

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SMS Financial P, LLC, assignee of PNC Bank NA,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: BERGEN COUNTY
Plaintiff(s),	:	DOCKET NO.: BER-L-5804-17
	:	
v.	:	<i>CIVIL ACTION</i>
	:	
M.P. Gallagher, LLC and Mark P. Gallagher,	:	
	:	
Defendant(s).	:	

Plaintiff's Motion to Vacate Dismissal, Reinstate and Amend Complaint

Decided: June 26, 2019

Hon. Robert L. Polifroni, P.J.Cv.

Janet L. Gold, Esq. and Christopher J. Macchi, Esq., attorneys for plaintiff
(Eisenberg, Gold & Agrawal, P.C., attorneys).

Edmund V. McCann, Esq., attorney for defendants (McCann & McCann,
attorneys).

MOTIONS TO BE CONSIDERED

This matter comes before the court by way of (1) plaintiff's motion to vacate dismissal, reinstate the case, and amend the original complaint and (2) defendant's motion to pay counsel's fees. Opposition and reply have been received by the court.

PROCEDURAL BACKGROUND

On November 30, 2018, parties appeared before the court on plaintiff's motion for summary judgment wherein the issue of plaintiff's corporate status was raised as a defense by defense counsel.¹ The court denied plaintiff's motion for summary judgment without prejudice and permitted counsel to provide supplemental briefings on this issue in particular for the courts consideration.

On January 18, 2019, the court entertained oral argument on the issue of plaintiff's corporate status in the context of defendant's motion to dismiss for lack of subject matter jurisdiction. Following oral argument, the court issued an order and twelve page opinion dismissing plaintiff's complaint.

¹ On November 21, 2018, defendant filed a motion to dismiss for lack of subject matter jurisdiction.

The instant motion relates to this court's January 25, 2019 dismissal of plaintiff's complaint for failing to register to do business in the State of New Jersey. The court noted that "this order does not determine whether or not the dismissal is with or without prejudice. Said determination will not ripen unless and until a subsequent action is filed by plaintiff."

Neither party has requested oral argument on the instant motions. Therefore, it is within this court's discretion to rule on the papers.²

LEGAL ARGUMENTS

Motion to Vacate Dismissal

Plaintiff moves to vacate dismissal this court's order of January 25, 2019, reinstate, and to amend the original complaint. Rule 1:13-7 governs dismissal for lack of prosecution in all matters (except receiverships, liquidations, condemnations and foreclosures) and provides that a dismissed matter may be reinstated on motion for good cause shown. See R. 1: 13-7.

The New Jersey appellate court has stated that "[the] 'good cause' standard is difficult to precisely define. Its application requires the exercise of sound discretion in light of the facts and circumstances of the particular case considered in the context of the purposes of the Court Rule being applied."³

Here, plaintiff seeks to vacate the dismissal of this action and to have the complaint reinstated. This action was dismissed for plaintiff's failure to register its business entity with the State of New Jersey as a foreign business entity authorized to conduct business within the state. During the action, plaintiff cured the registration defect by registering as a foreign business entity in New Jersey. Nevertheless, the case was dismissed by this court. Plaintiff has been

² In Raspantini v. Arocho, the Appellate Division stated:

While a request for oral argument respecting a substantive motion may be denied, see Great Atlantic and Pacific Tea Co. v. Checchio, 335 N.J. Super. 495, 497-98 (App. Div. 2000); Spina Asphalt Paving v. Fairview, 304 N.J. Super. 425, 427 n. 1, (App. Div. 1997); cf. Cobra Products, Inc. v. Federal Ins. Co., 317 N.J. Super. 392, 396 (App.Div.1998), certif. denied, 160 N.J. 89 (1999), the reason for the denial of the request, in that circumstance, should itself be set forth on the record. That being the case, plaintiffs' motion for reconsideration might quite properly have been decided without oral argument, if, for example, that motion on its face did not meet the applicable test for that relief, see Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996), and if that substantive shortcoming were given as the reason for denying oral argument.

Raspantini v. Arocho, 364 N.J. Super. 528, 531-32 (App. Div. 2003).

The Appellate Division reiterated its position in Personal Service Ins. Co. v. Relievus, stating:

PSIC notes that its request for oral argument was denied. However, under Rule 1:6-2, the trial court has the discretion to dispense with oral argument on substantive issues where the record provides all that is necessary to make a decision on the issue presented. See Raspantini v. Arocho, 364 N.J. Super. 528, 531-32, (App. Div. 2003). Such was the case here.

Personal Service Ins. Co. v. Relievus, 455 N.J. Super. 508, 511 n.2 (App. Div. 2018).

³ Ghandi v. Cespedes, 390 N.J. Super. 193, 196 (App. Div. 2007) (quoting Del. Valley Wholesale Florist, Inc. v. Addalia, 349 N.J. Super. 228, 232 (App. Div. 2002)). Our Supreme Court has defined "good cause" as "the presence of a meritorious [claim] worthy of judicial determination ... and the absence of any contumacious conduct ... " O'Connor v. Altus, 67 N.J. 106, 129 (1975). In Ghandi, we addressed the good cause standard under Rule 1: 13-7(a), stating that because administrative dismissals are "without prejudice," "the right to reinstatement is ordinarily routinely and freely granted when plaintiff has cured the problem that led to the dismissal even if the application is made many months later." Ghandi, supra, 390 N.J. Super. at 196. We also observed that "absent a finding of fault by the plaintiff and prejudice to the defendant, a motion to restore under [Rule 1: 13-7(a)] should be viewed with great liberality." Id. at 197." Abnathya v. Medley, No. A-2357-16T2, 2017 N.J. Super. Unpub. LEXIS 2538, at 7-9 (App. Div. Oct. 10, 2017)

prejudiced by the dismissal because the relevant statute of limitations has since expired due to the dismissal. Therefore, the effect of the court's order for dismissal of this action without prejudice is deemed to be "with prejudice" against the plaintiff because the plaintiff may not otherwise file a new complaint due to the expiration of the statute of limitations. Furthermore, defendants will face no prejudice by the reinstatement of this action, as the merits of plaintiff's claims remain uncontested. Defendants owe a debt to the plaintiff. The only justification for the court's dismissal of this action rested on plaintiff's failure to register its business as a foreign business entity, a technicality which has been cured and corrected. Therefore, good cause is shown due to "the presence of a meritorious [claim] worthy of judicial determination ... and the absence of any contumacious conduct ... " O'Connor v. Altus, 67 N.J. 106, 129 (1975).

Plaintiff should be permitted to amend its complaint. Rule 4:9-1, governing amendments to pleadings, provides that "[a] party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. Thereafter a party may amend a pleading by leave of court which shall be freely given in the interest of justice " R. 4:9-1.

Here, plaintiff seeks to amend its complaint to properly and more accurately reflect the causes of action and relevant facts in this matter. The interests of justice require that plaintiff be permitted to amend its complaint. Rule 4:9-1 provides that leave to amend be given freely.

Accordingly, in the interest of justice and for the reasons set forth hereinabove, plaintiff's motion to amend complaint should be granted.

Opposition

Defendant opposes the instant motion and contends that while initially noting that plaintiffs' motion was nominally captioned "to reinstate", it should be considered a motion for reconsideration which has been filed more than twenty days after the entry of the order and as such is time barred. See R. 4:49-2. Rule 4:49-2 governs "Motions to Alter or Amend a Judgment or Order and provides that the motion must be filed within twenty days after it has been received and must "state with specificity the basis on which it is made, including a statement of the matters or controlling decision which counsel believes the court has overlooked or as to which it has erred."

Motions for reconsideration are addressed to the trial court's sound discretion. Capital Fin. Co. of Del. Valley v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div.), certif. denied, 195 N.J. 521 (2008). If this court should, in its discretion, decide to relax the rule and entertain this motion as a motion for reconsideration, it must apply the standard in regard thereto and affirm its previous ruling regarding the prejudicial effect of plaintiff's failure to register in the state. On November 9, 2018, this court entered an order substituting SMS Financial P, LLC as plaintiff. As evidenced by and detailed in report obtained from the New Jersey Business Gateway website, SMS Financial, LLC was originally formed on August 26, 2003 but its charter was subsequently revoked on March 16, 2009 and no record was found for the substituted plaintiff, SMS Financial P, LLC having registered to do business in New Jersey. Pursuant to New Jersey Statutes, N.J.S.A. 42:2C-65 is jurisdictional because it limits the right of a foreign company to use our

state courts. This statute specifically restricts access to those foreign companies if they fail to comply with the provisions of the act and register to do business in the state.

Plaintiff mistakenly states that the motion is made pursuant to R. 1:13-7. Rule 1:13-7(a) which is an administrative rule "designed to clear the docket of cases that cannot, for various reasons, be prosecuted to completion. Rule 1:13-7 implicates only a Dismissal of Civil Cases for Lack of Prosecution and provides for a specific methodology for vacation of the dismissal. "If a defendant has been properly served (with a copy of a consent order to vacate the dismissal) but declines to execute a consent order, plaintiff shall move on good cause shown for vacation of the dismissal. The motion shall be granted on good cause shown if filed within 90 days of the order of dismissal, and thereafter shall be granted only on a showing of exceptional circumstances." Since the dismissal of the present matter was not for lack of prosecution, preceding and determination on the basis of the stated rule is inapplicable.

In addition, reliance upon the cases cited, to wit;⁴ are misdirected because they explain the standard to be applied for vacating an order of dismissal based on lack of prosecution which, to reiterate, was not the case in this matter.

Plaintiff should have brought this motion to vacate the judgment under R. 4:50-1⁵. When a trial court considers a motion to vacate a judgment or order, the motion must be "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div.), affd., 43 N.J. 508 (1964). Since there doesn't appear that there is any claim that the order herein is the result of R. 4:50-1 (b)(c)(d)(e) or (f), it would be assumed that the claim for relief from the order is based upon R. 4:50-1(a). However, a motion to vacate a judgment under R. 4:50-1(a) "should be granted sparingly and is addressed to the sound discretion of the trial court, whose determination will be left undisturbed unless it results from a clear abuse of discretion." Fineberg v. Fineberg, 309 N.J. Super. 205, 215 (App. Div. 1998) (citing Hous. Auth. Of Morristown v. Little, 135 N.J. 274, 283- 84 (1994)). An abuse of discretion occurs "when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Iliadis v. Wal- Mart Stores, Inc., 191 N.J. 88, 123 (2007). None of those delineated factors occurred in the present matter. Therefore, the motion should be denied.⁶

⁴ Ghandi v Cepedes, 396 N.J. Super. 193 (App. Div. 2007), Delaware Valley Wholesale Florist, Inc. v. Addalia, 349 N.J. Super. 228,232 (App. Div. 2002), Mason v. Nabisco Brands, Inc., 233 N.J. Super. 263, 267 (App. Div. 1989), and Rivera v. Atl. Coast Rehab Center, 321 N.J. Super. 340, 346 (App. Div. 1999).

⁵ "On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order."

⁶ In deciding a motion Rule 4:50-1, the court must "reconcile [s] the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case," U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467 (2012), the court's "determination warrants substantial deference[.]" Ibid. In the present matter there can be no conclusion other than that the plaintiff failed to demonstrate that it is entitled to relief under R. 4:50-1. As such, there wasn't any abuse of discretion and the motion must be denied.

In the present matter, the court dismissed the complaint for lack of subject matter jurisdiction, pursuant to R. 4:6-2(a). The court could not have made any ruling on the merits of the case as it lacked subject matter jurisdiction to consider the allegations of the complaint. "Subject-matter jurisdiction involves the threshold determination as to whether the court is legally authorized to decide the question presented." See Carroll v. United Airlines, 325 N.J. Super. 353, 357 (App. Div. 1999) (citing Gilbert v. Gladden, 87 N.J. 275, 280-81 (1981)). Because it is a threshold determination, any issues regarding subject-matter jurisdiction "must be addressed before considering the substantive merits of the matter." See New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 411 (App. Div. 1997).

The authority of a court to adjudicate a particular type of case is called subject-matter jurisdiction and is established by the federal or state Constitution, or by state statutes. Subject matter jurisdiction is the requirement that a given court have power to hear the specific kind of claim that is brought before it. While litigating parties may waive personal jurisdiction, they cannot waive subject-matter jurisdiction.

Pursuant to R. 4:6-2(a), a party may file a motion to dismiss on the basis that the court does not have subject-matter jurisdiction over the case. A motion to dismiss for lack of subject-matter jurisdiction is considered a favored defense and may be raised at any point in the litigation process, even if the parties had previously argued that subject-matter jurisdiction existed. A defendant who believes that a court lacks subject matter jurisdiction to hear the case may raise the issue before the trial court or even in an appeal from the judgment See R. 4:6-3; Hamilton, Johnston & Co. v. Johnston, 256 N.J. Super. 657 (App. Div.), certif. denied, 130 N.J. 595 (1992). If a defect in subject matter jurisdiction is found, the court must dismiss a case for lack of subject-matter jurisdiction upon motion of a party or sua sponte, upon its own initiative. Appellate review of a ruling on jurisdiction is plenary because the question of jurisdiction is a question of law. Mastondrea v. Occidental Hotels Mgmt., S.A., 391 N.J. Super. 261 , 268 (App. Div. 2007). Ironridge Global IV Ltd. v. Olde Monmouth Stock Transfer Co. Inc., Law Div. (Monmouth Cnty.) (Gummer, J.S.C.), Docket No.: MON-L-772-15, November 13, 2015.

The main legal issue to be decided in this matter is whether the legislature of the State of New Jersey affirmatively barred the courts of this state to hear a matter where the plaintiff, a limited liability company, has failed to comply with the statutory registration requirements.

"Absent ambiguity, the language of a statute must be read in accordance with its plain and ordinary meaning and must be afforded a construction which considers the words in the context of the entire statute, ascribing to the words a common-sense meaning which advances the legislative purpose." Voges v. Borough of Tinton Falls, 268 N.J. Super. 279 (App. Div. 1993), certif. denied, 135 N.J. 466, citing Dept. of Health v. Sol Schnoll Dressed Poultry Co., 102 N.J. Super. 172, 176 (App. Div. 1968).

Plaintiff, SMS Financial P, LLC never registered to do business in New Jersey. Therefore, it was not authorized to access the New Jersey courts pursuant to validly enacted New Jersey Statutes N.J.S.A. 42:2C-65.⁷

⁷ "Effect of failure to have certificate of authority.

a. A foreign limited liability company transacting business in this State may not maintain an action or proceeding in this State unless it has a certificate of authority to transact business in this State."

The court held further that, despite the fact that Seven Caesars might easily cure the defect, it does not vitiate the fact that the court is unable to act because of the initial failure to comply with the statutory requirements and to have authorization to conduct business in New Jersey.

The Appellate Division continued to instruct in Seven Caesars, "However, without a valid certificate to do business in this state, its stake in the action is insufficient to overcome the jurisdictional bar to suit imposed by N.J.S.A. 14A:13-11(1)."

Plaintiff suggests that it should be entitled to a final determination "on the merits." The mere assertion that plaintiff may not be able to recover from defendant cannot be a basis for upsetting our fundamental notion of jurisdiction. A determination on the merits is not a constitutional guaranty. The fundamental objective of the court is to provide each matter, issue and claim over which it has jurisdiction a resolution on its factual and legal merit. Like all aspirations, resolving cases "on the merits" is never perfectly achievable. This concept conflicts with all other policy objectives, such as achieving efficiency, judicial economy, cultivating mediation and settlements, preventing confusion, and balancing participant's control against active judicial management. In effect it attempts to trump the design and intent of our procedural rules. Thus, the concept of resolving cases on the merits proposes and ignoring procedural obstacles that stand in the way of the resolution allegedly demanded is the antitheses of our judicial system.⁸

The certainty in proceeding with proven procedural guidelines establishes a fair court system and the rules by which the court system operates provides all parties with specific guidelines. These procedures anticipate that the court system will deliver reasonably just outcomes. Fundamentally, court procedures do not guaranty any consequence. It assumes that fair and objective rulemaking will yield moral outcomes; therefore, all the scholarly energy is directed at producing neutral rules and guidelines under which the ideal system is expected to operate. The adoption of rules regulating access to the court contrasts with the "on the merits" philosophical alternative in which the gage of a justice is the opportunity for the decision-making process to be based on a strictly factual determination and procedures should not interfere with the development and presentation of those facts.

Contrary to the plaintiff's assertion in its brief, plaintiff's conduct is contumacious. Plaintiff asserted that its failure to register with the state was an oversight and a "one off," that it does not transact business in New Jersey, and that its activities merely involve interstate

⁸ Our system dictates that lawsuits should be decided according to procedural rules that are designed, interpreted, and implemented to give the parties the maximal opportunity to participate in shaping an outcome that can be sustained upon judicious scrutiny. Our system requires rulemakers and judges who design, interpret, and implement procedural rules to consider the behaviors of litigants in the case and on the capacity of the litigants to access the court system. It converts the approach of the "on the merits" philosophy, which provides the parties a right to participate in a process by which the judge decides the case on the facts, to an approach that includes both "procedural" and "substantive" elements: the process by which the outcome is just because it is guided by standardized procedural guidelines. The relevant outcome is not necessarily a litigated outcome as the "on the merits" principle presupposes. It is nevertheless an outcome that is fair under all of the circumstances. Procedural rules are adopted not with the sole objective of preserving an individual's cause of action but with the objective intent of ensuring for all parties the "orderly dispatch of business, with consequent saving of public time and maintenance of the dignity of tribunals." Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388,402 (1910).

commerce. These assertions were both false and misleading upon the court. A search of the court documents belies the truth of those assertions. The court records presented at the original hearing indicate that this plaintiff has sought the intervention of the New Jersey courts on numerous occasions to implement its collection activities in this state. This court has determined in its written opinion that plaintiff's assertion "that this singular transaction is insufficient to qualify as transacting business within New Jersey". However, this court finds that assertion to be inaccurate."

This court in its order file January 25, 2019 stated "defense counsel has submitted proof that SMS Financial P. LLC has never been registered with the State of New Jersey prior to November 29, 2018. Yet, defense counsel was also able to find numerous New Jersey court cases wherein SMS Financial P. LLC has either been previously involved or is currently involved. Therefore, plaintiff's characterization of this transaction as a "one off" has been effectively rebutted by defendants."

Plaintiff requests that the order be vacated on account of "good cause is shown due to the presence of a [meritorious] claim worthy of judicial determination ... and the absence of any contumacious conduct." Even if the plaintiff were to have grounds for any relief from this court which the defendant denies because court may not reinstate a civil case when there is a lack of subject- matter jurisdiction, the fact that neither of these statements are accurate would preclude such relief. First, the claim is admitted in plaintiff's counsel's certification to be time barred and therefore not justiciable. Second, the plaintiff's conduct in misrepresenting to the court the nature and extent of its business activity cannot be described as anything but contumacious

Reply

Plaintiff's reply provides that defendants argue that a motion for reconsideration pursuant to R. 4:49-2 or a motion to vacate judgment pursuant to R. 4:50-1 is the proper filing in this matter. Neither is correct. The motion to vacate dismissal is the proper motion in this matter.

First, defendants argue that a motion for reconsideration pursuant to R. 4:49-2 is the proper motion to be filed in this action.⁹ Here, this matter does not fall into the narrow corridor of cases referenced above. Therefore, a motion for reconsideration was not the proper motion to be filed in this matter.

Alternatively, defendants also argue that a motion to vacate judgment pursuant to R. 4:50-1 is the proper motion to be filed in this action.¹⁰ None of the forgoing reasons apply to this

⁹ Pursuant to R. 4:49-2, "Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence" Cummings v. Bahr, 295 N.J. Super. 374, 384, 685 A.2d 60, 65, 1996 N.J. Super. LEXIS 453, *11-12.

¹⁰ Pursuant to R. 4:50-1, "[T]he Court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under Rule 4:49; (c) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order." Rule 4:50-1.

matter. Rather, the order in this matter was based on a lack of subject matter jurisdiction, which may be and has been cured by plaintiff. Plaintiff has since cured this court's lack of subject matter over this matter, which can now be heard by this court.

In this action, the complaint was dismissed for lack of subject matter jurisdiction. "Because there is no adjudication on the merits, the dismissal, pursuant to the rule, is without prejudice. Accordingly, a subsequent complaint alleging the same cause of action will not be barred simply by reason of its prior dismissal. However, defendant in the second suit may assert, and a plaintiff may be subject to, the defense of the statute of limitations based upon the filing date of the second complaint." Mason v. Nabisco Brands, Inc., 233 N.J. Super. 263 1989 N.J. Super. LEXIS 209.¹¹

During this action, the statute of limitations expired, which barred Plaintiff from filing a second and subsequent complaint upon dismissal. After the statute of limitations expired, this court dismissed the present action without prejudice due to lack of subject matter jurisdiction. However, prior to dismissal, plaintiff cured the court's lack of subject matter jurisdiction upon registering as a foreign business entity with the State of New Jersey, deeming the court's lack of jurisdiction moot. Because the defect was cured, the court may now hear the merits of this action. Because the statute of limitations has expired and the plaintiff is barred from filing a second complaint, the only possibility for this court to rule on the merits of this action rests on the court's authority to vacate dismissal and reinstate the complaint, which this court has the equitable power to do.¹²

Failure of the court to grant plaintiff's motion to vacate, reinstate and amend the complaint will have a prejudicial effect on plaintiff, as plaintiff would otherwise be unable to pursue redress through the courts due to the expiration of the statute of limitations.

In Thabo v. Z Transp., a breach of contract case, the trial court judge erred by dismissing with prejudice plaintiff's complaint as the ultimate discovery sanction under Rule 4:23-5 ... " Thabo v. Z Transp., 452 N.J. Super. 359 (App. Div. 2017).¹³

¹¹ "Reinstatement of an original complaint differs significantly from filing a second complaint after the first complaint is dismissed without prejudice. Unlike the filing of a second complaint, a reinstated or restored complaint does not trigger the statute of limitations even though the reinstatement occurs after the statute of limitations has run. Where a matter is reinstated, the action reverts to the status of the complaint as it existed at the time the dismissal was entered." Ibid. "The rationale is simple. 'It is in recognition of the principle that the filing of a new complaint may implicate the statute of limitations that courts have been loathe' to deny a motion to reinstate a complaint previously dismissed without prejudice where there is good cause to do so." Ibid.

¹² Courts have exercised their equitable power to grant jurisdiction and allow parties their day in court on the merits of their actions. See New Jersey Highway Authority v. Renner, 32 N.J. Super. 197, 1954 N.J. Super. LEXIS 471 (App. Div. 1954). In New Jersey Highway Authority, a claim subject to bar under the entire controversy doctrine was permitted to go forward because under the circumstances of the case, the Court held that justice would be best served. Id. at 495. "... after all, justice is the polestar and our procedures must ever be moulded and applied with that in mind." X-L Liquors v. Taylor, 17 N.J. 444, 454 (1955); Handelman v. Handelman, 17 N.J. 1, 10 (1954).

¹³ The appellate court held, "The procedural safeguards under Rule 4:23-5 are intended to ensure that the defaulting litigant is aware that the order of dismissal or suppression without prejudice has been entered and of its consequences. The best way to foster public confidence in the civil courts is to decide cases on their merits." Id. The appellate court reversed the order of dismissal, reinstated plaintiffs complaint, and remanded the case to the trial court for further proceedings.

Similarly, here, this is a breach of contract action where plaintiff's case was dismissed due to the court's lack of subject matter jurisdiction over the action. Because the statute of limitations has expired, dismissal of the present action results as a dismissal with prejudice, due to the plaintiff's inability to refile a complaint. Because of the prejudice to plaintiff as a result of dismissal and because policy suggests that cases are better decided on their merits, the court should vacate dismissal and reinstate plaintiff's complaint as the court did in Thabo.

Moreover, in Crispin v. Volkswagenwerk, A.G., competing policies were at play. "The defendant's right to have the plaintiff comply with procedural rules conflicts with the plaintiff's right to an adjudication of the controversy on the merits. Crews v. Garmony, 141 N.J. Super. 93, 96 (App. Div. 1976). A range of sanctions is available when a party violates a court rule. Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will erase the prejudice suffered by the non-delinquent party."¹⁴

Similarly, here, competing policies are at play. Defendants' right to have plaintiff comply with procedural rules (i.e. registering as a foreign business entity with the State of New Jersey) conflicts with plaintiff's right to an adjudication on the merits of the action. Because dismissal of plaintiff's complaint in this matter effectively resulted as a dismissal with prejudice due to the expiration of the statute of limitations, the dismissal should be used as a last resort to allow the plaintiff the opportunity to be heard in court. Therefore, this court should vacate dismissal and reinstate plaintiff's complaint. Failure of this court to grant this motion in favor of plaintiff would prejudice plaintiff from recovery and unjustly enrich defendants.

As repeatedly stated, lack of subject matter jurisdiction was the only reason for dismissal in this action. Plaintiff cured the lack of subject matter jurisdiction with this court on November 29, 2018, when plaintiff registered its business as a foreign business entity with the State of New Jersey.¹⁵ In this matter, the irregularity was cured - plaintiff registered its business as a foreign business entity with the State of New Jersey. The registration by plaintiff provided this court with subject matter jurisdiction over this action, which it currently maintains. The irregularity was cured immediately, without undue delay, upon notice by defendants that foreign business registration was required by statute.

Moreover, defendants suffered no irreparable harm from plaintiff's actions. Defendants owe a debt to plaintiff regardless of plaintiff's business registration. In fact, defendants were avoiding liability to plaintiff only because of plaintiff's failure to register its business with the State.

Furthermore, the merits of this action are not in dispute - defendants owe a debt to plaintiff which remains unpaid. Defendants are avoiding liability for the debt through a technicality, which has now been cured.

¹⁴ See Gnapinsky v. Goldyn, 23 N.J. 243, 248 (1957); Schlosser v. Kragen, 111 N.J. Super. 337, 346 (Law Div.1970)." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336 (1984).

¹⁵ In General Trading Co. v. Director, Division of Taxation, the Supreme Court held that, "It does not follow . . . that every procedural omission rises to the level of a fatal defect in subject matter jurisdiction regardless of the attendant circumstances ... Rather, a review of the cases demonstrates this Court's reluctance to raise the jurisdictional bar ... where the irregularity may be cured without undue delay or irreparable harm to the other party." General Trading Co. v. Director, Division of Taxation, 83 N.J. 122, 127-128 (1980).

Alternatively, in this action, substantial time and effort have been spent addressing the merits of this action. Moreover, as all parties are aware, plaintiff became a party to this litigation after the litigation was commenced. Plaintiff purchased the loan owed by defendants via Loan Sale Agreement with PNC Bank, NA, the original plaintiff in this action. Plaintiff became involved in this matter in place of former plaintiff, PNC Bank, NA, due to the purchase of the loan via Loan Sale Agreement. Plaintiff had no choice but to assume the litigation after it purchased the loan from PNC Bank, NA.

Furthermore, in Seven Caesars¹⁶, the case cited by the defendants in support of its motion to dismiss the complaint, the Seven Caesars court never had subject matter jurisdiction over the action. Contrarily, in this action, the court maintained subject matter jurisdiction over this action initially, upon filing of the complaint by PNC Bank, NA, which it maintained in this matter for more than one (1) year. Jurisdiction only became problematic upon filing of the substitution of plaintiff by SMS Financial P, LLC, which occurred in October 2018, naming SMS Financial P, LLC as the substituted plaintiff. Upon notice by the defendants that business registration was required to continue litigation, Plaintiff filed its foreign business entity registration with the State of New Jersey without undue delay or irreparable harm to defendants.

Defendants' state that "a determination on the merits is not a constitutional guaranty. The fundamental objective of the court is to provide each matter, issue and claim over which is has jurisdiction a resolution on its factual and legal merit." Plaintiff agrees with the defendants' assessment.

Upon the filing of the complaint in this action, the court maintained subject matter jurisdiction to rule on the merits of the case. Based upon the factual and legal merits of PNC Bank, NA's initial claims, the defendants owed a debt on a loan that it had received from PNC Bank, NA, but failed to pay such loan timely and satisfactorily pursuant to the terms of the loan documents. As such, the defendants have become unjustly enriched due to their failure to pay their debt.

The court lacked subject matter jurisdiction at the time that plaintiff was substituted for PNC Bank, NA in this action. The only reason for the court's lack of jurisdiction rested on plaintiff's failure to register as a foreign business entity with the State of New Jersey upon substitution. In essence, a technicality prevented plaintiff from pursuing a debt from defendants that defendants justifiably owe.

While there is no constitutional right to an adjudication on the merits of any action, the merits should control as defendants owe a debt and their failure to pay their debt unjustly enriches them to an unfair and inequitable position. It is in the interests of justice and fairness that the court should exercise its equitable powers and reinstate this complaint to allow the parties to settle their issues on the merits of the action.

¹⁶ In Seven Caesars, Inc. v. Dooley House, regarding lack of subject matter jurisdiction, the Court noted, "There may be cases, however, where dismissal would not be appropriate. That may be the case if the defendant fails to raise the issue promptly, or when substantial time and effort may have been devoted to addressing other matters that would then have to be revisited in any new litigation. Those circumstances were not presented here. Defendant did raise the standing issue promptly. The parties were not required to litigate other issues. Plaintiffs right to proceed turned on plaintiffs ability to establish that it did have possession of the note at the time the original complaint was filed. That issue was ultimately addressed at trial. Seven Caesars, Inc. v. Dooley House, 2014 N.J. Super. Unpub. LEXIS 2222, *23.

Defendants also claim that plaintiff's conduct during this action was contumacious.¹⁷ Plaintiff made an error regarding the representation of cases that include SMS Financial P, LLC as a party to lawsuits within the State of New Jersey. When making its statement to the court, plaintiff's counsel relied upon the representation made by the asset manager, an employee of the plaintiff, who stated in uncertain terms that he was only aware of this matter being litigated by plaintiff in the state. Although, there were numerous cases involving SMS Financial P, LLC, including cases represented by plaintiff's law firm, plaintiff was unaware of their existence when he made the representation to the court. Plaintiff apologized to this court for making the erroneous representation. The error made by plaintiff's counsel was not contumacious, but an error.

Therefore, adjudication on the merits of this action, while not constitutionally guaranteed, should be the preferred method of determination by this court to prevent the defendants from becoming unjustly enriched due to their failure to adhere to the terms of their contractual obligations. Furthermore, plaintiff's counsel's misrepresentation to the court was not contumacious in nature. Rather, plaintiff's counsel made an honest mistake for which he delivered an apology.

Motion to Counsel Fees

During the period of his representation of these defendants, counsel's present billing rate is \$395 per hour. He believes that this rate in this county for a person of his experience is customary and usual. He has billed his fees in this matter at the aforementioned rate of \$395 per hour.¹⁸ These statements are taken from the actual time records maintained in the normal course of business by counsel's law firm.

Until the entry of the Order of Dismissal, counsel spent a total of sixty-two (62) hours working on this matter which, at \$395 per hour, is equal to the amount of \$24,490. Counsel has incurred costs of \$275.00. After the order dismissing the complaint was entered on January 25, 2019, on March 4, 2019, plaintiff directed correspondence to counsel in an effort to extract a payment from defendants, despite the fact that the statute of limitation on plaintiff's claim has expired.

Plaintiff in the certification in support of the companion motion to vacate the order of dismissal acknowledges at Paragraph 17 and again at Paragraph 19 that the statute of limitations on its claim has expired.

On April 4, 2019, counsel for defendants directed correspondence to plaintiff whereby plaintiff was put on notice that the claim was frivolous and that defendants would seek redress. Despite this admonition, plaintiffs persisted in filing an untimely motion to vacate the order of dismissal

¹⁷ The definition of contumacious is "the refusal or intentionally omission of a person who has been duly cited before a court to appear and defend the charge laid against him, or, if he is duly before the court, to obey some lawful order or direction made in the cause." The Law Dictionary, <https://www.thelawdictionary.org>.

¹⁸ Annexed hereto as Schedule A is a detailed statement of services for work performed and disbursements made by this office with respect to this matter

In preparing the opposition to the motion to vacate the order of dismissal, counsel spent a total of twenty-three hours working on this matter which, at \$395 per hour, is equal to the amount of \$9,085. A total of fees and costs and disbursements in the amount \$33,850 has been incurred by defendants in defending this frivolous action commenced in connection with plaintiff's attempt to collect on its uncollectable junk note purchases.

Reply

Plaintiff's reply to defendant's motion for counsel fees states defendants filed their motion to pay counsel fees against plaintiff on the basis that plaintiff's complaint is frivolous due to this court's lack of subject matter jurisdiction. While it is true that this court previously concluded that it lacked subject matter jurisdiction, it did not initially upon the filing of the complaint. This defect was immediately cured by plaintiff upon notice from defendants. This court upon reinstatement of the complaint can maintain subject matter jurisdiction over this action, should it choose to do so.

As defendants are aware, they owe a debt to plaintiff, which was previously owed to the former plaintiff, PNC Bank, NA. Plaintiff purchased the debt from PNC Bank, NA via Loan Sale Agreement, dated April 12, 2018. As a result of the agreement, defendants now owe the debt to plaintiff.

Defendants cite N.J.S.A. 2A:15-59.1 in support of their motion to pay counsel fees.¹⁹ First, the complaint is not frivolous. The allegations stated are factual. Defendants owe a debt to plaintiff as a result of the agreement between plaintiff and PNC Bank, NA. Moreover, defendants have knowledge of the agreement and the debt owed to plaintiff.

Upon dismissal of the present action by court order, dated January 25, 2019, plaintiff's counsel sent emails to and called defendants' counsel in efforts to negotiate a settlement of this matter prior to filing a motion or, alternatively, filing a new complaint. Defendants' counsel verbally requested plaintiff's counsel to send an offer via letter.

On March 4, 2019, Plaintiff sent a demand letter to Defendants and requested payment in the amount of \$74,000, which is significantly less than the full amount owed under the loan. The Demand Letter was sent in good faith in an attempt to avoid additional court proceedings and future motion practice. The demand was rejected by defendants.

In Ferolito v. Park Hill Association, the Court stated that "Awarding fees pursuant to the Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1(b)(2), is erroneous without considering whether

¹⁹ Pursuant to N.J.S.A. 2A:15-59.1, "A party who prevails in a civil action, either as plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous." N.J.S.A. 2A: 15-59.1 (a).

Furthermore, "In order to find that a complaint, counterclaim, cross-claim or defense of the non-prevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either: (a) the complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or (b) the non-prevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b).

the defendants established that the plaintiff commenced or continued the action in bad faith."²⁰ Comparatively, in this action, defendants cannot establish that plaintiff commenced or continued the action in bad faith because the purpose of plaintiff's complaint and subsequent Demand Letter were to collect a debt owed to plaintiff by defendants and to reach a settlement amount that was fair and reasonable to all parties. Defendants cannot show that plaintiff acted in bad faith, was hostile, or showed any ill-will with regard to bringing its claim because plaintiff is owed a debt for which defendants are liable, if this case is reinstated pursuant to the motion to vacate dismissal, reinstate and amend the complaint.

In the event that this court grants the defendants' motion to pay counsel fees, plaintiff requests this court to examine the records, calculation methods, and reasonableness of defendants' time spent and amount of fees attributed to defending this action.

While plaintiff agrees that the hourly rate of defendants' counsel is fair and reasonable, the time spent on this matter and amount billed to defendants is excessive. Comparatively, plaintiff's counsel charges an hourly rate of \$275.00 per hour and spent a total of forty-two hours on this matter, pre-dismissal and post-dismissal, equivalent to the sum of \$11,491.50.

It should be noted that this court maintained subject matter over this action until November 9, 2018, the date of the order substituting SMS Financial P, LLC as plaintiff in this action. Thus, any time and efforts expended by defendants' counsel prior to November 9, 2018, and the fees and costs commensurate therewith, should not be considered for an award of counsel fees to be paid by plaintiff. All such fees should be attributed to defendants because this court maintained subject matter jurisdiction over this matter until such date, and the complaint and all other relevant documents associated therewith were pursued in good faith by PNC Bank, NA and SMS Financial, LLC.

DECISION

Plaintiff seeks to reinstate this matter utilizing R. 1:13-7, and to amend its complaint pursuant to R. 4:9-1 instead of refile the complaint now that plaintiff's corporate status has been properly filed with the State of New Jersey. Plaintiff asserts this approach is due to the fact that the statute of limitations has run.

Plaintiff has cited to an incorrect standard and rule. Rule 1:13-7 governs vacating lack of prosecution dismissals. Rule 1:13-7(a) provides, in pertinent part:

After dismissal [for lack of prosecution], reinstatement of an action against a single defendant may be permitted on submission of a consent order vacating the dismissal and allowing the dismissed defendant to file an answer, provided the proposed consent order is accompanied by the answer for filing, a case information statement, and the requisite fee. If a defendant has been properly served but declines to execute a consent order, plaintiff shall move

²⁰ Ferolito v. Park Hill Association, 408 N.J. Super. 401 (App. Div.), certif. denied, 200 N.J. 502 (2009). The Appellate Court noted, " the trial court erred by awarding the company \$26,988.62 in fees and costs under the Frivolous Litigation Statute N.J. Stat. Ann. § 2A:15-59.1, because there was no showing that the owner acted in bad faith, was hostile, or showed any ill will with regard to bringing his claim ... " Id.

on good cause shown for vacation of the dismissal. In multi-defendant actions in which at least one defendant has been properly served, the consent order shall be submitted within 60 days of the order of dismissal, and if not so submitted, a motion for reinstatement shall be required. The motion shall be granted on good cause shown if filed within 90 days of the order of dismissal, and thereafter shall be granted only on a showing of exceptional circumstances. . . . Nothing in this rule precludes the court with respect to a particular defendant from imposing reasonable additional or different procedures to facilitate the timely occurrence of the next required proceeding to be taken in the case with respect to that defendant.

As the purpose of this administrative rule is to clear the docket of cases where a plaintiff has failed to take certain actions, the good cause standard is a liberal one; however, courts consistently require a showing of an absence of prejudice as part of the good cause standard for reinstatement. See Ghandi v. Cespedes, 390 N.J. Super. 193, 197-98 (App. Div. 2007).

This matter was not dismissed pursuant to R. 1:13-7. Therefore, reinstatement under this rule is inappropriate, and plaintiff's argument, citing the rule, is frivolous. In reply, plaintiff acknowledges filing the motion under R. 4:49-2 would be ineffective because plaintiff cannot meet the standards required. The obvious alternative, is to appeal this court's decision, not to argue an inapplicable rule. Attempting to fit a square peg into round hole is an inappropriate waste of this court's time and that of the defendant.

Plaintiff, citing Mason v. Nabisco Brands, Inc., 233 N.J. Super. 263 (App. Div. 1989), argues that the instant complaint was dismissed for lack of subject matter jurisdiction and because there was no adjudication on the merits, the dismissal, pursuant to the rule, is without prejudice. A subsequent complaint alleging the same cause of action will not be barred simply by reason of its prior dismissal. Id. However, defendant in the second suit may assert, and a plaintiff may be subject to, the defense of the statute of limitations based upon the filing date of the second complaint." Id. "It is in recognition of the principle that the filing of a new complaint may implicate the statute of limitations that courts have been loathe' to deny a motion to reinstate a complaint previously dismissed without prejudice where there is good cause to do so." Ibid.

Plaintiff's reliance on Mason is misplaced. In Mason, unlike the present case, the complaint was dismissed by the court pursuant to R. 1:13-7(a). Thus, plaintiff's argument that the court should permit reinstatement pursuant to a rule that was not used in this court's dismissal and to allow the case to proceed on the merits fails. The holding of Mason cannot be used to reinstate this matter and avoid the consequences of the statute of limitations. More significantly, the dismissal was based on plaintiff's own failure to comply with New Jersey law. Consequences of a dismissal are to be borne by the plaintiff.

By way of brief background, this court notes the instant complaint was filed by plaintiff PNC Bank, N.A. on August 28, 2017. On April, 2018, a loan sale agreement, which included

defendant’s loan, was executed between PNC Bank, N.A. and SMS Financial.²¹ On June 26, 2018, Christopher Macchi of Eisenberg Gold & Agrawal, P.C. filed a substitution of attorney for plaintiff SMS Financial, LLC, Assignee of PNC Bank, N.A. Also on June 26, 2018, Macchi filed a motion to substitute²² PNC Bank, N.A. for SMS Financial, LLC as plaintiff. That motion was granted by this court on July 20, 2018. On October 19, 2018, Macchi filed a motion to substitute²³ SMS Financial, LLC for SMS Financial P, LLC as plaintiff. That motion alleged a typographical error occurred which resulted in the improper plaintiff name. That motion was opposed by defendant. The motion was ultimately granted by this court on November 9, 2018 citing R. 4:9-1 and R. 4:9-2. Subsequent motion practice ensued which brought to light the significance of the substitution and legal standing of plaintiff assignee.

As discussed on the Procedural Background above and this court’s January 25, 2019 order and opinion, plaintiff previously articulated the argument stated above that the November 29, 2018 corporate filing rectified the issues relating to this court’s subject matter jurisdiction. This court entertained a second oral argument on this issue in particular on January 18, 2019. After consideration of all of counsels’ briefings, including supplemental submissions, as well as oral arguments, this court issued its January 25, 2019 opinion which dismissed plaintiff’s complaint. Plaintiff’s complaint was not dismissed as a result of a lack of prosecution, it was dismissed after thorough briefings and oral arguments. The dismissal was **not** pursuant to an administrative rule designed to clear the docket of cases where a plaintiff has failed to take certain **litigation** actions. Here, the dismissal was due to plaintiff’s failure to properly register to do business in this state. Therefore, the relief that plaintiff is seeking is reconsideration of this court’s January 25, 2019.

Accordingly, the court begins its analysis with R. 4:49-2, which provides:

Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on

²¹ SMS Financial P, LLC is listed as the purchasing company. However, under the signature line, it was executed by Daniel Shorr under the heading “SMS Financial, LLC, its manager.” See below



²² Filed as a motion to substitute service rather than amend the complaint.

²³ Filed as a motion to substitute service rather than amend the complaint or correct data.

which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

Such motions are “within the sound discretion of the Court, to be exercised in the interest of justice.” Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). Reconsideration should be narrowly utilized in those cases in which either: “(1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence.” Cummings, 295 N.J. Super. at 384 (quoting D’Atria, 242 N.J. Super. at 401).

Cummings further explained a circumstance which may warrant reconsideration which plaintiff contends is particularly relevant in the instant action. This is where a litigant wishes to bring new or additional information to the Court’s attention which it could not have provided on the first application. Id. The Cummings Court, relying on D’Atria further held that when such evidence is presented it should be considered in the interest of justice. Id. The court is mindful of the warning in D’Atria which cautioned “motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the Court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.” D’Atria 242 N.J. Super. at 402.

Procedurally, plaintiff’s motion is deficient. As discussed in the comments to R. 4:49-2, the time period runs from the date of service of the order or judgment rather than from the date of its entry. The time prescription of this rule applies only to final judgments and orders. Rusak v. Ryan Automotive, L.L.C., 418 N.J. Super. 107, 117 n. 5 (App. Div. 2011).

As stated above, a motion for reconsideration shall be served not later than twenty days after service of the judgment or order. The time for filing has long expired as the order was electronically filed on e-courts on January 25, 2019, and the instant motion was filed on April 26, 2019. More than ninety days have elapsed before plaintiff filed the instant motion to reinstate his complaint.

Notwithstanding the procedural deficiency, if plaintiff had timely filed the appropriate motion for reconsideration, it would have been denied on the merits.

A motion for reconsideration must contain a statement of controlling decisions which counsel believes the court has overlooked. See Lahue v. Pio Costa, 263 N.J. Super. 575, 598 (App. Div. 1993). However, “a litigant should not seek reconsideration merely because of dissatisfaction with a decision of the court.” D’Atria, *supra*, 242 N.J. Super. at 401.

Examining the certification in support and reply brief filed by plaintiff, it is evident that there is a lack of any new case law or any controlling decisions counsel believes the court overlooked, but rather the briefs are merely an analysis of the issues plaintiff provided in their initial moving papers and at oral argument. This application brings no new information to light and does not claim the court’s decision is based upon a palpably incorrect or irrational basis.

The court engaged in a legal analysis at the time of the original motion to dismiss for lack of subject matter jurisdiction and found that, despite plaintiff's opposition, defendant's motion should be granted. Further, the court reviewed all the evidence before it, considered all parties' arguments, and reviewed all appropriate materials before granting defendant's motion to dismiss. Furthermore, plaintiff here fails to meet the standard for reconsideration as set forth in Lahue as the plaintiff does not cite any controlling decisions overlooked by the court. Therefore, the motion for reconsideration must be denied.

Similarly, R. 4:50-1 would be inappropriate to reinstate this matter as plaintiff has failed to demonstrate that the order herein is the result of R 4:50-1(b),(c),(d),(e), or (f); therefore, this court would have to evaluate plaintiff's motion using the R. 4:50-1(a) standard. A motion to vacate a judgment under Rule 4:50-1(a) "should be granted sparingly and is addressed to the sound discretion of the trial court, whose determination will be left undisturbed unless it results from a clear abuse of discretion." Fineberg v. Fineberg, 309 N.J. Super. 205, 215 (App. Div. 1998). An abuse of discretion occurs "when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007). Here, plaintiff has failed to establish that it is entitled to relief pursuant to R. 4:50-1(a), and indeed, plaintiff agrees that it is not seeking relief pursuant to this rule. Thus, there is no abuse of discretion in this court denying to vacate its order pursuant to R. 4:50-1(a).

This court excused plaintiff's counsel's prior apparent lack of candor by accepting his representation that his comment was an oversight. It took efforts by defense counsel – and this court – to discover plaintiff's counsel's firm represented plaintiff – in its prior and current corporate form – in various cases in this state, wherein plaintiff filed multiple actions for damages without having registered to do business in this state.

Here, plaintiff's counsel, effectively conceding his motion would be untimely and without basis under R. 4:49-2, seeks relief under R. 1:13-7(a).

Movant's argument focus on defendant's failure to pay on a loan agreement, and plaintiff bemoans the "technicalities" which led to the dismissal of the complaint. Plaintiff argues "procedural deficiencies" ought not operate to prejudice plaintiff in its collection of a debt it purchased from a financial institution. Movant seeks "equity" in this regard. But it is well-established in the law that one seeking equity must do so with clean hands. Here, plaintiff did not have standing to do business in New Jersey, and in its initial presentation argued this litigation was the "only one" proceeding under these circumstances. That argument was proven inaccurate by defense counsel, and this court. Indeed, plaintiff's counsel had litigated various matters without plaintiff's authority to do business in this state. Plaintiff's subsequent argument it corrected the deficit by securing the business certificate – only after the deficiency was exposed by defense counsel – is much too little, and much too late.

This defendant did not borrow money from the plaintiff. Defendant secured a loan from PNC Bank, N.A. The loan agreement in question listed both SMS Financial LLC and SMS Financial P LLC. SMS Financial LLC, the parent of SMS Financial P LLC, was formed on August 26, 2003, and its charter was revoked on March 16, 2009. SMS Financial P LLC was incorporated in Arizona on April 10, 2018, just two (2) days prior to the loan purchase agreement applicable here.

It appears plaintiff is quite comfortable utilizing “legal technicalities” when same serves its purposes. This Arizona entity did business in New Jersey, utilizing the resources of the judiciary, funded by the taxpayers, while ignoring state law. Plaintiff’s casual disregard of this state’s laws will not be tolerated, nor will movant’s misapplication of the Court Rules.

For the reasons stated above, plaintiff’s motion is **DENIED**, and defendant’s motion is **GRANTED**, in part. Defendant is entitled to attorney fees generated in connection with this motion. The arguments and legal authority cited were inapplicable and frivolous. See R. 1:4-8(a) and N.J.S.A. 2A:15-59.1. Defendant’s legal rate of \$395 is fair and reasonable in light of the hourly rate customarily charged in Bergen County for litigation services by counsel. Counsel for defendant shall submit a revised certification for services rendered, and a proposed order, consistent with this ruling.