Martins, plaintiff's counsel was quite concerned the Martins would do all they could to avoid depositing the monies, even though Judge Lehrer so ordered. Thus, on the same day Judge Lehrer entered his order, counsel for plaintiff placed the Martin's closing attorney, Ms. Ambrosio, as well as the other counsel involved, on "double notice" of Judge Lehrer's order that $45,000 be held in escrow. (Pa194) Despite the representations to the Court that the closing would take place on August 27th, it was rescheduled for September 30th. We now know from subsequent developments, that this is likely because the Martins were buying themselves time to plan a knowingly subvert ion of the August 12 and 23rd Orders of Judge Lehrer.

On September 30, 2004, plaintiff's counsel received an emergent phone call from counsel for the Martins, Andrea Dalton White, Esq. of the Bowe & Fernicola law firm. She advised that it appeared her clients, Andrea and Ronaldo Martins, knowingly subverted Judge Lehrer's Order of August 23, 2004, that $45,000 from the closing of 378 West Colombus Avenue be held in escrow. That is, she advised that the closing was supposed to take place that day but that she somehow found out that it had in fact taken place one day prior, on September 29, 2004. She explained that the Martins, one day prior to the previously scheduled closing date, went to another attorney in Newark, Stephanie Hand, Esq. of the Hand, Little, LLC law firm to "handle" the closing.[3] (Pa183-184) The Martins simply walked in off the street, on their own, and requested Ms. Hand handle this closing. Ms. Hand, apparently having no notice Judge Lehrer ordered that $45,000 from this closing was to

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[2]As discussed *infra*, since the Martins failed to deposit said escrow monies, they were also in violation of the various provisions of the August 12th Order.

[3]Apparently Ms. Hand was the only attorney representing parties at this closing, exactly which party or parties is unclear.

be held in escrow pending the final resolution of this case, did so and did not hold the monies in escrow. The closing was effectuated and a check was issued to the Martins in the amount of about $92,000. (Pa202-204) (Pa205-223) (Pa235-237) (Pa240-242).

Earlier, on August 26, 2004, counsel for plaintiff made an application to Judge Locascio that the entire $92,000 be held in escrow pending the final outcome of the case because if plaintiff is successful in this matter, the $34,000 would be trebled to over $100,000 under the mandatory provisions of the New Jersey Consumer Fraud Act. Additionally, plaintiff argued that there was a clear risk, in fact likelihood, the Martins would abscond after the closing and never pay any more than the $45,000 that was supposed to be held in escrow. Therefore, additional monies should be held to reimburse plaintiff Gontijo the counsel fees he would have to incur in getting his $34,000 back. As stated, fee shifting would be mandatory in this case under two separate statutes. *N.J.S.A.* 56:8-2, *et seg.,* The New Jersey Consumer Fraud Act ("CFA"); *N.J.S.A.* 12A:4A-305(5) "Liability for late or improper execution or failure to execute payment order". In making this argument, counsel for plaintiff wrote:

> [I]f plaintiff has to spend $40,000 litigating this matter over the next 2 years to recover his $34,000, he might just as well give up now. While the pertinent statutes do provide fee shifting, as Judge Lehrer already found, one can not get water from a stone. Thus, even if 2 years from now plaintiff gets a judgment for the $34,000 plus his counsel fees which will probably exceed $40,000 by that point, it would be a mere paper judgment while defendants will be far away basking in the warm Latin American sun chuckling about how they got over on that naive immigrant wood floor installer who was dumb enough to entrust $34,000 of his life's savings to them.

(Pa249-252) (emphasis in original). In opposing the motion, counsel for the Martins belittled this argument and assured the court the Martins had no intention of absconding, and have every intention of answering this case and honoring any judgment or orders of the Court. Judge Locascio agreed

with defense counsel and denied the application to increase the escrow amounts, apparently deciding there was no risk the Martins would abscond.

Only some 2 weeks later, counsel for plaintiff turned out to be correct- at the time Ms. White made the emergent phone call to plaintiff's counsel on September 30th- she advised the Martins were on a flight to Florida with the $92,000 proceeds from the sale, including the $45,000 Judge Lehrer Ordered on August 23, 2004 was to be held in escrow pending the final resolution of this case. The Martins had knowingly, secretively and intentionally disobeyed the August 12 and 23rd Orders of the Court. Their clear plan was to close on the sale a day before the scheduled date with an attorney who was unaware of the Court's order and escape out of the reach of the court with the funds before anything could be done to stop them. (Pa183-184) (Pa202-204) (Pa205-223) (Pa235-237) (Pa240-242)

To make a long story short, the Martins were caught. Ms. White, counsel for the Martins, fulfilled her duty as an officer of the Court and promptly notified counsel and the Court of this development. As a result, Judge Locascio, during emergent phone application on September 30th and then later on October 8th, was able to Order a successful freeze on the entire $92,000. (Pa202-204) (Pa205-223) (Pa235-237) (Pa240-242)

Given the egregious actions of their clients, the Bowe & Fernicola law firm moved to withdraw as counsel. Somewhat incredibly however, making no mention of the above circumstances, defense counsel also moved to extinguish the August 12 and 23rd Orders of Judge Lehrer and the September 30 Order of Judge Locascio that the Martins knowingly attempted to subvert. (Pa131-166) Plaintiff, on the other hand, cross-moved for the appropriate course, befitting the egregious actions of the Martins: 1) to hold the Martins in contempt for their unmistakable

subversion of the August 12 and 23rd Orders of the Court under Rules 1:10-1;2; 2) maintaining the status quo of the September 30, 2004 Order of Judge Locascio that the entire $92,000 be held in escrow pending the final outcome (Pa203-204) and; 3) reimbursing plaintiff Gontijo the over $6000 in counsel fees he had to incur as a result of the actions of the Martins as is provided for under Rule 1:10-3 and required under Rule 4:23-2(4). (Pa167-239)

After a number of adjournments, the motion was finally heard on January 14, 2004 before the Honorable Robert O'Hagan. Judge O'Hagan unmistakably found that the Martins did indeed knowingly and intentionally violate the aforementioned court orders. (Pa253-256) Nevertheless, he took no responsive action. Despite the fact that over $33,000 was wrongfully taken from Gontijo by the Martins and their businesses, and despite the fact that he had to incur over $6000 in attorneys fees protecting his rights in response to their knowing attempt to subvert court orders and avoid depositing the escrow funds, Judge O'Hagan refused to require he be reimbursed same, notwithstanding the clear mandate of two applicable Rules. Rule 1:10-3; Rule 4:23-2(4)

This result is patently unfair– how can justice ever be done if an entirely innocent person has to spend attorney fees near or in excess of that which was wrongfully taken from him in order to recover that amount from a defendant who has already admitted responsibility and whom the court has already found is in fact likely liable? (Pa14) (Pa40) (Pa124-125) (Pa193) This is particularly unfair where over $6000 of those were incurred as a direct result of the Martins' intentional subversion of at least two court orders.

LEGAL DISCUSSION

I. JUDGE O'HAGAN ERRED IN VACATING THE SEPTEMBER 30TH ORDER OF JUDGE LOCASCIO; THE ENTIRE $92,000 SHOULD HAVE BEEN HELD IN ESCROW *PENDENTE LITE* BECAUSE THE COURT HAS ALREADY FOUND A LIKELIHOOD OF SUCCESS ON THE MERITS, PLAINTIFF'S CLAIM EXCEEDS $92,000 AND THE MARTINS HAVE DEMONSTRATED THEY WILL ABSCOND

Somewhat incredibly, after having been caught knowingly subverting the August 12 and 23rd Orders of Judge Lehrer by secretively closing on the property the day before the scheduled date with an attorney unaware of the Court's order, and then trying to flee the jurisdiction with the escrow monies- the Martins thereafter moved to undo the very Orders they thumbed their noses at. They also sought to undo the September 30 (Pa203) and October 12 (Pa241) Orders that Judge Locascio entered in order to prevent them from "getting away with it."

Defendants' motion was couched in terms of a request for "Instructions." This is frivolous. The instructions were clear- they were to deposit $45,000 in escrow. They intentionally disobeyed this order and instead tried to flee the jurisdiction with these escrow monies. Judge O'Hagan erred because he in essence rewarded them for their actions by vacating Judge Locascio's September 30 Order and by failing to at the very least order the Martins to reimburse Gontijo for the over $6000 in counsel fees he incurred as a result. Their motion should have been denied and they should have been held in contempt under Rules 1:10-1;2. At a minimum plaintiff should have been reimbursed his counsel fees caused by their failure to comply with the orders as is specifically called for here under Rule 4:23-2(4).

In support of the motion in question below, Defendants made the same exact arguments which Judge Lehrer had already rejected in connection with the August 23rd motion to vacate the temporary restraints, including, but not limited to:

- that Andrea Martins had nothing to do with plaintiff's $34,000 having been taken from him;
- that Ronaldo Martins had no financial interest in 378 West Colombus Avenue and;
- that there was no personal liability for either Andrea or Ronaldo Martins

(*Compare Pa78-85 with Pa135-140*) It is unclear whether Judge O'Hagan found these arguments persuasive. To the extent he did, he erred on both procedural and substantive grounds. Procedurally, Judges Lehrer and Locascio's earlier findings to the contrary constitute the Law of the Case. *See generally, e.g. Hart v. City of Jersey City*, 308 N.J.Super. 487, 497 (App.Div.1998) (doctrine "tends to bar a second judge on the same level, in the absence of additional developments or proofs, from differing with an earlier ruling..."); *State v. Hale*, 127 N.J.Super. 407, 410 (App.Div.1974) ("where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit.").

Substantively, rather than rehash here plaintiff-appellant's position which has already been accepted by both Judges Lehrer and Locascio, we respectfully rely on the briefs submitted with those prior applications. (Pa23-35) (Pa111-121). Thus defendants' motion was in many ways a motion for reconsideration and should have been further denied under the rules (it was out of time, it raised nothing new- in fact, the facts later were even more compelling- and it should have been brought before Judge Lehrer). In fact, on this appeal defendant-respondent will no doubt continue to argue the underlying merits of the claim. However, these arguments have already been rejected by Judges Lehrer and Locascio and are not materially relevant to this appeal and should be disregarded. The real issue on this appeal is whether Judge O'Hagan erred when he vacated Judge Locascio's orders of September 30 and October 12 and whether he should have required the Martins to reimburse plaintiff the attorney fees he incurred as a result of their intentional violation of the court orders.

Given the Martins contemptuous actions and the clear probability of flight, the September 30, 2004 Order of Judge Locascio which required that the entire proceeds from the sale of the Long Branch property be held in escrow should have remained in place until the final outcome of this case. As stated, Judge Lehrer had already applied the Crowe v. De Gioia, 90 N.J. 126 (1982) standard (irreparable harm and likelihood of success on the merits) and Ordered $45,000 be held in escrow until the end of the case. When the Martins, to the surprise of plaintiff, stated through their counsel after the August 12th hearing, that their intention was to fight the case to the end hoping Mr. Gontijo would make an economic decision to simply "give up" instead of spending the counsel fees it would take to recover his money, counsel for plaintiff moved before Judge Locascio to increase the amounts to be held in escrow to cover counsel fees. Judge Locascio, apparently disagreeing the Martins were a serious flight risk, denied the application. When the Martins were caught in fact fleeing with the escrow funds, Judge Locascio wasted no time in reconsidering that prior decision and ordered the entire $92,000 be placed in escrow. (Pa203) (Pa241).

Accordingly, given plaintiff Gontijo's claim exceeds $92,000 ($34,000 trebled under the mandatory fee shifting provisions of the CFA), and given he is entitled to attorneys fees if he prevails under both the CFA and the state statute governing wire transfers, *N.J.S.A.* 12A:4A-305(5), and given the Martins have demonstrated they will stop at nothing to disobey Court orders and abscond, let alone ignore civil judgments, the September 30, 2004 Order of Judge Locascio which requires the entire $92,000 be held in escrow, should have remained in place pending final resolution.

II. THE LOWER COURT ERRED IN NOT REQUIRING GONTIJO BE REIMBURSED THE OVER $6000 HE INCURRED AS A DIRECT RESULT OF WHAT JUDGE O'HAGAN AGREED WAS AN INTENTIONAL VIOLATION OF AT LEAST TWO COURT ORDERS

Rule 1:10-3, "Relief to Litigant" specifically states:

> The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule.

The actions of the Martins demonstrated here rise to the level of contempt. The Law Division nevertheless declined to enforce. This was a mistake. While the Law Division is certainly vested with wide discretion in deciding whether or not to hold one in contempt, under the facts and circumstances here, it was clearly erroneous to fail to take at least some action. At the very least, Judge O'Hagan should have required the Martins reimburse Gontijo the over $6000 in attorney fees he incurred as a result of their failure to comply with, indeed their intentional subversion of, the August 12 and 23rd Orders. Rule 4:23-2, "Failure to Comply With Order" states in pertinent part:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 4:23-2 (emphasis added) Indeed, while the Court had discretion on the contempt issue (appellant submits it was nevertheless an abuse of discretion to not hold them in contempt), under the plain language of Rule 4:23-2, reimbursement of fees was mandatory unless the court finds the disobedience was substantially justified. The court did not and could not, in fact the defendant did not even argue, substantial justification. In fact, Judge O'Hagan did explicitly find that the Martins knowingly and intentionally violated the court orders. (Pa253) He nevertheless failed to take any action.

In this case the actions of the Martins were calculated. This is not a situation where a litigant has engaged in contemptuous actions by, for example, acting inappropriately in court with outbursts or heated defiance. Rather, the premeditated actions of the Martins are much worse because they challenge the fundamental legitimacy of the court and its constitutional mandate to govern process in the state. In situations such as these, it is incumbent upon the court to enforce its authority lest the dangerous precedent be set that it is "ok" for litigants to intentionally subvert court orders. Such challenges to the fundamental authority of the court on a wider scale threatens the ability of the justice system to function. As such they should be dealt with firmly. The Law Division erred in failing to do so.

In this case, because the Martins have engaged in their contemptuous actions, plaintiff Mateus Gontijo has had to incur yet more counsel fees. Gontijo's attorneys have had to deal with two emergent applications made by various present and former lawyers for the Martins, directly necessitated because of the Martins' defiance. His attorneys have had to make and respond to the applications *sub judice*, have had to review the file and various related correspondence and pleadings– over $6000 all in an attempt to recover the $34,000 he entrusted with the Martins.

CONCLUSION

In the final analysis, as Judge Lehrer aptly noted, this case is about an immigrant worker who has been exploited. He was "strung along" by the Martins for weeks as he was repeatedly told directly and by way of an e-mail that the Martins requested be published in the local Portugese language newspaper, that they accept full responsibility and that he would be paid back. They even tried to trick him into giving up the receipt which proves the deposit. (Pa40) They strung him along in order to buy time to liquidate their assets and abscond, knowing full well that once they did so,

any judgment would be uncollectible and/or economically senseless to pursue; their attorney has repeatedly used these facts to attempt to achieve a bargain settlement.

In the end it is the primary function of any court to see to it that justice is done. Judge O'Hagan missed the opportunity to do so. His rulings have left Mateus Gontijo in the impossible situation of giving up his life savings, or spending near or in excess of that which he is owed to recover what he is owed- all in a case where the Martins have already admitted liability and Judges Lehrer and Locascio found irreparable harm and likelihood of success on the merits of a claim based on two fee shifting statutes. Rather than reaching a just result which balances the equities[4], Judge O'Hagan dismissed the impossible situation his rulings have placed Gontijo in by saying, "Unfortunately, nothing is certain in life."[5]

For all these reasons, it is respectfully requested this Court reverse these rulings and enforce the September 30 and October 12 Orders of Judge Locascio. (Pa203)(Pa241) It is further requested Judge O'Hagan be directed to award Mateus Gontijio the over $6000 in counsel fees and costs he has had to incur because of the actions of the Martins which Judge O'Hagan agreed demonstrated an intentional violation of at least two court orders.

Lynch ♦ Martin

_____

By: JOHN E. KEEFE, JR.
Attorneys for Plaintiff-Appellant Mateus Gontijo

Dated: January 17, 2005

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[4]At oral argument plaintiff agreed to an expedited discovery schedule of 3-5 months if Judge Locascio's escrow orders were left in place. That way, in the (unlikely) event the Martins were somehow deemed not liable, then the monies would only be tied up (in an interest bearing account) for that length of time. Judge O'Hagan declined to accept this solution.

[5]Based on the notes of counsel from the 1/14/04 hearing.