

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0197-16T3

ERGOWERX INTERNATIONAL LLC,
d/b/a SMARTFISH TECHNOLOGIES, LLC,

Plaintiff-Respondent,

v.

MAXELL CORPORATION OF AMERICA,
and HITACHI AMERICA, LTD.,

Defendants-Appellants.

Argued April 26, 2017 – Decided July 26, 2017

Before Judges Alvarez and Accurso.

On appeal from the Superior Court of New
Jersey, Law Division, Bergen County, Docket
No. L-8914-15.

Hilary Preston (Vinson & Elkins LLP) of the
New York bar, admitted pro hac vice, argued
the cause for appellants (Scarinci &
Hollenbeck, LLC, Ms. Preston, and Isabel
Sukholitsky (Vinson & Elkins LLP) of the New
York bar, admitted pro hac vice, attorneys;
Robert E. Levy and Ms. Preston, of counsel and
on the brief; Charles H. Friedrich, Roshan D.
Shah, and Ms. Sukholitsky, on the brief).

Hillel I. Parness argued the cause for respondent (Parness Law Firm, PLLC and Jay Nelkin (Nelkin & Nelkin, P.C.) of the Texas bar, admitted pro hac vice, attorneys; Mr. Parness and Mr. Nelkin, on the brief).

PER CURIAM

On leave granted, defendants Maxell Corporation of America and Hitachi America, Ltd., appeal the April 11, 2016 Law Division denial of their Rule 4:6-2 application to dismiss all counts of plaintiff Ergowerx International, LLC, doing business as Smartfish Technologies', complaint for failure to state a claim upon which relief can be granted. For the reasons that follow, we reverse. The matter is remanded so the case can proceed on Smartfish's remaining cause of action for breach of contract.

Smartfish manufactures ergonomically designed computer keyboards and mice. Maxell is a retailer of computer-related products. Hitachi, Ltd. is the controlling American branch of Hitachi Maxell and Maxell Corporation of America.

In its complaint, Smartfish alleged that through fraudulent promises and misrepresentations, Maxell induced it to enter a contract on December 22, 2009. The contract called for Maxell to purchase and distribute Smartfish's products throughout Maxell's already established distribution channels. Smartfish, dissatisfied with Maxell's performance under the contract, filed suit initially in the United States District Court for the Southern District of

New York. The thirteen-count complaint included claims under both State and Federal law: breach of contract; promissory estoppel; intentional interference with prospective economic advantage; fraud in the inducement; fraud; conversion; patent infringement; trademark infringement; violations of the Lanham Act, 15 U.S.C.A. § 1125(a); violations of The General Business Law of the State of New York, Gen. Bus. § 360; breach of the implied covenant of good faith and fair dealing; unjust enrichment; and equitable accounting.

On April 23, 2014, the district court dismissed twelve of Smartfish's thirteen claims with prejudice on Maxell's motion. Ergowerx Int'l, LLC. v. Maxell Corp. of Am., (Ergowerx I) 18 F. Supp. 3d 430, 452 (S.D.N.Y. 2014). The breach of contract claim survived in part, although the court ruled that Maxell's liability, if any, did not extend beyond its commitment to purchase Smartfish products for an initial eighteen-month period. In a detailed decision, the court dismissed the remaining counts of the first amended complaint.

Four counts were dismissed mainly because the causes of action were precluded under New Jersey's economic loss doctrine. Pursuant to State Capital & Abstract Co. v. Pappas Bus. Servs., LLC, 646 F. Supp. 2d 668, 676 (D.N.J. 2009)), and other dispositive precedent, when a party's entitlement to damages arises from a

breach of contract, it is barred from recovering economic losses in tort as well.

Accordingly, count two, which asserted a claim of promissory estoppel, was dismissed as the factual basis for the claim was indistinguishable from that supporting the breach of contract claim. Count three, asserting intentional or tortious interference with prospective economic advantage was also dismissed as the harm alleged was "fairly encompassed by the breach of contract claim." Count six, seeking damages for conversion, and count eleven, asserting breach of the implied covenant of good faith and fair dealing, were also dismissed because they arose from the conduct underlying the alleged breach of contract action. Count twelve, the quasi-contractual claim for unjust enrichment, could not be pursued because an actual contract existed governing the relationship between the parties.

The judge also dismissed counts four and five, asserting claims of fraud in the inducement and common-law fraud. The court observed that "[i]n New Jersey, the elements of both claims are identical." The judge concluded the complaint failed to plead facts that would lead to "a plausible inference" that at the time Maxell made its commitments its representatives "did not believe [their] statements to be true. . . ." As to common-law fraud, a similar analysis mandated dismissal. That claim "effectively

repackages [c]ount [t]hree's claim that Maxell sold products outside of its areas of exclusivity, and therefore harmed Smartfish. This claim is fairly encompassed within [c]ount [o]ne, for breach of contract."

Count seven, which sought damages for patent infringement, was dismissed because Maxell was authorized to sell Smartfish's products pursuant to the contract. The court similarly dismissed three trademark-related claims: counts eight, nine, and ten. Noting that Maxell purchased the products pursuant to agreement with Smartfish, all of the claims failed by operation of the law.

As to count thirteen, which sought an equitable accounting, the court found no fiduciary relationship existed between Smartfish and Maxell that required such an accounting. A commercial transaction does not ordinarily give rise to a fiduciary relationship.

With regard to the breach of contract claim, the court stated that "the clear, unambiguous language of the [a]greement contradicts Smartfish's claim that Maxell was required to purchase \$1.8 million in products every eighteen months, in perpetuity, until the [a]greement was terminated." Instead, after analyzing the language of the agreement, the court concluded: "the damages attributable to the asserted breach of the contract's minimum purchase obligation are limited to such damages incurred in

connection with the eighteen-month period, beginning December 22, 2009." The United States Court of Appeals affirmed.

On May 7, 2014, the district court dismissed the remaining breach of contract claim without prejudice. Ergowerx Int'l, LLC v. Maxell Corp. of Am., (Ergowerx II) 18 F. Supp. 3d 453, 456 (2014). The court declined to exercise supplemental jurisdiction over the remaining state claim and explicitly preserved "Smartfish's right to bring such a claim in state court."

The Law Division judge who declined to dismiss the Smartfish claims held that the district court decision, and the doctrine of res judicata, did not bar Smartfish from proceeding in state court. In state court, Smartfish added a cause of action under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -20. Additionally, Hitachi was added as a corporate defendant.

On appeal, Maxell raises the following points of error for our consideration:

POINT ONE

THE TRIAL COURT ERRED IN REFUSING TO GIVE PRECLUSIVE EFFECT TO THE JUDGMENT ENTERED IN THE FEDERAL COURT ACTION.

A. Smartfish Cannot Evade the Preclusive Effect Of The Federal Court Judgment.

B. Smartfish Is Additionally Precluded From Asserting Any And All Claims That Could Have Been Brought.

C. Smartfish Cannot Now Attack The District Court's Jurisdiction.

D. The Trial Court's Unfounded Decision Must Be Vacated.

1. The Trial Court Erroneously Reviewed Jurisdiction In Direct Contravention to Waiver and Review Principles

2. The Trial Court Erroneously Addressed Questions Not At Issue

I.

We apply a plenary standard of review when reviewing a trial court's decision on a motion to dismiss pursuant to Rule 4:6-2. Razem Family Associates, LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div.) certif. denied, 208 N.J. 366 (2011). This court "owe[s] no deference to the trial court's conclusions." Ibid.

In determining whether a motion to dismiss for failure to state a claim should be granted, the complaint must "be searched in depth and with liberality to determine if there is any 'cause of action suggested by the facts.'" State v. Cherry Hill Mitsubishi, 439 N.J. Super. 462, 467 (App. Div. 2015) (quoting Printing-Mart Morristown v. Sharp Elecs. Corp., 116 N.J. 738, 746 (1989)). This "inquiry is limited to 'examining the legal

sufficiency of the facts alleged on the face of the complaint.'"

Ibid.

II.

Maxell first contends that res judicata precludes Smartfish from making the same claims it brought before the federal court. Res judicata is grounds for dismissal under Rule 4:6-2. See Velasquez v. Frank, 123 N.J. 498, 515 (1991).

The preclusive "effect of a judgment is determined by the law of the jurisdiction that rendered it." Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 423 (App. Div. 2011) (quoting Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 411 (1991)). Therefore, "[f]ederal law determines the effects under the rules of res judicata of a judgment of a federal court." Watkins, supra, 124 N.J. at 411 (quoting Restatement (Second) of Judgments § 87 (1982)).

The federal law of claim preclusion requires that:

(1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one."

[Id. at 412 (citing Fed. Dep't Stores v. Moitie, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428, 69 L. Ed. 2d 103, 108 (1981))]

It is undisputed that the claims here, and those in the federal action, derive from the same transaction or occurrence, and that the same parties, or parties in privity, were present in the federal action. Therefore, the dispositive inquiry is whether the federal court's dismissal of the claims was valid, final, and on the merits.

A dismissal "with prejudice constitutes an adjudication on the merits 'as fully and completely as if the order had been entered after trial.'" Velasquez, supra, 123 N.J. at 507 (quoting Gambocz v. Yelencsics, 468 F. 2d 837, 840 (3d Cir. 1972)). The United States Supreme Court has long held specifically that a "dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits.'" Moitie, supra, 452 U.S. at 399 n. 3, 101 S. Ct. at 2428, 69 L. Ed. 2d at 110 (citing Angel v. Bullington, 330 U.S. 183, 190, 67 S. Ct. 657, 661 91 L. Ed. 832, 837 (1947)).

However, "[i]t is well established that a dismissal without prejudice has no res judicata effect on a subsequent claim." Camarano v. Irvin, 98 F. 3d 44, 47 (2d Cir. 1996). Federal Rule of Civil Procedure 41(b) expressly exempts dismissals for lack of jurisdiction from operating as an adjudication on the merits. See also Velasquez, supra, 123 N.J. at 509 (upholding a dismissal on

res judicata grounds because the earlier action was "not a dismissal for lack of jurisdiction").

Contrary to Smartfish's position, the district court's dismissal was a decision on the merits. The court rendered a substantive decision on each count, dismissing with prejudice, and made findings with regard to the only count, count one, which survived the motion. These findings are dispositive.

The test for "determining the sameness of two causes of action" considers:

(1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions). . . ; (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first). . . ; and (4) whether the material facts alleged are the same.

[Bondi, supra, 423 N.J. Super. at 427 (quoting United States v. Athlone Indus., Inc., 746 F. 2d 977, 984 (3d Cir. 1984)).]

The claims Smartfish now raises in state court are identical to those disposed of in federal court, with the exception that it added Hitachi as a party defendant and added consumer fraud claims. Since the fraud claims were dismissed with prejudice in federal court, pursuant to Federal Rule of Civil Procedure 12(b)(6), res

judicata precludes Smartfish from reasserting them in a different guise in state court. See Velasquez, supra, 123 N.J. at 507.

Smartfish's promissory estoppel claim, count four of the state court complaint, differs from count two of the federal complaint only in that it alleges "Maxell and Hitachi" acted together. But this claim has been disposed of in the federal court on the merits, not on jurisdictional grounds. Since Maxell is a subsidiary of Hitachi, the entities are in privity, and the addition of Hitachi to the complaint does not alter the landscape for res judicata purposes. Watkins, supra, 124 N.J. at 412. Therefore, this count of the complaint should have been dismissed.

Count five of the state court complaint alleges intentional interference with economic advantage. That cause of action was also dismissed in federal court, and therefore should have been dismissed by the Law Division judge as barred by res judicata.

Count ten of the state court complaint, which alleges unjust enrichment, differs from the federal claim only in that the allegations target both Hitachi and Maxell, who stand in privity. This too was a quasi-contractual claim barred because an actual contract exists governing the relationship between the parties. Res judicata applies to this count as well.

The fraud claims in the state court complaint, counts three, six, and seven, allege in virtually identical language, the same

conduct as asserted in the federal complaint. The elements of these causes of action were also dismissed because Smartfish failed to plead them with sufficient specificity in the federal court. These counts are also precluded. See Caballero-Rivera v. Chase Manhattan Bank, 276 F.3d, 85, 86-87 (1st. Cir. 2002) (holding that a dismissal for failure to plead with sufficient specificity under the Federal Rules of Civil Procedure has preclusive effect); Velasquez, supra, 123 N.J. at 507.

Although the conversion count in the New Jersey complaint is slightly more detailed, both the state and the federal causes of action allege the same basic conduct. The conversion claim was dismissed in the federal court because the cause of action failed to specify the artwork that defendant allegedly converted. Thus, this count is also precluded by res judicata.

Count nine of the complaint is repeated verbatim from the federal complaint and alleges breach of the implied covenant of good faith and fair dealing. Having been substantively dismissed by the federal court, it too was barred by res judicata.

Count eleven demanded an equitable accounting. No fiduciary relationship existed between the parties, thus this cause of action was dismissed. Res judicata precludes it in our courts as well.

III.

If a federal court in a prior action "would have exercised pendent jurisdiction over related state claims that were not asserted, a final judgment on the merits by the federal court precludes raising those claims in a subsequent action in a state court." Watkins, supra, 124 N.J. at 413. However, a judgment on a claim will only have preclusive effect on a subsequent claim where "the transaction or connected series of transactions at issue . . . is the same, that is 'where the same evidence is needed to support both claims, and where the facts essential to the second were present in the first.'" SEC v. First Jersey Sec., Inc., 101 F. 3d 1450, 1463-64 (2nd Cir. 1996) (quoting NLRB v. United Techs. Corp., 706 F. 2d 1254, 1260 (2 Cir. 1983)), cert. denied, 522 U.S. 812, 118 S. Ct. 57, 139 L. Ed. 2d 21 (1997).

Although the district court declined to exercise supplemental jurisdiction over the breach of contract claim in Ergowerx II, it did not hesitate to exercise its jurisdiction over either that cause of action or all other related state law claims brought by Smartfish and dismissed in Ergowerx I. See Ergowerx I, supra, 18 F. Supp. 3d at 430. Only the court's judgment in Ergowerx II has no preclusive effect, as the court only dismissed the action for lack of jurisdiction. See Merry v. Coast Comm. College Dist., 97 Cal. App. 3d 214, 228 (1979).

The judgment in Ergowerx I, however, does have such effect. In that decision the court demonstrated its willingness to exercise jurisdiction over Smartfish's state law claims, and dismissed all but one of them with prejudice. See Ergowerx I, supra, 18 F. Supp. 3d at 430. Thus, it is apparent that the court "would have exercised pendent jurisdiction over related state claims that were not asserted," and, therefore, its judgment precludes Smartfish from bringing different state law claims arising from the same transaction here. See Watkins, supra, 124 N.J. at 413. As detailed below, Smartfish's remaining state law claims all arose from the same transaction or occurrence as the claims the district court dismissed in Ergowerx I.

Smartfish alleges a new cause of action under the New Jersey Consumer Fraud Act based on the following:

By forcing Smartfish to incur extra costs to purchase Maxell brand batteries not required by its Agreement, Maxell and Hitachi engaged in acts of, used, and employed unconscionable commercial practices, deception, fraud, false pretenses, false promises, misrepresentation, and the knowing, concealment, suppression, or omission of material fact with the intent that Smartfish rely upon such concealment, suppression or omission, in connection with the sale of merchandise and with the subsequent performance of Maxell.

These facts simply elaborate on Smartfish's main contention, that after executing an agreement with Maxell, Maxell and Hitachi "began

to make unreasonable demands on Smartfish and to condition Maxell's own performance on Smartfish's acquiescence to Hitachi's and Maxell's unreasonable and extra-contractual demands." The claim arises from precisely the same transaction, and relies on the same facts and evidence, as Smartfish's claims that were dismissed in federal court. Therefore, it is precluded by the federal judgment. See First Jersey, supra, 101 F. 3d at 1463-64.


With regard to the alleged tortious interference with a contract, Smartfish in the state court complaint alleges that "Hitachi wrongfully interfered with [Smartfish's relationship with Maxell] through dishonest and/or improper means by exercising control, influence and persuasion over Maxell to ensure that Maxell would not pay Smartfish the sums owed to Smartfish by Maxell pursuant to the agreement." Again, these actions are the same as those disposed of in the federal proceeding. Even if Hitachi used its influence over Maxell to cause it to breach the contract, its conduct is still part of the same circumstances already disposed of in the federal court and should be dismissed as well. See First Jersey, supra, 101 F. 3d at 1463-64.

Smartfish also claims it is entitled to replevin because "Maxell has wrongly retained Smartfish goods for which it has failed to make payment." This claim is obviously integrally related to the breach of contract claim Smartfish can still pursue.

Accordingly, we reverse the Law Division judge's decision, with one exception. The breach of contract cause of action can proceed against Maxell, but only as to one eighteen-month term.

Reversed and remanded for proceedings in accordance with this decision.

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


CLERK OF THE APPELLATE DIVISION