NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6455-08T1

NEW LINE BOOKS, LTD.,

Plaintiff-Appellant,

v.

WHITEHURST & CLARK BOOK
FULFILLMENT, INC.,

Defendant-Respondent.

Argued January 5, 2011 - Decided April 5, 2011

Before Judges Lihotz and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-671-07.

Brian E. Eyerman argued the cause for appellant (Dario Yacker Suarez & Albert, LLC, attorneys; Mr. Eyerman, of counsel and on the brief).

Anthony E. Koester argued the cause for respondent (Dilts & Koester, attorneys; Mr. Koester, of counsel and on the brief).

PER CURIAM

Plaintiff, New Line Books, Ltd., appeals from the summary judgment dismissal of its action for breach of contract and

various torts against defendant Whitehurst & Clark Book Fulfillment, Inc. Plaintiff published and sold "coffee table books." Defendant provided book storage and order fulfillment services pursuant to the parties' contract. Plaintiff alleged defendant wrongfully released plaintiff's inventory upon the direction of one officer-shareholder in the midst of an ownership dispute. The Law Division judge determined, as a matter of law, plaintiff could not maintain a cause of action because the books were shipped at the direction of a "director and/or principal" of the company. Further, the court found plaintiff's claims were precluded by "principles of judicial estoppel" and Rule 4:5-1(b)(2), because a prior suit to determine the ownership of the corporation's assets, including the inventory in question, was pending in the United Kingdom. Consequently, the court dismissed plaintiff's action without prejudice until the litigation in England was concluded.

Plaintiff argues summary judgment was inappropriately granted as the competent evidence, viewed in a light most favorable to plaintiff, created a factual dispute regarding whether defendant was justified in releasing the inventory. Contrary to plaintiff's assertions, its action was dismissed without prejudice. Consequently, this appeal is dismissed.

I.

These facts are established by the summary judgment record. Plaintiff, a New Jersey corporation, was formed in 2004. The company is equally owned by Eyal Zeller of Israel and Grange Books, Ltd. (Grange), a British corporation owned by brothers Stephen and Michael Ash. Earlier in 2004, Zeller had separately formed a related corporation (New Line Books, Ltd., Israel), which acquired the intellectual property rights (copyrights) and publishing assets of Todtri Productions Ltd. (Todtri). Todtri was owned and operated by Robert Tod. Plaintiff, as a sales and marketing company, distributed Todtri's inventory and marketed Todtri's titles, reprinted under plaintiff's brand in the United States. Tod was designated the manager of U.S. operations and was given "full authority in all day-to-day operational matters" regarding Todtri's U.S. inventory.[1]

Defendant, also a New Jersey corporation, is owned and managed by Brad Searles. Prior to plaintiff's creation, defendant had a contract relationship with Todtri. On April 23, 2004, Zeller, as the owner of New Line Books, Ltd., Israel, informed Searles plaintiff had acquired Todtri, including its

[1] In his deposition, Tod asserts he was plaintiff's vice-president. It is not clear whether plaintiff had more than one vice-president, as Stephen Ash also held that title, or whether Tod followed Ash as plaintiff's vice-president.

inventory held by defendant. Thereafter, on March 1, 2005, the Ashes and Tod met with Searles to discuss Grange's interest in plaintiff. At that time, the parties executed a Warehouse Agreement (agreement) in which defendant agreed to store plaintiff's inventory and fulfill its orders. Stephen Ash signed the agreement as "V.P. New Line Books" and managing director of Grange. Zeller was plaintiff's president and Michael Ash was chairman of the board of directors, until his purported resignation on May 18, 2007.

The parties' contract obliged plaintiff to remit payments within thirty days of the date of defendant's invoice. Authorized signatories on plaintiff's checking account included Zeller, Stephen Ash, Michael Ash, and Elliot Schwartz, plaintiff’s accountant. Finally, the agreement stated it was terminable by either party on sixty days notice.

On March 8, 2007, Searles sent an email to Tod and Stephen Ash giving plaintiff sixty days to bring its account within the terms of the parties' agreement by paying its outstanding balances and he cautioned plaintiff that it needed to correct its pattern of late payments that had been exhibited over the prior twelve months. Plaintiff asserts that by May 7, 2007, it had paid its account in full and accumulated a credit balance of

$10,000. Despite these efforts, by May 8, defendant informed plaintiff it was terminating the parties' contract.

On May 16, 2007, Searles emailed Tod and Stephen Ash, stating "the inventory [could] be removed from our facility" once the account was settled. On behalf of plaintiff, Stephen Ash proposed to resolve any outstanding receivables in exchange for defendant's agreement to honor all existing orders. He also requested defendant suggest acceptable terms for a new agreement.

By this time, plaintiff's shareholders were in conflict. In a June 2, 2007 email, Tod wrote to Searles explaining he was "hopeful of being able to work matters out amicably with Michael & Stephen [Ash], but so far this has not happened." Tod urged defendant to continue to fulfill its orders, as the personal dispute should not interfere with "day-to-day operations" of the corporation. Tod then learned defendant already released plaintiff's inventory to Stephen Ash "at Grange's request." Tod accused Searles of "conceal[ing] the truth [] and [] conspir[ing] with Michael Ash, Stephen Ash and Grange to defraud [plaintiff]. The inventory all belongs to [plaintiff]" and defendant "[knew] all along . . . that all operations issues" were to be handled by Tod. Defendant admitted "it was [Stephen]

Ash"[2] who came to defendant "as the authority partner" and directed disposition of the inventory. Soon thereafter, Tod filed an action against Grange in the United Kingdom, on behalf of plaintiff. Plaintiff described this suit as a "dispute among partners over corporate assets," which was not limited to, but included the inventory released by defendant.

On July 26, 2007, plaintiff filed this matter. Plaintiff's five-count complaint averred causes of action for unlawful interference with prospective economic advantage, unlawful interference with contractual relations, conversion, breach of contract, and negligence causing $2,500,000 in actual and other damages as a result of defendant's release of "all or a large quantity" of plaintiff's inventory to an unauthorized third-party.

II.

Following discovery, defendant moved for summary judgment. It maintained there were no material facts in dispute and

[2] Although not impacting our determination, we note defendant's email actually stated it was Michael Ash who directed the inventory's release, however, the record reflects this was an error and Stephen Ash made the request. We base this conclusion on defendant's answer to the complaint, which admits it shipped the inventory to Stephen Ash; interrogatory answers that list Stephen as the one who ordered the books shipped; and Tod's deposition testimony, which reflects Stephen Ash directed defendant to release the inventory.

plaintiff's claims should be dismissed as a matter of law because defendant had "returned the books to [their] rightful owner (or at least the party with authority on behalf of the owner)." Plaintiff opposed the motion, acknowledging it consisted of two equal shareholders, but urging that only its officers had the authority to direct the disposition of its inventory.

The court considered the pleadings and the parties' arguments. In a written memorandum accompanying its order granting defendant's motion, the court made certain findings and conclusions (Section B). Specifically, the court determined Stephen Ash was plaintiff's vice-president, and the sole signatory of behalf of plaintiff on the contract with defendant, he co-signed checks with Tod to satisfy defendant's invoices and he frequently communicated with defendant concerning payment and termination of the contract. Relying on these findings, the court concluded:

> [T]he only logical conclusion was that both Robert Tod and Stephen Ash were entitled to speak for the corporation . . . . Mr. Tod[,] despite his claims to have been a point person[,] never certified that he has authority to make corporate decisions to the exclusion of others who outranked him . . . .
>
> Based on the foregoing[,] the [c]ourt finds that plaintiff cannot sustain its cause of action against the defendant.

> Defendant simply shipped the books per the direction of one of the directors and/or principals of the corporation. Clearly they had the authority to speak on behalf of [plaintiff] as to the contract. Defendant cannot be held responsible for a wrong guess in the guessing game advocated by [] Tod. Very simply, defendant followed the direction of a corporate director who signed its contract for [plaintiff] and whose name was on the checks they received from [plaintiff] . . . . [Defendant] should not be held responsible for [Stephen] Ash's alleged disloyalty as a shareholder and director . . . . [O]ne cannot breach a contract, or commit conversion, by returning inventory to its owner.

Additionally, the court found plaintiff failed to disclose there was litigation pending in the United Kingdom involving substantially the same claims and corporate assets at issue in the instant case as required by Rule 4:5-1 (Section C). Consequently, the court's order held plaintiff was provisionally barred from pursuing its claims against defendant until the conclusion of the United Kingdom action. The court stated it was dismissing plaintiff's complaint "so long as the English action is pending and the potential harm for double recovery continues."

During argument, plaintiff requested the court "to strike" the "factual decisions" contained in Section B of the court's opinion. The court declined, but acknowledged its findings may not have binding effect if the matter is re-filed at the

conclusion of the English lawsuit. Seeking further clarification, plaintiff asked whether "[Section] B is a non-definitive decision on the facts." As to the findings in Sections B and C, the judge responded, "Take it for what it's worth."

On August 28, 2009, a second order was entered by consent of all parties. This order clarified that dismissal of plaintiff's action was without prejudice and also contained defendant's agreement to toll the statute of limitations for conversion for two years, not to exceed the total six-year statute of limitations for a breach of contract "as measured from the alleged date of breach, May 8, 2007."

During oral argument before this panel, defendant's counsel agreed the parties intended to extend any applicable statute of limitations until the conclusion of the shareholder dispute then pending in England.

III.

The July 17, 2009 order grants summary judgment and bars re-filing "so long as the suit in England is pending." However, the accompanying written memorandum, oral argument and the August 28, 2009 order crystallize that plaintiff's action was dismissed without prejudice. Such a disposition is not appealable. Malhame v. Demarest, 174 N.J. Super. 28, 30-31

(App. Div. 1980). See also Woodward-Clyde Consultants v. Chemical & Pollution Sciences, Inc., 105 N.J. 464, 475 (1987) (holding a counterclaim, dismissed without prejudice for failure to comply with an order of discovery, could be reinstated in a later action without violating the entire controversy doctrine); Christiansen v. Christiansen, 46 N.J. Super. 101, 109 (App. Div.) (holding that a dismissal without prejudice is comparable to a nonsuit as it adjudicated nothing), certif. denied, 25 N.J. 56 (1957).

Despite this, plaintiff presses for review, asserting the court's adjudications in Sections B and C make factual findings that may be binding if a future action is filed. "Typically, 'without prejudice' means that there has been no adjudication on the merits of the claim and that a subsequent complaint alleging the same cause of action will not be barred simply by reason of its prior dismissal." Mason v. Nabisco Brands, Inc., 233 N.J. Super. 263, 267 (App. Div. 1989). Although the court's opinion included legal conclusions as to Stephen Ash's authority to act for plaintiff, these were based on a very limited record revealing the few facts discussed above, which were not disputed. These include his execution of the contract with defendant, his authority to co-sign checks and the parties' email communications. We refrain from analyzing plaintiff's

asserted factual dispute regarding whether defendant was justified in releasing plaintiff's inventory at the direction of Stephen Ash, noting the court's findings as stated would not obviate plaintiff's presentation of additional proofs were it required to re-file this action.

We also reject plaintiff's argument that it should be permitted to proceed and the Law Division incorrectly dismissed this matter pending conclusion of the shareholder dispute. Plaintiff suggests a myopic view, contending the suit for breach of the March 1, 2005 Warehouse Agreement does not concern the "dispute between partners." Where as here a prior action was pending, "'the general rule [is] that the court which first acquires jurisdiction has precedence in the absence of special equities.'" Cogen Techs. N.J. Venture v. Boyce Eng'g Int'l, Inc., 241 N.J. Super. 268, 273 (App. Div.) (quoting Yancoskie v. Del. River Port Auth., 78 N.J. 321, 324 (1978)), certif. denied, 122 N.J. 358 (1990). Plaintiff's suggestion ignores that the action pending in England will determine the shareholders' respective entitlement to all assets, including the inventory previously stored by defendant. We agree with the motion judge that the matters are interrelated and disposition of the instant litigation could result in double recovery or inconsistent judgments.

Based upon our conclusion that the nature of the dismissal without prejudice does not adjudicate the parties' rights, we have no need to address plaintiff's arguments discussing the need to join necessary parties,[3] R. 4:28-1, and that the order "fail[ed] to dispose of any and all claims between the parties." We also need not discuss defendant's assertions that plaintiff has violated Rule 2:5-4, by failing to provide us with the evidentiary materials considered by the Law Division and Rule 2:6-1, by including three documents in its appendix that were not submitted to the motion court.

The appeal is dismissed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

[3] In the same point heading, plaintiff additionally suggests Rule 4:5-1 was inapplicable. The Rule outlines the requirements for first pleadings, including that "a certification as to whether the matter in controversy is the subject of any other action pending in any court." The motion court stated plaintiff failed to comply with Rule 4:5-1, because it had not disclosed the filing of a suit in the United Kingdom. The court's determination centered only on the fact that a prior litigation to address the same issues had been commenced in England. In its merits brief, however, plaintiff has failed to address its contention that this determination was error.