

PREPARED BY THE COURT

WISER INSURANCE AGENCY, LLC,	:	SUPERIOR COURT OF NEW JERSEY
	:	ATLANTIC COUNTY – LAW DIVISION
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	
	:	DOCKET NO: ATL-L-1584-22 (CBLP)
MY1AGENT INC., ET AL.,	:	
	:	
Defendants.	:	ORDER
	:	
	:	
	:	

THIS MATTER, having been opened to the court on motion by David J. Bloch, Esq. on behalf of Defendant Swyfft, LLC, i/p/a “Swyfft Insurance Company” (“Swyfft”), and the court having considered the motion papers, the opposition papers, the supplemental submissions, and the arguments of counsel set forth on the record on October 16, 2024, and for the reasons set forth in the accompanying Memorandum of Decision;

IT IS on this 8th Day of January, 2025 **ORDERED AND ADJUDGED** that the motion is **GRANTED in part**, and the Plaintiff’s claims against Swyfft are **DISMISSED without prejudice** under R. 4:37-1(b).

IT IS FURTHER ORDERED that, pursuant to R. 4:47-1, Swyfft shall deposit all retained commissions with the Court within 30 days of the date of this order, and Swyfft shall continue to deposit any future commissions owed to Plaintiff and Defendant My1Agent, Inc. into the Court every 60 days thereafter.

IT IS FURTHER ORDERED that, within 30 days of the date of this order, Swyfft shall provide Plaintiff and Defendant My1Agent, Inc. an accounting of commissions accrued and earned by either, and Swyfft shall continue to provide accountings of any retained commissions every 60 days thereafter.

IT IS FURTHER ORDERED that Swyfft shall provide responses to any written discovery requests propounded prior to the entry of this order.

IT IS FURTHER ORDERED that Plaintiff shall not seek to reinstate any prior claim, nor institute any new claim, against Swyfft without a formal application on notice to Swyfft that cites in detail the record evidence supporting the claims sought to be prosecuted.

IT IS FURTHER ORDERED that this order shall be deemed served on all counsel of record via filing in e-courts. Counsel for Swyfft shall serve any unrepresented parties within 7 days.

Sarah Beth Johnson
SARAH BETH JOHNSON, J.S.C.



SUPERIOR COURT OF NEW JERSEY

SARAH BETH JOHNSON, J.S.C.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

TO: Justin D. Santagata, Esq.
Cooper Levenson PC
Attorney for Plaintiff

David J. Bloch, Esq.
Farber Brocks & Zane LLP
Attorney for Defendant Swyfft

RE: Wisser v. My1Agent, et al.

DOCKET NO. ATL-L-1584-22

This is a complex commercial litigation matter arising from a failed business venture between two consumer insurance producers, Plaintiff Wisser Insurance Agency, LLC (“Wisser”) and Defendant My1Agent, Inc. (“My1Agent”). The movant, Defendant Swyfft Insurance Company (“Swyfft”), was joined on March 22, 2024 when Wisser filed its second amended complaint. Wisser alleges Swyfft improperly withheld certain commission payments to Wisser after the conflict arose between it and My1Agent.

Moving under Rule 4:46-2, Swyfft seeks an order granting summary judgment in its favor and dismissing with prejudice any and all claims against it. Swyfft also moves for permission to deposit retained commissions into the Court under Rule 4:47-1.

Wisser filed an opposition to this application on September 3, 2024. Swyfft filed a reply on October 2, 2024. Wisser filed a supplemental opposition and proposed order on October 11, 2024. Swyfft filed a surreply on October 14, 2024. I heard oral argument on this application on October 16, 2024.

I find the following facts to be material and undisputed:

- In January 2021, Wiser’s and My1Agent’s principals, Keith Haring and Richard Ferro, respectively, contemplated a business arrangement wherein Haring would act as a “producer” for Ferro’s insurance business, meaning Haring would provide a book of business of individual insureds, and Ferro’s company would act as their “servicing agency.” Haring and Ferro anticipated splitting commissions and other incentives 50/50.
- At some point thereafter, Ferro proposed rolling Haring’s book of business into new platform called My1Agent. Although Haring refused to enter a broader agreement, Haring and Ferro began merging and sharing information into My1Agent, and some insurance carriers were advised that Wiser and My1Agent had merged into one business entity.
- Swyfft was one of the carriers to whom the merger representation was made. Once Swyfft became aware of the dispute between Wiser and My1Agent, it retained all commission payments that could be paid to either Wiser or My1Agent.
- Swyfft now seeks to account for those commissions and create a fund in court that can be dispersed after the dispute between Wiser and My1Agent is resolved. Swyfft also seeks to be dismissed from the ongoing litigation.

THE MOTION STANDARD

Rule 4:46-2 provides that summary judgment is appropriate where the record establishes that the moving party is entitled to a judgment or order as a matter of law. All inferences of doubt are drawn against the movant in favor of the opponent of the motion. See Brill vs. Guardian Life Ins. Co., 142 N.J. 520 (1985).

In deciding a summary judgment motion, the court must consider “whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill, 142 N.J. at 540. The thrust of Brill is that “when the evidence ‘is so one-sided that one party must prevail as a matter of law,’ ... the trial court should not hesitate to grant summary judgment.” Ibid.

THE PARTIES' CONTENTIONS

Swyfft contends that the extent of its liability to Wiser cannot exceed the amount of the commissions it has retained from Wiser and My1Agent's transactions. Swyfft asserts that, if it deposits all existing and future retained commissions into the court, all claims, crossclaims, and counterclaims should be dismissed with prejudice because it cannot be liable for any additional damages to any party.

In its opposition, Wiser generally agrees with Swyfft's position regarding damages vis a vis retained commissions for certain claims. However, it notes there are additional claims against Swyfft that, if proven, could result in the imposition of damages beyond the amount of retained commissions. Nonetheless, Wiser is willing to voluntarily dismiss those claims without prejudice to protect Wiser and My1Agent "if there are future issues arising from the facts in this litigation."

Wiser's opposition does not contain a response to Swyfft's statement of facts as required by Rule 4:46-2(b). However, the various prior applications and proceedings over which I have presided have given me sufficient familiarity with the events that led to this litigation. As such, I do not find a meaningful dispute arising from the underlying facts.

Rather, it appears the questions posed by this application are (1) whether there is a basis to dismiss with prejudice all claims against Swyfft and (2) how to handle the commissions retained by Swyfft.

ANALYSIS

Swyfft joined the litigation with the March 2024 seconded amended complaint, but the operative pleading is the June 2024 third amended complaint. Wiser's current claims against Swyfft and the other insurance carriers are negligence (Count 2), conversion (Count 3), and tortious interference with contractual relations and prospective business advantage (Count 9).

Based on the undisputed facts of record and the applicable law, I find that, upon payment of all current and future retained commissions into court (as well as other conditions), it is appropriate for me to dismiss without prejudice all claims asserted by Wiser against Swyfft.

In reaching this determination, I am considering Swyfft's application, and Wiser's response thereto, under Rule 4:37-1, which addresses voluntary dismissals. Subsection (b) provides that an action may be dismissed at the plaintiff's instance with leave of court and upon such terms and conditions as the court deems

appropriate. Dismissals under Rule 4:37-1(b) are without prejudice unless otherwise specified by the court.

The purpose of a voluntarily dismissal – with conditions – is “to protect a litigant where a termination of the proceedings without prejudice will place him in the probable position of having to defend, at additional expense, another action based upon similar charges at another time.” Union Carbide Corp. v. Litton Prec. Prods., Inc., 94 N.J. Super. 315, 317 (Ch. Div. 1967). And although Swyfft has moved for summary judgment under Rule 4:46-1, the record is insufficient for me to enter judgment in Swyfft’s favor under the standards set forth in the Rule and Brill.

Specifically as to Wiser’s negligence and conversion claims, the record is insufficient for me to make any findings regarding the validity of those claims. However, I agree with Swyfft’s assessment that, if Wiser’s allegations are proven true, its damages would be limited to the total amount of the commissions retained by Swyfft. Thus, once Swyfft deposits those commissions with the court and provides an accounting for same, Wiser cannot obtain additional damages unless it shows that Swyfft’s accounting is flawed.

Though Wiser appears to be unconcerned with the amount of Swyfft’s retained commissions at this time, additional discovery could reveal inaccuracies in Swyfft’s records. Thus, there is an unresolved issue not with liability, but with damages, and I cannot enter a final judgment as to the amount of damages due from Swyfft to any party until discovery is complete and a verdict is entered.

As to Wiser’s claims for tortious interference, the instant application does not address any facts in the record material to such a claim against Swyfft. Therefore, I cannot make any findings regarding the futility of that charge that would support dismissal with prejudice.

Moreover, if such allegations are proven true, Wiser’s damages would be separate from, and unrelated to, the commissions retained by Swyfft in connection with the dispute between Wiser and My1Agent. Thus, the tortious interference claim presents unresolved issues of both liability and damages, and I cannot enter a final judgment in either respect.

However, because Wiser has indicated a willingness to voluntarily dismiss all claims against Swyfft, I will convert this summary judgment motion by Swyfft to a cross-motion for voluntary dismissal by Wiser, and I will dismiss all claims against Swyfft without prejudice but with conditions similar to those set forth in the proposed order submitted with Wiser’s October 11, 2024 letter. Consistent with

the purpose of Rule 4:37-1(b), I find the conditions contained in the accompanying order sufficient to protect Swyfft from unnecessary participation in this litigation and to ensure the other parties are not later foreclosed from pursuing viable claims if established through discovery, which is ongoing.

Thus, the parties' respective applications are **GRANTED in part**. An appropriate order has been entered. Conformed copies accompany this Memorandum of Decision. The filing of the Order and the Memorandum on e-courts shall serve as service of same on all counsel of record.

Sarah Beth Johnson

SARAH BETH JOHNSON, J.S.C.