

**NOT FOR PUBLICATION WITHOUT THE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-3673-20**

**SAADIA SQUARE LLC,
individually and in its capacity
as member of SM LOGISTICS
HOLDCO, LLC,**

Plaintiff-Appellant,

v.

**SM LOGISTICS MEMBER LLC,
SM LOGISTICS MOUNT OLIVE
LLC, and US ELOGISTICS
SERVICE CORP.,**

Defendants-Respondents.

Argued November 28, 2022 – Decided December 22, 2022

Before Judges Messano, Gilson, and Rose.

On appeal from the Superior Court of New Jersey,
Chancery Division, Morris County, Docket No. C-
000044-21.

Jonathan A. Ozarow argued the cause for appellant
(Clark Guldin, attorneys; Jonathan T. Guldin and
Jonathan A. Ozarow, of counsel and on the briefs).

Jason H. Kislin argued the cause for respondents SM Logistics Member LLC and SM Logistics Mount Olive LLC (Greenberg Traurig, LLP, attorneys; Cory Mitchell Gray and Jason H. Kislin, of counsel and on the brief).

PER CURIAM

This appeal arises out of disputes concerning a right of first offer related to real property owned by SM Logistics Holdco, LLC (the Company). The Company is a Delaware limited liability company that has two members: plaintiff Saadia Square LLC (Saadia) and defendant SM Logistics Member LLC (SM). The operating agreement for the Company allows SM to sell real estate owned by the Company, provided it gives Saadia the right to first purchase the property for the price SM would sell the property to the third-party.

SM notified Saadia that it intended to sell real property located in New Jersey. Disputes arose concerning the notice, due diligence, and the time when Saadia had to elect to purchase the property. SM sent notice to Saadia that its conduct amounted to a rejection of SM's offer to sell. Saadia then sued SM seeking, among other things, a declaration that its time to elect to purchase the property was still open. SM thereafter revoked its offer to sell the property, stating that the property would not be sold to a third party or Saadia.

Saadia appeals from an order dismissing its complaint and denying its motion to amend its complaint. We are constrained to reverse because the order was entered prematurely on a motion to dismiss before discovery. Accordingly, we remand with the direction that Saadia be allowed to file a motion to amend its complaint and the parties be allowed to conduct discovery.

I.

We discern the relevant facts from the motion record, assume that the allegations in Saadia's pleadings are true, and afford those pleadings all reasonable inferences. See Sparroween, LLC v. Township of West Caldwell, 452 N.J. Super. 329, 339 (App. Div. 2017).

In 2018, SM and Saadia formed the Company as a joint venture to own and operate real property. When established, the Company indirectly owned two commercial real estate properties: property located in Mount Olive, New Jersey (the NJ Property) and property located in Rialto, California (the CA Property) (collectively, the Properties). The Company is the sole member of SM Logistics Owner LLC, which in turn holds all the membership interests in two single-purpose Delaware limited liability companies that own the NJ Property and the CA Property.

To govern the Company, Saadia and SM signed an operating agreement (the Operating Agreement). Section 13.5 of the Operating Agreement states that it is to be "governed by and construed and enforced in accordance with the laws of the State of Delaware."

Under the Operating Agreement, SM is the Company's managing member with the rights to manage the Company's operations, including the right to sell the Properties. Under Section 10 of the Operating Agreement, SM cannot sell either property to a third party without first offering Saadia the right to purchase the property for the price and on the terms and conditions that the Company would be willing to sell the property to the third party (the right of first offer). In that regard, the Operating Agreement states that SM must send Saadia a written "Sale Proposal," which "shall constitute an offer by SM to sell the Offered Property" for the offered sale price. The "Offered Sale Price" is defined in the Operating Agreement as the cash price the Company would receive from the third party less certain specified deductions.

Saadia has thirty days to accept the offer by giving SM an "irrevocable" "notice of election" and depositing seven-and-one-half percent of the sale price into escrow. Saadia also has the right to extend its time for accepting the offer by an additional thirty days, provided it notifies SM of its intention to extend

the time "not fewer than five (5) days" before the notice of election is due and deposits a non-refundable \$1 million into escrow with a designated agent.

In considering the Sale Proposal, Saadia has the right to request and receive "reasonable and customary due diligence materials with respect to the Offered Property consistent with materials that would be provided to a prospective third-party purchaser." Saadia must request the due diligence materials within five days of receiving the Sale Proposal and SM must provide the materials within five business days of receiving Saadia's request. If SM does not provide the due diligence materials within the five days, the time for Saadia to accept the offer is extended "day-for-day" until the materials are provided.

On January 23, 2021, SM sent Saadia a Sale Proposal offering to sell the NJ Property for \$157 million. Because January 23, 2021, was a Saturday, under Section 13.1 of the Operating Agreement, which states that notices sent on non-business days are deemed received on the following business day, the Sale Proposal was deemed to be received on Monday, January 25, 2021.

On January 28, 2021, Saadia sent SM a list of requested due diligence materials. The next day, SM provided Saadia with electronic access to certain

materials, but contended that other requested items were outside what would be customarily provided to a third-party purchaser.

On February 19, 2021, the twenty-fifth day after January 25, 2021, Saadia sent SM a letter stating that it considered the Sale Proposal deficient because it failed to include the terms and conditions for the offered sale. Saadia also asserted that SM's response to its due diligence material requests was deficient. Nevertheless, Saadia stated that it was electing to extend its time to consider the offer by thirty days and it asked SM to provide instructions for the deposit of the \$1 million extension payment.

On February 24, 2021, Saadia placed the \$1 million extension payment in escrow with Signature Title Agency and Land Service, an escrow agent, albeit not the escrow agent identified in the Operating Agreement. That same day, SM sent Saadia a letter and took the positions that the Sale Proposal was proper; the due diligence materials had been timely provided; Saadia had not timely extended its election date; and, therefore, Saadia had rejected the Sale Proposal. The letter, however, invited Saadia to continue to negotiate with SM if still interested in purchasing the NJ Property.

On April 22, 2021, Saadia commenced this action by filing a complaint seeking declarations that the Sale Proposal was defective, SM had failed to

provide all due diligence materials, and Saadia's time to accept the offer to purchase the NJ Property had been tolled. The complaint asserted causes of action for a declaratory judgment; breaches of fiduciary duty; breaches of the Operating Agreement; and unjust enrichment.¹ Saadia also filed a lis pendens on the NJ Property.

On May 28, 2021, before answering the complaint, SM sent Saadia a letter stating that it was revoking the January 23, 2021 Sale Proposal. The letter also stated: "SM is not currently offering or marketing the [NJ] Property for sale and has no current intention to do so. SM recognizes that any future sale of the [NJ] Property remains subject to the requirements of Section 10 of the [Operating] Agreement."

Several days later, on June 2, 2021, SM moved to dismiss the complaint and discharge the lis pendens. In short, SM contended that it had withdrawn the Sale Proposal for the NJ Property before Saadia accepted the offer. SM also explained that it had been approached by a prospective tenant that wanted

¹ The complaint named three defendants: SM, SM Logistics Mount Olive, LLC, the limited liability company that owns the NJ Property, and Elogistics Service Corp. (Elogistics). In May 2021, Saadia voluntarily dismissed without prejudice its claims against Elogistics.

to lease fifty-eight percent of the NJ Property and "SM elected to abandon efforts to sell the [NJ] Property[] and pursue a leasing strategy instead."

Saadia opposed the motion to dismiss and cross-moved seeking to amend its complaint and compel access to the Company's books and records. In its proposed amended complaint, Saadia sought (1) a declaration that SM "has no right to revoke the Sale Proposal;" (2) an injunction preventing the withdrawal of the Sale Proposal for the NJ Property; and (3) to withdraw its cause of action for unjust enrichment. The proposed amended complaint sought to direct SM "to specifically perform all of [its] obligations under the [Operating Agreement] so as to enable Saadia to purchase the [NJ] Property in accordance with the terms and conditions of the [Operating Agreement] and the Sale Proposal."

After hearing oral argument, on August 16, 2021, the Chancery court issued a written opinion and order granting SM's motion to dismiss, dismissing the complaint without prejudice, and denying Saadia's cross-motion. In its opinion, the court applied Delaware law and held that SM had lawfully revoked its offer to sell the NJ Property before Saadia accepted that offer. Accordingly, the Chancery court dismissed the declaratory judgment cause of action and the *lis pendens*.

The Chancery court also ruled that the breach of fiduciary duty claim was barred by the Operating Agreement, which expressly stated that Saadia had waived and could not bring a claim for breach of fiduciary duty against SM. Concerning the cause of action for breach of the Operating Agreement, the Chancery court held that neither the complaint nor the proposed amended complaint alleged facts supporting a breach given its ruling on the withdrawn Sale Proposal. Addressing the unjust enrichment claim, the court accepted Saadia's withdrawal of that cause of action.

Finally, the Chancery court reviewed the proposed amended complaint and held that the allegations in the proposed amended complaint also failed as a matter of law because the offer to sell the NJ Property had been lawfully revoked. In addition, the Chancery court rejected Saadia's proposed amendment concerning access to the Company's books and records. In that regard, the court noted that Saadia could properly make a demand for access to the books and records under Delaware law, but Saadia had failed to properly make that demand.

Saadia filed a notice of appeal from the August 16, 2021 order. SM moved before us to dismiss the appeal contending that the August 16, 2021 order was not final because it dismissed Saadia's complaint without prejudice.

We remanded the matter to the Chancery court to clarify whether the order was a final order. On October 15, 2021, the Chancery court issued a clarifying order stating that the August 16, 2021 order was a final order. SM again moved before us to dismiss the appeal contending that although the Chancery court had stated that its order was a final order, the order still dismissed the complaint without prejudice. We denied that motion deeming the August 16, 2021 order to be a final order and the dismissal with prejudice.

With its notice of appeal, Saadia also filed a second *lis pendens* on the NJ Property. Initially, the Chancery court ordered that *lis pendens* withdrawn, but later dissolved that order reasoning that the *lis pendens* fell within the jurisdiction of this court because it related to the appeal.

II.

On appeal, Saadia makes four arguments. First, it contends that the Chancery court erred in dismissing its complaint because the Sale Proposal was not rejected and was not revocable. Second, it argues that the Chancery court erred in dismissing its other causes of action and in particular its contention that SM had breached an implied covenant of good faith and fair dealing. Third, Saadia asserts that it should be given leave to amend its

complaint. Finally, Saadia argues that SM should be directed to produce the Company's books and records.

We use a de novo standard when reviewing an order dismissing a complaint for failure to state a claim. State ex rel. Campagna v. Post Integrations, Inc., 451 N.J. Super. 276, 279 (App. Div. 2017). "When reviewing a motion to dismiss under Rule 4:6-2(e), we assume that the allegations in the pleadings are true and afford the pleader all reasonable inferences." Sparroween, 452 N.J. Super. at 339. Our inquiry is focused on examining the legal sufficiency of the facts alleged on the face of the complaint. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Thus, we must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, [giving] opportunity . . . to amend if necessary." Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). "Where, however, it is clear that the complaint states no basis for relief and that discovery would not provide one, dismissal of the complaint is appropriate." Sparroween, 452 N.J. Super. at 339 (quoting J.D. ex rel. Seipio-Derrick v. Davy, 415 N.J. Super. 375, 397 (App. Div. 2010)).

Having reviewed Saadia's complaint and proposed amended complaint under the governing generous standard, we are constrained to reverse and remand for discovery. In remanding, however, we point out that the governing law of Delaware is clear that Saadia will have to establish that it had a legal right to hold the offer open for a period of time before SM could revoke the offer. In addition, Saadia will have to establish that it acted timely in preserving its right to accept the offer.

A. The Right of First Offer.

The Operating Agreement provides that it is governed by and enforceable in accordance with Delaware law. Delaware follows the long-established rule that an offer, absent some additional circumstances that would turn the offer into an option, is revocable prior to its acceptance. See Montray Realty Co. v. Arthurs, 105 A. 183, 186 (Del. 1918) ("an offer may be revoked at any time before acceptance" (citing Anson on Contracts (2d Am. Ed. of the 11th English Ed.) p. 40; 1 Elliot on Contracts, §§ 33, 45; James on Option Contracts, § 703)).

In that regard, Delaware law is consistent with the well-established principle that an offer can be revoked before it is accepted. See Restatement (Second) of Contracts § 36(1)(c) (Am. Law Inst. 1981) (explaining that an

offeree's power of acceptance may be terminated by "revocation by the offeror"); id. § 42 (explaining that "[a]n offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract"); 1 Williston on Contracts § 5:10 (4th ed.) (pointing out that "[a]s a result of the rule that unsealed promises without consideration are not binding, offers, unless under seal in a jurisdiction recognizing the seal or given for a consideration, may be revoked by the offeror at any time prior to the creation of a contract by acceptance"); Perillo on Contracts § 2.20 (6th ed.) (stating that "[a] revocable offer may be revoked at any time prior to acceptance"); id. § 2.25 (explaining that an offer can be made irrevocable by consideration, by statute, by virtue of a sealed instrument, performance in a unilateral contract, or by promissory estoppel); Friedman v. Tappan Dev. Corp., 22 N.J. 523, 534 (1956) (explaining that "where an offered promise receives no return promise . . . [that] leaves the offer revocable at the will of the offeror" (citing Corbin on Contracts § 152)).

Delaware law is also clear that the contractual rights of parties are determined by the plain language of the parties' agreement. See Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp., 206 A.3d 836, 846 (Del. 2019) (explaining that "Delaware adheres to the 'objective' theory of contracts, i.e., a

contract's construction should be that which would be understood by an objective, reasonable third party"). The Operating Agreement is clear and unambiguous concerning the right of first offer. Before selling the NJ Property to a third party, SM had to offer the property for sale to Saadia for the same price and on the same terms and conditions as the Company would have accepted from the third party. The Operating Agreement expressly states that the Sale Proposal was an "offer." In that regard, the Operating Agreement states: "The Sale Proposal shall constitute an offer by SM to sell the Offered Property . . . for the Offered Sale Price (as hereinafter defined)."

Saadia argues that the right of first offer operates as an option contract. An option contract has two elements: the underlying offer and the collateral promise to keep the offer open for a certain time. See 1 Williston on Contracts § 5:15 (4th ed.); Restatement (Second) of Contracts § 25 (Am. Law Inst. 1981). A right of first refusal or offer is generally not treated as an option. See 3 Corbin on Contracts § 11.3 (explaining that a "right of first refusal" does not create an option contract but instead creates "a contractual right to preempt another"); Bateman v. 317 Rehoboth Ave., LLC, 878 A.2d 1176, 1183–84 (Del. Ch.), aff'd, 889 A.2d 283 (Del. 2005) (explaining that "[u]nlike an option to purchase property, which an option holder can proactively

exercise, a right of first refusal can be exercised only when the holder of property entertains an offer from a third party to purchase the property"). For purposes of analyzing whether the Operating Agreement creates an option, there is no meaningful distinction between a right of first refusal and a right of first offer.

According to Saadia, once it received the Sale Proposal, SM could not revoke the offer until Saadia either accepted or rejected the Sale Proposal. Saadia also contends that it never rejected the offer and because not all due diligence materials were provided, its time for accepting the offer was still open.

The Operating Agreement is silent on whether a Sale Proposal will be held open for a certain time. Instead, the focus of the Operating Agreement is on the time within which Saadia must irrevocably accept the offer. In that regard, Saadia was not obligated to accept the Sale Proposal for the NJ Property. Nevertheless, before the Operating Agreement is construed on whether it gives Saadia an option, Saadia should be allowed to conduct discovery on the due diligence materials it claims it was entitled to receive. If Saadia can show it should have received additional due diligence materials, it

may be able to argue that it had a period of time within which it could consider the offer before SM could withdraw the offer.

Moreover, the parties should also be accorded discovery on whether Saadia exercised its right to extend its election period for an additional thirty days. On February 19, 2021, the twenty-fifth day after January 25, 2021, Saadia sent SM a letter stating that it was electing to extend its time to accept the offer by thirty days. The following business day, Saadia placed the \$1 million extension payment in escrow with Signature Title Agency and Land Service. The parties dispute whether that extension payment was timely and whether it complied with the Operating Agreement. Saadia also argues that the extension payment operates like an option. Before those issues are addressed, Saadia should be accorded discovery so the Chancery court has a complete record to decide those issues.

In making its option argument, Saadia cites to and relies on two unpublished cases by a Delaware Chancery court and a federal Bankruptcy court located in Delaware. See Walsh v. White House Post Prods., LLC, No. CV

2019-0419, 2020 WL 1492543 (Del. Ch. Mar. 25, 2020); In re Ryckman Creek Res., LLC, No. 16-10292, 2018 WL 4178692 (Bankr. D. Del. Aug. 29, 2018).²

The unpublished cases relied on by Saadia are distinguishable because in those cases the option-holders had exercised their option by accepting the underlying offer. Walsh involved a buyout provision that granted a limited liability company the right to purchase former employees' interests in the company at fair market value. 2020 WL 1492543 at *2. The governing agreement set out an appraisal process for determining the fair market value once the company invoked its buy-out right. The company invoked its buy-out right and then attempted to back out of the process before completing the appraisal process. The Delaware Chancery court held that the buy-out provision was like a "call option" because once the company exercised the buy-out provision, the former employees were obligated to sell their shares.

² Under Delaware law, litigants may cite unpublished opinions. New Castle County v. Goodman, 461 A.2d 1012, 1013 (Del. 1983); see also, 1984 cmt. on Del. Supr. Ct. R. 17 (explaining that "[t]he purpose of this rule change is to make clear that orders of this Court may be cited as precedent in unrelated cases in this Court and in any other Delaware Court, which was the intent of the amendment of Rule 17(a), effective April 15, 1983"). Nevertheless, although unpublished cases may be entitled to some deference in Delaware, those cases do not establish controlling precedent. See Aprahamian v. HBO & Co., 531 A.2d 1204, 1207 (Del. Ch. 1987) (pointing out that "an unreported decision, while entitled to great deference, is not necessarily stare decisis").

The court then held that the buy-out process created an option agreement, and the company could not revoke its buy-out offer until the appraisal process was completed. Id. at *6.

Ryckman was a bankruptcy court case involving a call option that gave the majority members of a limited liability company the right to purchase a minority member's interest. 2018 WL 4178692 at *2. The Bankruptcy court held that once the majority members issued their "call option notice," a binding contract was created. Id. at *9.

In summary, we hold that it was premature to decide the issues of whether the January 2021 Sale Proposal had to be held open for thirty or sixty days and whether SM could revoke the offer during that time. Instead, the parties should be allowed to conduct discovery and thereafter the legal issues can be addressed on a complete record.

B. The Right to File An Amended Complaint.

A trial court's decision to grant or deny a motion to amend the complaint is reviewed for abuse of discretion. Port Liberte II Condo. Ass'n, Inc. v. New Liberty Residential Urb. Renewal Co., 435 N.J. Super. 51, 62 (App. Div. 2014) (citing Kernan v. One Wash. Park Urb. Renewal Assocs., 154 N.J. 437, 457 (1998)). "Rule 4:9-1 requires that motions for leave to amend be granted

liberally." Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006) (quoting Kernan, 154 N.J. at 456–57). Leave to amend "'should generally be granted even if the ultimate merits of the amendment are uncertain.'" Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 77 (App. Div. 1997) (citation omitted); see also Prime Acct. Dep't v. Township of Carney's Point, 212 N.J. 493, 511 (2013). Nevertheless, a court can deny a motion to amend if the non-moving party would be prejudiced or the amendment would be futile. Notte, 185 N.J. at 501.

The Chancery court denied Saadia's motion to file an amended complaint, holding that the allegations in the amended complaint do not state viable claims. We also reverse the portion of the order that denied Saadia the right to file an amended complaint. In its appeal papers, Saadia has made clear that it is not seeking to file the proposed amended complaint it previously submitted to the Chancery court. Instead, it seeks the right to file a new amended complaint based on "additional information and limited documentation" it has obtained. We do not decide if Saadia has the right to file a new (and unseen) amended complaint. Instead, we hold that on remand Saadia has the right to file a motion seeking to amend its complaint and the parties can conduct discovery.

In so holding, we clarify the scope of that right. First, Saadia cannot assert claims clearly precluded by the Operating Agreement. In its original complaint, Saadia asserted a claim for breaches of fiduciary duty. The Operating Agreement is clear and unambiguous that Saadia waived any right to bring a claim against SM for breaches of fiduciary duty. Section 6.1(b) of the Operating Agreement states:

To the fullest extent allowable by applicable law, any fiduciary or other duties (including any duties of care, disclosure, or loyalty) that the Managing Member or any of its Affiliates might otherwise have to the Company, the Subsidiary Entities or other Members are hereby eliminated, provided that nothing in this subsection 6.1(d) will eliminate the implied contractual covenants of good faith and fair dealing as contemplated by Section 18-1101(c) of the Act.

Second, in its proposed amended complaint and in its briefs filed on this appeal, Saadia has made clear that it is not seeking to pursue a claim for unjust enrichment. Saadia is bound by that representation and any new complaint cannot reassert that claim.

Third, in its proposed amended complaint, and in its papers filed on appeal, Saadia has alleged that SM improperly sold the CA Property. At oral argument before us, however, its counsel clarified that it has filed an action in California concerning the CA Property and is not seeking to add claims about

the CA Property to this action. Principles of comity dictate that Saadia cannot pursue claims in two separate courts concerning the same issues. Accordingly, the amended complaint filed here cannot raise issues that have been asserted in the California action. See Sensient Colors, Inc. v. Allstate Ins. Co., 193 N.J. 373, 386 (2008) (explaining that "a New Jersey state court ordinarily will stay or dismiss a civil action in deference to an already pending, substantially similar lawsuit in another state, unless compelling reasons dictate that it retain jurisdiction").

Fourth, Saadia cannot reassert a claim for access to the Company's books and records. Saadia has acknowledged that it filed a complaint in a Delaware court seeking access to the Company's books and records. It has also represented that it received those records and is not seeking further records. Thus, Saadia cannot file the same claim in an amended complaint here in New Jersey.

Finally, at oral argument before us, Saadia informed us that the parties have made claims against each other in a new action filed in November 2021 in the Chancery court. See SM Logistics Holdco LLC v. Saadia Square LLC, Docket No. MRS-C-130-21. Any new proposed claims in this action cannot add claims already at issue in that new action and, at an appropriate time, the

parties or the Chancery court can decide if this action and the new action should be consolidated.

C. Summary.

We reverse the order dismissing Saadia's complaint and denying its motion to amend its complaint. On remand, the parties will be allowed to conduct discovery as supervised by the Chancery court. Thereafter, either party can decide if there is a basis to move for summary judgment. We express no opinion on the viability of a future motion for summary judgment, but we have identified the governing law that generally an offer can be revoked unless the offeree can show that the offer had to be held open for some period.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION