SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2961-21

NED BEVELHEIMER and
SPORTSLAND, LTD,

Plaintiffs-Appellants,

v.

WILLIAM MUIRHEAD and
STARPARKS NORTH, LLC,

Defendants-Respondents.

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Submitted December 6, 2022 – Decided December 13, 2022

Before Judges Berdote Byrne and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3132-19.

Constants Law Offices, LLC, attorneys for appellants (Alfred C. Constants, III, on the brief).

Giordano, Halleran & Ciesla, attorneys for respondents (Matthew N. Fiorovanti, of counsel and on the brief).

PER CURIAM

In April 2013, plaintiff Sportsland, Ltd. conveyed its amusement rides and other tangible assets located in Pine Beach and known as "Blackbeard's Cave" to defendant Starparks North, LLC. In consideration, Starparks (the buyer) gave Sportsland (the seller) a $600,000 promissory note, which required the buyer to make ten annual $64,649.88 payments. Defendant William Muirhead signed the asset purchase agreement, the promissory note, and other related documents, only as a representative of the buyer; he did not personally guarantee the buyer's performance in any respect.

After making the first two annual payments, the buyer defaulted, prompting the seller[1] to commence this action for damages – based on ten legal theories[2] – against both the buyer and Muirhead. Because he was not personally a party to the note or any of the contract documents, Muirhead moved for

[1] We recognize that the seller's president – Ned Bevelheimer – was also named as a plaintiff even though the causes of action alleged in the complaint would appear to belong solely to Sportsland, the owner of the assets sold and the only party that contracted with the buyer. For convenience, we will refer to both plaintiffs as "the seller" throughout the rest of this opinion.

[2] The complaint consisted of ten counts, which set forth claims based on breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, unjust enrichment, fraud, alter ego, promissory estoppel, fraudulent misrepresentation, fraudulent concealment, and fraudulent conveyance.

summary judgment, which was granted in his favor by order entered on August 10, 2021.

In November 2021, the seller moved to amend the complaint to add a claim against Muirhead. The proposed amendment alleged that, in or about May 2020, Muirhead sold the amusement rides and equipment, all of which had been pledged as collateral to ensure the buyer's annual payments under the promissory note, and that he personally retained the proceeds of those transactions. The amendment asserted that, by failing to remit the sale proceeds of the collateral to the seller, Muirhead engaged in "theft and conversion." In his oral opinion, the motion judge concluded that the earlier summary judgment "had preclusive effect" and that he would not "allow the reintroduction of the same claims by way of an amended complaint." A memorializing order was entered on January 11, 2022.

The following month the remaining parties arbitrated their disputes; as a result, judgment was entered in the seller's favor against the buyer for $517,199.04. The seller appeals the order denying the motion to amend the complaint, arguing:

> I. THE TRIAL COURT ERRED IN DENYING [THE SELLER'S] MOTION TO AMEND THE COMPLAINT BASED UPON THE [AUGUST 10, 2021] SUMMARY JUDGMENT ORDER.

II. THIS COURT SHOULD AGREE THAT THE COMPLAINT SHOULD BE AMENDED BECAUSE THE AMENDED COMPLAINT SUPPLEMENTS [THE SELLER'S] PRIOR PLEADING.

We agree the judge erred in denying the motion to amend and, therefore, reverse the January 11, 2022 order and remand for further proceedings.

Rule 4:9-1 provides trial judges with discretion when ruling on motions for leave to file amended pleadings, Kernan v. One Washington Park, 154 N.J. 437, 457 (1998), specifically declaring that leave to file an amended pleading "shall be freely given in the interest of justice." Despite the liberality of this standard, courts have recognized that judges may deny leave when the granting of relief would be "futile" – as when the new claim lacks merit and would ultimately be dismissed for failure to state a claim upon which relief may be granted, Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006) – or if the new claim, even possessing marginal merit, would unduly protract the litigation or cause undue prejudice, Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 484 (App. Div. 2012); Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994).

None of these grounds for denying leave to amend has been shown to be present here. The amended count alleges Muirhead converted funds derived

from the sale of the collateral in which the seller had a security interest. That states a cause of action, so, without expressing any view about whether the seller can prove this claim, permitting the seller to pursue this claim would not constitute a futile act. And it has not been shown that the claim was asserted at an unreasonably late date or that its assertion would otherwise delay the proceedings or cause undue prejudice. The seller's claim against the buyer was still pending and was not finally adjudicated until months after the motion to amend was denied. The seller did not allege that the new claim would warrant additional discovery or that it would unduly delay the disposition of the remainder of the case.

Instead, the judge denied the motion because he believed the conversion claim was subsumed by the counts against Muirhead that had been dismissed. That, however, is simply not so because not one of the original ten counts included a claim or assertion that Muirhead converted the collateral for his own benefit. The judge's conclusion that the conversion claim should have been asserted earlier, even if true – although the record suggests that the events giving rise to the claim either occurred after suit was filed or were not known until discovery in this action – was unaccompanied by a meritorious assertion that the late assertion would cause prejudice to the buyer, Muirhead or the efficient

administration of justice. And, to the extent the judge's decision denying the motion to amend seems based on the seller's attempt to "end around" the August 10, 2021 ruling in Muirhead's favor, we cannot lose sight of the fact that the earlier grant of summary judgment in Muirhead's favor remained interlocutory – and subject to reconsideration and revision – when the motion to amend was filed. See Lawson v. Dewar, 468 N.J. Super. 128 (App. Div. 2021).

In short, there was nothing about the circumstances or posture of the litigation to preclude the seller's assertion of the amended complaint against Muirhead. The seller was entitled to the liberality underlying Rule 4:9-1 and, therefore, the motion judge abused his discretion in denying the seller's motion to amend.

The order of January 11, 2022 is reversed and the matter remanded for further proceedings. We do not retain jurisdiction.