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RESPOND TO NEW YORK

BY OVERNIGHT

Hon. Glenn R. Wenzel, J.S.C.
Superior Court of New Jersey
Passaic County Courthouse, Civil Division
Chambers 222-W
77 Hamilton Street
Paterson, NJ 07505-2017

Re: AOS Acquisition Corp. d/b/a Allied Office Supplies v. R&M Industries Corp. of N.Y. et. al. 825-06

Dear Judge Wenzel:

We represent defendants in the above-captioned matter. We are writing in response to plaintiff's papers submitted in opposition to defendants' motion to dismiss this action pursuant to N.J.S.A. 4:5-1(b)(2) and N.J.S.A. 4:30A.

Plaintiff takes the position that the defendants' motion to dismiss should be denied because plaintiff was "unaware of defendants' existence and action until discovery in the Peller matter." *See* Plaintiff's Opposition Brief at 6. It is for this very reason that the defendants' motion should be granted. Plaintiff became aware of the defendants' existence during the early stages of discovery in the Peller action, not after the Peller action had concluded. Rather than joining defendants as a party in that action as required by the entire controversy doctrine, plaintiff chose to file a separate lawsuit against defendants even though it involved the same set of core facts and legal issues.

Plaintiff further contends that its claims against defendants should not be barred by the entire controversy doctrine because they were not known during the time of the Peller matter and a second suit obviates "complicating an otherwise simple case against Peller." *See* Plaintiff's Opposition Brief at 8. This contention is misapprehends the purpose and effect of the entire controversy

doctrine. First, as set forth above, plaintiff discovered defendants' identities during the discovery phase of the Peller action and could have easily joined defendants' as parties to that action. Second, the purpose of the entire controversy doctrine is to enable courts to "determine an entire controversy in a single judicial proceeding...." Codgell v. Hosp. Center at Orange, 116 N.J. 7, 27 (1989). The entire controversy doctrine applies to all claims involving the same set of core facts, not just subsequent claims against the same parties as plaintiff suggests. *See* Plaintiff's Opposition Brief at 9. Therefore, the fact that trying two separate lawsuits would be more convenient to the plaintiff is irrelevant and contrary to goal of the entire controversy doctrine which is to promote judicial economy. Merely arguing that the entire controversy doctrine is a bad idea – which is in essence plaintiff's argument – cannot carry the day.

Plaintiff also argues that notifying the Court via facsimile of a pending action satisfies its obligation to amend its certification under Rule 4:5-1(b)(2) is without merit. Ms. Ewers Hurley states in her certification, rather incredibly, that "it was not completely clear whether the certification applied to the Peller litigation." *See* Hurley Certification ("Hurley Cert.") at 3. Ms. Ewers Hurley, still uncertain of her obligation faxed a letter on March 8, 2006, to Judge Passero's chambers, the Judge assigned to the Peller action, not this action, requesting an adjournment of the trial date in the Peller action. In the last sentence of the letter, counsel wrote "By the way, in case you are unaware of the case we recently filed against R&M, one of the purchasers of the toner cartridges, it is attached." *See* Exhibit D to Hurley Cert. Plaintiff's counsel has not asserted that a similar notice was sent to your chambers, or for that matter, to the defendant in this case. Accordingly, the facsimile sent only to Judge Passero's chambers cannot be considered sufficient notice for the purposes of counsel's duty to amend her certification pursuant to Rule 4:5-1(b)(2).

Further, defendants have clearly been prejudiced by plaintiff's failure to join them as a party in the Peller action because they will have to absorb the cost of engaging in discovery with Peller, while plaintiff has already had the benefit of completing this process. Plaintiff has obtained a judgment against Peller in the amount of $992,000, with the knowledge that Peller is judgment-proof. At no time did plaintiff ever notify defendants that they were aware that Peller was judgment-proof. *See* Plaintiff Opposition Br. at 6 and Exhibit I to Hurley Cert. On top of the $992,000 judgment it obtained against Peller, plaintiff is also seeking to recover approximately $815,000 from defendants. *See* p.6 of Exhibit B to Hurley Cert. It is patently unfair to permit plaintiff to recover against both

Peller and defendants for a claim arising from the same simple set of core facts when defendants did not and were not given the opportunity to participate in the Peller action.

This is simply the classic situation for application of the entire controversy doctrine: Multiplication of litigation that was eminently avoidable. If the N.J.S.A. 4:5-1(b)(2) and N.J.S.A. 4:30A are not applicable to this case, it is hard to imagine when they would be. The magnitude of plaintiff's potential loss cannot be a factor that exempts it from the requirements of the law; for that matter, the magnitude of its resources make its proceeding in this fashion eminently avoidable, and any prejudice suffered solely of its own device. For the reasons set forth above and in the defendants' moving papers, we respectfully submit that defendants' motion to dismiss be granted.

Very truly yours,

Ronald D. Coleman

cc: Jennifer Ewers Hurley, Esq.