

CV 01 0744

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSEPH DELLO RUSSO, M.D.,

Plaintiff,

v.

TLC LASER EYE CENTERS, INC. d/b/a
TLC GARDEN CITY LASER CENTER,
ERIC DONNENFELD, M.D. and
GIUSEPPE DELLORUSSO, M.D.

Defendants.

AMON, J.
LEVY, M.J.

Civil Action No.

FEB 9 10 20 11
U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

#5

COMPLAINT

Plaintiff Joseph Dello Russo, M.D., through his counsel Paul, Hastings, Janofsky & Walker LLP, as and for his Complaint against defendants, TLC Laser Eye Centers, Inc. ("TLC"), Eric Donnenfeld, M.D. and Giuseppe Dellorusso, M.D. (collectively, "defendants") alleges as follows, upon actual knowledge with respect to himself and his own acts and upon information and belief as to all other matters:

1

Nature Of The Action

1. This is an action to recover for defendants' false description, false designation of origin and false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), deceptive trade practices and false advertising under Sections 349 and 350 of the New York General Business Law, invasion of privacy under Sections 50 and 51 of the New York Civil Rights Law and unfair competition under New York common law, for which plaintiff seeks preliminary and permanent injunctive relief and compensatory and punitive damages against defendants, based on the unauthorized and intentionally deceptive use of his name by competitors in a way that will irreparably injure plaintiff and mislead the public in an area of great public concern -- individual health and welfare.

Parties

2. Plaintiff Joseph Dello Russo, M.D. is an individual who is a citizen of the State of New Jersey. Plaintiff has a principal place of business at 21 West Main St., Bergenfield, New Jersey 07621 and maintains an office in New York City.

3. Defendant TLC Laser Eye Centers, Inc. ("TLC") is an Ontario corporation with its principal place of business at 5600 Explorer Drive, Suite 301, Mississauga, Ontario L4W 4Y2.

4. TLC owns and manages a refractive center, TLC Laser Eye Center - Garden City or TLC Garden City Laser Center ("TLC Garden City"), within this district, located at 200 Garden City Plaza, Suite 130, Garden City, New York 11570.

5. Defendant Eric Donnenfeld, M.D. is an individual who, upon information and belief, is a citizen of the State of New York and resides within this district. Dr.

6. Defendant Giuseppe Dellorusso, M.D. is an individual who, upon information and belief, is a citizen of the State of New York and resides within this district. Dr. Dellorusso has a place of business within this district located at 58 Main Street, East Rockaway, New York.

Jurisdiction And Venue

7. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1332, 1338 and 1367.

8. Complete diversity of citizenship exists and the amount in controversy exceeds the jurisdictional threshold of \$75,000.

9. This Court has personal jurisdiction over defendants because each of them resides or is doing business within this district.

10. Venue is proper in this district pursuant to 28 U.S.C. § 1391

Factual Allegations

Plaintiff Joseph Dello Russo, M.D.

11. Plaintiff is an ophthalmologist and surgeon engaged in the business of eye measure, plaintiff's services are advertised through various media including television, radio, newspaper and magazine articles and print advertisements.
12. Since at least as early as 1975, plaintiff has devoted substantial time, money and effort in publicizing and promoting his name and practice in the field of laser eye surgery, including cataract and laser vision correction surgery. He has become extremely well-known to actual and potential patients needing eye surgery, particularly, laser vision surgery.
13. Plaintiff maintains offices in New York and New Jersey and he predominantly serves patients from the tri-state area.
14. Plaintiff has exercised great care, skill and diligence in the conduct of his practice, and has maintained a uniform standard of high quality in his surgical field.
15. Promotion of plaintiff's services has been extensive. So has unsolicited media coverage. Since at least as early as 1975, and continuing to date without interruption, plaintiff has appeared in television and radio commercials, and also has promoted his name and business through newspaper and magazine articles and print advertisements. Plaintiff also has appeared on national television, a rarity for ophthalmologists.

16. Total expenditures for publicity, promotion and advertising in the tri-state region for plaintiff's services have been in the millions of dollars. During the past year alone, advertising expenditures in the tri-state region exceeded \$5 million. By any measure, plaintiff's services are among the most widely recognized and extensively advertised laser eye surgery services in the tri-state area, if not the United States.

17. As a result of his continuous and substantial publicity, promotion and advertising, and his high-quality practice, plaintiff's name has become well-known to consumers and professionals throughout the United States, and has acquired enormous goodwill such that consumers, especially those in the tri-state area, and professionals everywhere recognize his name in connection with laser eye surgery.

TLC Garden City and Dr. Donnenfeld

18. Defendant TLC Garden City provides laser vision correction services, including excimer laser eye surgery in Garden City, New York.

19. Defendant Dr. Eric Donnenfeld is an ophthalmologist who performs laser vision corrective surgery and is presently Medical Director of TLC Garden City and Co-Director for TLC for the New York metropolitan area.

20. Defendants TLC Garden City and Dr. Donnenfeld offer the same or similar laser vision correction services as provided by plaintiff and cater to potential patients in the same or similar geographical area, within the same or similar price range.

TLC Garden City and Dr. Donnenfeld are plaintiff's direct, and among his primary, competitors.

Defendant Giuseppe Dellorusso, M.D.

21. Defendant Giuseppe Dellorusso, M.D. is a pediatrician.

22. Upon information and belief, defendant Giuseppe Dellorusso may have had laser eye surgery performed by Dr. Donnenfeld at TLC Garden City in or about November 1999.

23. Upon information and belief, defendant Giuseppe Dellorusso participated, or allowed someone else to participate under his name, in the acts complained of herein.

Defendants' Scheme to Capitalize on Plaintiff's Goodwill

24. Defendants are well aware of the popularity of plaintiff's name and practice and the enormous goodwill associated therewith.

25. Pursuant to a predatory and intentional scheme to unfairly capitalize on plaintiff's name, defendants undertook to attract new business, including by diverting plaintiff's patients to defendants, through the willful and unlawful misappropriation of plaintiff's business reputation and goodwill by their false and misleading use of plaintiff's name.

26. In or about the summer of 2000, plaintiff began to receive inquiries from his patients and colleagues concerning a radio commercial they had heard. According to plaintiff's patients and colleagues, the commercial indicated that plaintiff himself had

undergone laser vision surgery and that he endorsed the services of another surgeon who had allegedly performed the surgery.

27. Upon further inquiry, plaintiff discovered that defendants TLC, TLC Garden City and Dr. Donnenfeld have disseminated, or caused to be disseminated, and continue to disseminate, in commerce and to the public and the profession, advertising matter which claims that "Dr. Joe Dello Russo" or "Dr. Joe Dellorusso" had laser surgery performed at TLC Garden City by Dr. Donnenfeld.


28. In words or substance, the commercial opens with a "Dr. Dello Russo" stating: "Hi, I'm Dr. Joe Dello Russo and I just had my eyes done by Dr. Eric Donnenfeld." The commercial closes with the same "Dr. Dello Russo" stating, "I would only trust my eyes to the best, Dr. Donnenfeld of TLC Laser Center."

29. Dr. Donnenfeld never performed laser surgery on plaintiff.

30. No one else at TLC or TLC Garden City ever performed laser surgery on plaintiff.

31. Dr. Donnenfeld may have performed laser surgery on defendant *Giuseppe Dellorusso*, a local pediatrician.

Anglicized version of his name in his profession and is not known by his colleagues as

 or "Joseph."

33. The commercial and advertisements disseminated by defendants are literally false in that they proclaim that Dr. Donnenfeld performed laser eye surgery on "Dr. Joe Dello Russo" or "Dr. Joe Dellorusso."

34. The commercial and advertisements disseminated, or caused to be disseminated, by defendants are misleading in that they proclaim that Dr. Donnenfeld performed laser eye surgery on plaintiff.

35. Defendant Giuseppe Dellorusso, M.D. participated in the defendants' commercial and/or allowed another to participate in the defendants' commercial under his name, knowing and with the intent of having his name perceived as being plaintiff's name.

36. Defendants used plaintiff's name in their commercial without his consent.

37. Defendants intended the listening public to believe that the endorsement contained in their commercial came from plaintiff.

38. Defendants' advertisements are likely to cause confusion, mistake or deception as to plaintiff's and defendants' services and as to the endorsement, affiliation, sponsorship or association of defendants' services with plaintiff.

39. Defendants Dr. Donnenfeld and TLC are direct competitors of plaintiff, and have the same potential patient or customer base in the same geographical area. The services of defendants Dr. Donnenfeld and TLC are also advertised in the same way and promoted and distributed through the same channels of trade as plaintiff's services.

40. By defendants' using the same name as plaintiff, or a name that is phonetically the same, patients, potential patients and the profession are likely to be confused and/or to mistakenly believe that plaintiff has used, authorized, licensed, endorsed or sponsored defendants' services.

41. Defendants intended falsely to suggest, and have falsely suggested in a endorsed, sponsored, or approved by plaintiff.



42. Defendants' use of plaintiff's name is likely to dilute its distinctiveness in the minds of the consuming public by eroding its role as identifying plaintiff and his services.

43. Upon information and belief, defendants' activities complained of herein have been willful, wanton and in deliberate disregard of plaintiff's rights, and for the purpose of intentionally misappropriating plaintiff's enormous goodwill.

44. Since the airing of the commercial, there has been a significant decline in the number of plaintiff's patients from Long Island, New York.

45. This is an exceptional case.

46. Defendants' deceptive and false advertising poses a potential danger to public health and safety in that it affects the public's choice of a surgeon.

47. Plaintiff has no adequate remedy at law.

First Claim For Relief
False Advertising under 15 U.S.C. § 1125(a)

48. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-47 as if fully set forth herein.

49. Defendants' acts alleged herein regarding the use of the plaintiff's name in connection with their services misrepresent the nature, characteristics, and qualities of their services, in violation of 15 U.S.C. § 1125(a)(1)(B).

50. The activities of defendants complained of herein have caused, are causing and, unless enjoined by the Court, will continue to cause irreparable harm, damage and injury to plaintiff, for which plaintiff has no adequate remedy at law.

51. The activities of defendant complained of herein have damaged, are damaging and will damage plaintiff in an amount as yet undetermined.

Second Claim For Relief
False Description, False Designation of Origin under 15 U.S.C. § 1125(a)

52. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-51 as if fully set forth herein.

53. Defendants' acts alleged herein are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of defendants with plaintiff, or as to the origin, sponsorship, or approval of defendants' services by plaintiff, in violation of 15 U.S.C. § 1125(a)(1)(A).

First Claim For Relief
False Advertising under 15 U.S.C. § 1125(a)

48. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-47 as if fully set forth herein.

49. Defendants' acts alleged herein regarding the use of the plaintiff's name in connection with their services misrepresent the nature, characteristics, and qualities of their services, in violation of 15 U.S.C. § 1125(a)(1)(B).

50. The activities of defendants complained of herein have caused, are causing and, unless enjoined by the Court, will continue to cause irreparable harm, damage and injury to plaintiff, for which plaintiff has no adequate remedy at law.

51. The activities of defendant complained of herein have damaged, are damaging and will damage plaintiff in an amount as yet undetermined.

Second Claim For Relief
False Description, False Designation of Origin under 15 U.S.C. § 1125(a)

52. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-51 as if fully set forth herein.

53. Defendants' acts alleged herein are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of defendants with plaintiff, or as to the origin, sponsorship, or approval of defendants' services by plaintiff, in violation of 15 U.S.C. § 1125(a)(1)(A).

54. The activities of defendants complained of herein have caused, are causing and, unless enjoined by the Court, will continue to cause irreparable harm, damage and injury to plaintiff, for which plaintiff has no adequate remedy at law.

55. The activities of defendants complained of herein have damaged, are damaging and will damage plaintiff in an amount as yet undetermined.

Third Claim For Relief
Deceptive Acts and Practices under New York General Business Law § 349

56. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-55 as if fully set forth herein.

57. Defendants' acts as set forth above constitute deceptive trade practices in violation of New York General Business Law § 349.

58. Defendants' acts set forth above have been willful, wanton and deliberate.

59. The activities of defendants complained of herein have caused, are causing and, unless enjoined by the Court, will continue to cause irreparable harm, damage and injury to plaintiff, for which he has no adequate remedy at law.

60. The activities of defendants complained of herein have damaged, are damaging and will damage plaintiff in an amount as yet undetermined.

61. Upon information and belief, defendants' unlawful activities have also damaged the public, as patients have relied upon defendants' false and misleading representations that plaintiff endorses TLC's and Dr. Donnensfeld's services. Defendants' unlawful acts will continue to cause damage to the public unless enjoined by this Court.

Fourth Claim For Relief
False Advertising Under New York General Business Law § 350

62. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-61 as if fully set forth herein.

63. Defendants' acts as set forth above constitute false advertising in violation of New York General Business Law § 350.

64. Defendants' acts set forth above have been willful, wanton and deliberate

65. The activities of defendants complained of herein have caused, are causing and, unless enjoined by the Court, will continue to cause irreparable harm, damage and injury to plaintiff, for which he has no adequate remedy at law.

66. The activities of defendants complained of herein have damaged, are damaging and will damage plaintiff in an amount as yet undetermined.

67. Upon information and belief, defendants' unlawful activities have also damaged the public, as patients have relied upon defendants' false and misleading representations that Dr. Donnenfeld performed laser surgery on plaintiff. Defendants' unlawful acts will continue to cause damage to the public unless enjoined by this Court.

Fifth Claim for Relief
Invasion of Privacy Under New York Civil Rights Law §§ 50 and 51

68. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-67 as if fully set forth herein.

69. Defendants' acts as set forth above constitute invasion of privacy in violation of New York Civil Rights Law § 50.

70. The activities of defendants complained of herein have caused, are causing and, unless enjoined by the Court, will continue to cause irreparable harm, damage and injury to plaintiff, for which he has no adequate remedy at law.

71. The activities of defendant complained of herein have damaged, are damaging and will damage plaintiff in an amount as yet undetermined.

**Sixth Claim For Relief
Common Law Unfair Competition And Misappropriation**

72. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-71 as if fully set forth herein.

73. Defendants' acts constitute unfair competition and misappropriation under the common law of the State of New York and under the statutory and/or common law of each and every state in which defendants engage in such activities in that defendants' actions will cause consumer confusion and deception and will constitute an unlawful misappropriation of plaintiff's name, business reputation and goodwill, so as to attract consumer attention to defendants' services and thereby to gain a commercial advantage in attracting patients by trading on plaintiff's goodwill.

74. The activities of defendants complained of herein have caused, are causing and, unless enjoined by the Court, will continue to cause irreparable harm, damage and injury to plaintiff, for which plaintiff has no adequate remedy at law.

75. The activities of defendants complained of herein have damaged, are damaging and will damage plaintiff in an amount as yet undetermined.

Demand For Relief

WHEREFORE, plaintiff respectfully prays for judgment to be entered against defendants as follows:

a. Preliminarily and permanently enjoining defendants, their officers, agents, servants, employees and attorneys, and those persons acting in concert with them from:

- 1) further violating Section 43(a) of the Lanham Act;
- 2) representing by any means whatsoever, directly or indirectly, that any of defendants' services are associated with, used, sponsored, endorsed or authorized by, connected or affiliated with plaintiff;
- 3) further violating Sections 349 and 350 of the New York General Business Law;
- 4) further violating Sections 50 and 51 of the New York Civil Rights Law;
- 5) committing further acts of unfair competition, deceptive trade practices and false advertising;

6) causing, engaging or permitting any individual or entity to perform any of the aforementioned acts.

b. Compelling defendants to recall from the trade and all distribution channels any and all publicity, advertising and promotional materials bearing representations that Dr. Donnenfeld or anyone else at TLC performed laser surgery on plaintiff or is in any way associated with plaintiff.

c. Compelling defendants to issue an effective public notification in all markets in which defendants advertise their services that defendants did not perform laser surgery on plaintiff and have no affiliation with plaintiff, and that plaintiff does not endorse their services;

d. Directing defendants to deliver up to this Court by a date which the Court

false or misleading statements in defendants' possession, custody or control, including, but not limited to, all tapes, disks or other things containing advertising or other materials and the means for making or reproducing same.

e. Directing defendants to file with the Court and serve upon counsel for plaintiff within thirty (30) days after entry of any preliminary or permanent injunction issued by this Court, a sworn written statement as provided in 15 U.S.C. §1116 setting forth in detail the manner and form in which defendants have complied with the injunction.

- f. Directing defendants to account to plaintiff for any and all gains, profits and advantages derived from defendants' wrongful acts complained of herein.
- g. Awarding plaintiff such damages as he has sustained as a consequence of defendants' wrongful acts complained of herein, including multiple damages, in that this is an exceptional case.
- h. Awarding plaintiff on its state law claims compensatory damages in an amount to be determined at trial, but which in no event should be less than \$ 30,000,000.00.
- i. Awarding plaintiff punitive damages in an amount to be determined at trial, but which in no event should be less than \$ 61,000,000.00.
- j. Awarding plaintiff the costs of this action and his reasonable attorney's fees pursuant to 15 U.S.C. § 1117.
- k. Granting such other and further relief as the Court deems just and proper.

Jury Trial Demand

Plaintiff hereby demands a trial by jury on all issues triable by a jury.

Dated: New York, New York
February 9, 2001

MELINDA HARRIS, JAMES H. HARRIS & WALTER LLP

By: Robert L. Sherman

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Transcript of TLC's radio advertisements

There is only one way to choose a doctor for laser vision correction, ask a doctor.

"I'm Dr. Joe Dello Russo, and I had laser eye surgery in November, by Dr. Donnenfeld."

TLC laser eye center medical director, Dr. Eric Donnenfeld has performed LASIK surgery on more doctors than any other doctor in the area.

"I know Dr. Donnenfeld has taken care of many physicians. There is no question. You go with the experience".

Call TLC Garden City at 1-888-Call-TLC. There is never a charge for a consultation, and you can watch Dr. Donnenfeld perform the procedure in person, before you have yours.

"I'm Dr. Joe Dello Russo and I would definitely recommend Dr. Donnenfeld. You want the best."

TLC Laser Eye Centers: You only have one set of eyes, don't trust them to anyone but TLC, because better doctors mean less risk and better results. 1-888-Call-TLC. The number again, 1-888-Call-TLC. Call today.

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Author

Topic: lasik complications from TLC Laser Center in NYC

cthia
Member

posted 10-31-2000 04:42 PM

Posts: 7
From: New York, NY
Registered: Oct 2000

I had my Lasik done on Jan 2000 from the famous Laser Center located in the Trump Towers. I have diffuse lamellar keratitis also called SOS. This is inflammation under the corneal flap that can damage the cornea if untreated. It also cause cloudy vision due to scarring to the lens. I saw 5 doctors who claimed to be specialists in Lasik complications and I found out there was an outbreak of SOS in the TLC Laser Center around the time I had my Lasik done. I was wondering if anyone heard or know of anyone who had it done there and had similar complications. The definitive cause of SOS is unknown but it have been suggested to be link to improperly cleaned blades. I would appreciate any information or leads.
Thank you
Cynthia

IP: [Logged](#)

Marc
Member

posted 10-31-2000 06:04 PM

Posts: 39
From:
Registered: Oct 2000

Everything I've read on Sands, including several articles in a recent Journal of Refractive Surgery, indicates that all of the information in your post is accurate. The incidence of Sands correlation to the handling of the microkeratome and sterilization method of same are well documented. Dr. Horn has made a similar observation in a post on this BB in his practice. The incidence of Sands is increasing with the increase of Lasik procedures performed everywhere, not just at the center which you visited. I was re-diagnosed with Grade 1 Sands (again) today. Had it before and it dissipated somewhat and then returned immediately upon discontinuation of PredForte. I have not yet researched the incidence of Sands with the Clinic I used and, quite frankly, it's hard to imagine any Lasik doctor who is familiar with what Sands IS and what it LOOKS LIKE not being familiar with the most plausible CAUSE of it. Good luck in your quest - I'm curious about what's being done for you? Please post ...

IP: [Logged](#)

dvo
Member

posted 10-31-2000 06:57 PM

Posts: 48
From: nashville, tn, usa
Registered: May 2000

Cynthia,
Theories regarding DLK abound, and I too ended up with Stage 3 at 72 hours post-op.

Hammer the affected eye with steroids. I even went as often as every 30 minutes, and used an ointment at night. I believe I recovered much faster as a result of such aggressive treatment.

Insist on having your flap checked every few days while doing this; the inconvenience is worth the peace of mind that you are improving. And keep up drops like Celluvisc--steroids really cook the eye, and I was too stubborn to use the thick stuff initially.

Best wishes to you!

IP: [Logged](#)

BC
Member

 posted 10-31-2000 08:04 PM    

Posts: 114
From: USA
Registered: Jan 2000

This is also a good warning for people that ANY facility can have patients with serious complications. I mention this because I have seen many pro-TLC posters on other message boards who keep touting how much better they are than the rest of the industry. To me this is hogwash, as the procedure itself is risky with too many success variables for any surgeon or practice to be able to ensure a high degree of success. Even the oft quoted and controversial 1-2% rate is too high. A .001% failure rate, literally "one in a million", is what we expect from other things (air travel, some outpatient surgeries, etc.), so why not expect it from LASIK?

[This message has been edited by BC (edited 10-31-2000).]

IP: [Logged](#)

Marc
Member

 posted 10-31-2000 08:12 PM    

Posts: 39
From:
Registered: Oct 2000

Amen to B.C.'s comment. I have tried to let on to a couple of "haven't had Lasik - yet" posters that if they think they're going to catch RS at perfection some magical time "when technology is perfected" they'd better not be holding their breath.

IP: [Logged](#)

Wrinkled
Member

 posted 10-31-2000 08:18 PM    

Posts: 549
From: USA
Registered: Jan 2000

Cynthia,

I agree with DVO about "hammering the eye with steroids", but you have to make sure that your intraocular pressure is being monitored, as steroids can raise it. Every 1/2 to 1 hour seems to be the norm for the steroids, but don't dose more frequently than your doctor tells you to.

IP: [Logged](#)

Leslie
Member

 posted 10-31-2000 11:28 PM    

Posts: 1078
From: Green Bay, Wisconsin, USA

Cynthia,

I also had DLK/SOS. Have you lost any lines of your BCVA?