AOS ACQUISITION CORP. d/b/a ALLIED OFFICE SUPPLIES,

Plaintiff,

- vs. -

R & M INDUSTRIES CORP. OF N.Y. AND REUVEN WEINSTEIN a/k/a ROBERT WEINSTEIN,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : PASSAIC COUNTY

DOCKET NUMBER 825-06

CIVIL ACTION

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT PURSUANT TO RULE OF COURT 4:5-1(b)(2) and 4:30A

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PRELIMINARY STATEMENT

Allied Office Supplies ("Allied") filed the Complaint in this action on February 16, 2006, despite the fact that a pending action in this Court, brought by the same plaintiff against another person only months earlier, dealt with precisely the same facts. Defendants R&M Industries Corp. of N.Y. ("R&M") and Reuven Weinstein a/k/a Robert Weinstein ("Weinstein") are being sued here in connection with their sale of merchandise stolen by a rogue Allied salesman, the defendant in that pending action in this Court, in which Allied has moved for summary judgment. R&M and Weinstein had no knowledge of the illegitimate source of the merchandise and have denied the claims against them in this lawsuit.

But Allied should not have sued R&M and Weinstein in a new lawsuit - it had already sued its former employee, Michael Peller, based on the same facts - and that action was only a few months old when this case was filed. Allied not only failed properly to add R&M and Weinstein to the pending action, it falsely certified in this matter that there were no related pending actions and failed to disclose Peller as a person who should be joined in this action. R&M and Weinstein now move pursuant to R. 4:5-1(b)(2) and R. 4:30A to dismiss this action.

FACTS

On September 16, 2005, plaintiff Allied filed an action (the "Peller action") against Michael Peller ("Peller"). (A copy of the Complaint in this action is attached to the Certification of Counsel filed herewith.) Peller was employed as an outside account executive for Allied from 1990 until September 13, 2005. Peller's responsibilities included marketing Allied's products and services to existing and potential customers and to service and maintain Allied's customer accounts. In February 2003, R&M became a customer of Allied and Peller was the sales executive assigned to the R&M account. R&M placed orders through Peller until Peller's resignation in September 2005.

Allied alleges that during the course of his employment, Peller placed orders for toner print cartridges under the guise of HUBCO, Inc., an Allied customer, and without authority, took possession of the cartridges and failed to bill HUBCO or pay Allied for the merchandise. Allied alleges that Peller sold the HUBCO cartridges to other Allied customers at a deep discount and pocketed any profits for his own personal gain. Allied alleges that as a result of Peller's actions, it suffered a loss of approximately $1,200,000.

Allied filed a Verified Complaint and Order to Show Cause with Civil Restraints against Peller on or about September 16, 2005 in this Court and in this County, Docket No. L 3938-05. (A copy of the Verified Complaint against Peller is attached to the Certification of Counsel filed herewith.) No John Doe defendants were named. Just a few months later, on February 16, 2006, Allied filed the present action against defendants R&M and Weinstein, explicitly pleading the existence of the pending lawsuit against Peller. In the complaint, Allied alleged that between 2004 and 2005, R&M purchased "unauthorized" cartridges from Peller exceeding $815,000 in value. Allied explicitly referred in the allegations of the Complaint to their pending lawsuit against Peller, and alleged conversion against R&M and Weinstein based on its sales relationship with Allied and Peller. The cause of action for conversion arises from the same exact set of facts alleged in the Peller action.

On April 10, 2006, R&M and Weinstein filed a third party complaint against Peller seeking indemnification and damages. As for plaintiff, despite being on notice of defendants' affirmative defense based on the entire controversy doctrine, it proceeded with a summary judgment motion in the Peller matter rather than moving to

consolidate these matters or add defendants herein to that case, and made no effort to amend or revise the false certification filed with the Complaint.

LEGAL ARGUMENT

THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE ENTIRE CONTROVERSY DOCTRINE BARS PLAINTIFF'S CLAIM AGAINST R&M AND WEINSTEIN

Rule 4:30A provides that non-joinder of claims "required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine…."

The entire controversy doctrine seeks to assure that all aspects of a legal dispute are addressed in a single lawsuit. "[T]o the extent possible courts must determine an entire controversy in a single judicial proceeding and that such a determination necessarily embraces … joinder of all persons who have a material interest in the controversy." Cogdell v. Hosp. Center at Orange, 116 N.J. 7, 27 (1989); see, VW Credit, Inc. v. Coast Automotive Group, Ltd., 2005 WL 3750752 at *5 (N.J. Super. Ct. App. Div. 2006) (entire controversy doctrine is a "preclusionary device, intended to prevent fractionalized litigation by requiring the assertion of all claims arising from a single controversy in a single action.")

The application of the entire controversy doctrine requires the court to consider fairness to the parties as the "polestar of the application of the rule is judicial fairness." Oliver v. Ambrose, 152 N.J. 383, 395, 705 A.2d 742, 748 (1998) (plaintiff's tort action precluded by the entire controversy doctrine); Greenbaum v. Tully, 2005 WL 2364758 at * 11 (N.J. Super. Ct. App. Div. 2005) (purpose of entire controversy doctrine is to "encourage comprehensive and conclusive litigation determinations, to avoid fragmentation of litigation, and to promote party fairness and judicial economy and efficiency."); Shoremount v. APS Corp., 368 N.J.Super. 252, 255, 845 A.2d 729, 731 (N.J. Super. Ct. App. Div. 2004) (defendants precluded from litigating in civil action issues which they were aware of at time of prior arbitration and which were ripe and amenable to resolution in arbitration).

Additionally, a party is required to include a claim in the previous action if the there is sufficient information to do so at the time of filing. Del Mastro v. Grimado, 2005 WL 1010266 at *6 (N.J. Super. Ct. Ch. Div. 2005); VW Credit, 2005 WL 3750752 at *7 (defendants' counterclaims precluded under entire controversy doctrine where defendants' could have requested relief for counterclaims in first lawsuit); In the Matter of

Gabrellain, 372 N.J. Super 432, 859 A.2d 700 (N.J. Super. Ct. App. Div. 2004) (summary judgment granted to respondent where claims in second probate action were known to appellant at time first action was filed and claims arise from same facts in first action).

Thus, merely by way of example, in Del Mastro, summary judgment was granted against the defendant's counterclaims where the defendant knew of those claims in a prior action and failed to raise them. Similarly, in Dimitrov v. Petrus, 2005 WL 3952884 at *3 (N.J. Super. App. Div. 2006), the Appellate Division ruled that the plaintiffs' complaint was properly dismissed under the entire controversy doctrine where, as here, it consisted of the same factual complex as counterclaim in an earlier action. The court ruled that such claims must be joined in a single action where the claims arise from a core set of facts, Del Mastro, 2005 WL 1010266 at *6, which is exactly what plaintiff has failed to do here.

In Greenbaum, too, the court applied the entire controversy doctrine and granted summary judgment to third party defendants where the defendants filed a separate lawsuit against the third party defendants for indemnification of attorneys' fees. The court held that despite the fact that the amount of the fees' defendants

sought to be reimbursed could not be determined at the time of the filing of the original action, the defendants' claims should have been raised in that action pursuant to the entire controversy doctrine. 2005 WL 2364758 at *15.

In the present action, Allied was aware when it filed the Peller action that it potentially had claims against Allied's customers, whether or not their identity was ascertainable at the time of filing. It failed to preserve its rights by naming John Doe defendants and identifying them in that case as discovery permitted, pursuant to R. 4:26-5. But even without having done so, once Allied learned that R&M had purchased cartridges from Peller which were not accounted for in Allied's records, it failed to join R&M and Weinstein in the Peller action despite the fact that Allied's claims against these defendants arise from the same core set of facts as Allied's claims against Peller. And not only did they fail to proceed properly when filing this lawsuit, but when the Answer was filed asserting the entire controversy doctrine as an affirmative defense, plaintiff still made no effort to bring defendants into the Peller matter, preferring to maintain for its own reasons this multiplicity of lawsuits, even proceeding with a summary judgment motion in that case.

A better example of piecemeal adjudication, which the Courts and the Legislature have for decades made eminently clear is contrary to the policy of this State, could hardly be imagined. What is more, this action was not filed years after Allied's claims against Peller but merely a few months. Certainly if plaintiff's delay had been excusable, or in all probability even if it were not, any New Jersey judge would have granted a motion that the claims against R&M and Weinstein be addressed in the action against Peller.

Instead of taking the course demanded by the Rules, however, plaintiff has cavalierly "opted" to litigate its claims in two fragmented lawsuits - contrary to the law and policy of this State and to the detriment of R&M and Weinstein, who were deprived of the opportunity to participate in those proceedings. Indeed, to protect their interests, defendants here have been forced to file a third-party action against Peller for indemnification and to effect service on him and have incurred unnecessary costs and fees in doing so. This could have been avoided if Allied had joined defendants as a party in the original action as required and defendants could merely have filed their indemnification claims as cross-claims in an existing litigation.

By bringing two separate actions, Allied is draining the judicial system of resources and placing an undue burden on R&M and Weinstein by forcing them to participate in and monitor two lawsuits premised on the same set of core facts. Such behavior is precisely what the entire controversy doctrine was meant to prevent, and should not be permitted by the Court. For this reason, the Complaint should be dismissed.

BY FALSELY CERTIFYING THAT THERE WERE NO RELATED PENDING ACTIONS WHEN FILING THE COMPLAINT IN THIS ACTION, PLAINTIFF VIOLATED RULE 4:5-1(b)(2)

Defendants are also entitled to dismissal based on Rule 4:5-1(b)(2)[1]. That provision (set out in the margin)

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[1] 4:5-1. General Requirements for Pleadings

(b) Requirements for First Pleadings.

(2) Notice of Other Actions and Potentially Liable Persons. Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts. Each party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification. The court may require notice of the action to be given to any non-party whose name is disclosed in accordance with this rule or may compel joinder pursuant to R. 4:29-1(b). If a party fails to comply with its obligations under this rule, the court may impose an appropriate sanction including dismissal of a successive action

requires a party in its first pleading to certify whether the matter in controversy is the subject of any other action or proceeding, and to name any party subject to joinder. This disclosure obligation is a continuing one and by its terms the Rule explicitly requires the filing of an amended certification as appropriate. The Rule grants a court the power to dismiss a successive action where, as here, failure to comply with the rule is inexcusable and the undisclosed party has been substantially prejudiced by not having been identified in the prior action.

This Rule provides an additional grounds for relief to that provided by the entire controversy doctrine because failure to comply works a fraud on the Court and makes it impossible for it to have the information to which it is entitled by law so that it may rule on the question of whether the cases should be tried separately until, as here, it is too late. Thus in Gelber v. Zito Partnership, 147 N.J. 561 (1997), our Supreme Court ruled that dismissal of a claim was warranted because the failure to give notice

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against a party whose existence was not disclosed or the imposition on the noncomplying party of litigation expenses that could have been avoided by compliance with this rule. A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action.

of a related suit in a certification under the Rule deprived the court of the opportunity to manage and coordinate the two proceedings. As the Court wrote:

> The notice requirements of *Rule* 4:5-1 require conduct on the part of attorneys for reasons not limited to joinder of actions. Joinder is but one goal of the entire controversy doctrine. Quite aside from joinder of the controversies in either the arbitral or judicial forum, a trial court, once informed of related actions, can employ various procedural tools to prevent excessively complicated or unfair litigation. . . . Even if the trial court could not have controlled the disposition of the arbitration, it could have sought to foster mediation among the parties.
>
> At a minimum, therefore, the [plaintiff]'s failure to give notice deprived both the [defendant] and the court of the opportunity to have the Superior Court manage or otherwise coordinate the two proceedings. Hence, we agree that on this record there has been a sufficient showing of prejudice to the [defendant], resulting from violation of the notice requirements of *Rule* 4:5-1, to warrant a measured application of the entire controversy doctrine.

Id. at 556.

In purported compliance with the Rule, counsel for Allied certified in its complaint against defendants that this action "is not the subject of any other action pending in any court or arbitration proceeding." The certification was completely silent as to the identity of one obvious one particular "non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party

on the basis of the same transactional facts," in the Rule's own words – that "non-party" being Michael Peller. Reading plaintiff's innocuous and wholly inadequate certification, it is almost as if the obligation of R. 4:5-1(b)(2) were merely to print and sign a boilerplate certification without regard to its content. What the Rule requires, in fact, is that counsel actually disclose related litigation in its certification, such as the Peller action is related to this case, to the Court.

Relatedness

Certainly, there is no serious question as to the relatedness of this case and the Peller case under R. 4:5-1(b)(2):

- Procedurally, plaintiff admits the cases are related because it designated the docket number of the Peller case as a related case on its Civil Case Information Statement. (See Exh. 2 to the Certification of Counsel.)
- Axiomatically, plaintiff would not have explicitly pleaded the existence and the facts of the Peller case in ¶ 6 of its own Complaint in this action if the cases were not factually related.

- Analytically, comparing the pleadings demonstrates their relatedness: The Peller lawsuit claims that Peller acquired and sold something to a third person that he had no right to sell. This case claims the same thing involving the same merchandise, and merely seeks relief against the third person. In deciding whether successive claims constitute one controversy for purposes of this doctrine, the focus is on whether the claims arise from related facts or the same transaction or series of transactions. "It is the core set of facts that provides the link between distinct claims against the same or different parties and triggers the requirement that they be determined in one proceeding." DiTrolio v. Antiles, 142 N.J. 253, 267-8 (1995).

Give the foregoing, it is beyond cavil that the certified statement filed by plaintiff is patently false and, given especially the high level of practice of plaintiff's counsel[2], inexcusable. But while those allegations acted to put defendant on notice of the Peller

[2] Indeed, the designated trial counsel in the Peller matter is the former Chief Justice of the State of New Jersey.

case, already well under way, a judge may not read the factual allegations of a complaint for months after the filing of a litigation matter. That is precisely why R. 4:5-1(b)(2) requires an explicit, clear statement, separate from the allegations of the pleading and certified under penalty of perjury, that no related actions are pending.

Joinder

Rule 4:5-1(b)(2) requires that persons who are "subject to" joinder in an action under the standard of R. 4:29-1(b) be named in the certification that is part of the initial pleading. Given the opportunity if disclosure had been properly made, this Court would likely have ordered that Peller be joined in this case. The purpose of 4:29-1(b) is to eliminate the requirement that for mandatory joinder for claim preclusion under the entire controversy doctrine. Pressler, Current N.J. Court Rules, Comment R. 4:29-1(b) (Gann); thus disclosure should be made even where permissive joinder is possible.

Joinder of all parties involved in a transaction involving alleged conversion is appropriate. Snediker v. Potts, 13 N.J. Misc. 356, 178 A. 573 (1935). Where the subject matter of a new claim namely clearly originated in the same transaction that gave rise to an earlier lawsuit, joinder is appropriate and failure to join is a bar under

the entire controversy doctrine. DeGroot, Kalliel, Traint & Conklin, P.C. v. Camarota, 169 N.J. Super. 338, 346 (App. Div. 1979). The Supreme Court has also ruled that under the entire controversy doctrine, a claim for common-law indemnification from a third party should ordinarily be joined in the original action. Harley Davidson Motor Co., Inc. v. Advance Die Casting, Inc., 150 N.J. 489 (1997).

Here joinder of Michael Peller was foreseeable, yet plaintiff completely ignored its obligation to disclose that Peller was "subject to" disclosure in its certification under Rule 4:5-1(b)(2). This provides an additional "inexcusable" violation of that Rule.

Prejudice

As the Supreme Court made clear in Gelber, the mere fact that the parties and trial court were, in the original case, deprived of the opportunity to address and manage whatever issues may have compelled plaintiff here to maintain separate actions, and to otherwise participate in a unitary proceedings, constitutes prejudice under this Rule. Defendants have also been prejudiced by being excluded from the conduct of the Peller action. Also, to protect their interests, defendants had to file a third-party action against Peller for indemnification and as a result have incurred unnecessary costs and fees which could

have been avoided if counsel had disclosed the Peller action in its certification. Plaintiff has thus forced defendants to participate in and monitor two lawsuits premised on the same set of core facts and in which their rights could be affected, including one in which a motion for summary judgment has already been filed. Defendants in this case simply have no idea what did and did not happen in the Peller matter, and there is no reason they should not have had the ability to participate in it, as required under the Entire Controversy doctrine.

This Court should have been put on notice of all the foregoing in the manner required by the Rules. This was not a mere omission: Plaintiff's counsel explicitly misled the Court by filing a false certification, and maintained that false filing despite the assertion of the entire controversy doctrine as an affirmative defense by defendants here and despite the Rule's specific instruction that changes be reflected by the filing of amended certifications:

> Each party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification.

Indeed, because the Rule also requires "a certification as to . . . whether any other action or arbitration proceeding

is contemplated" (emphasis added) plaintiffs were required, upon filing this action, to file an amended certification in the Peller litigation to reflect the existence of this case and put that Court, now contemplating their summary judgment motion with no knowledge of the filing of this case, on notice of the claims here. Defendants have no reason to believe they have done so.

Accordingly, this action should be dismissed pursuant to R. 4:5-1(b)(2).

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment pursuant to N.J.S.A. 4:30A should be granted in its entirety and the Complaint in this matter dismissed with prejudice.

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