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LAWRENCE M. MARON, J.S.C.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

DOCKET NO. HUD-L-6191-11

GONZALO CHIRINO, FELIX D. JAY, ANDREW ANKLE, GARY JOSEPHS, RENE CAMPBELL, ASTON HEMLEY and MARYAN VASYUTA on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

PROUD 2 HAUL, INC., IVANA KOPROWSKI, and "Anonymous Managers 1-5" (names being fictitious),

Defendants, and

TRUCKING SUPPORT SERVICES, LLC, d/b/a CONTRACTOR RESOURCE SOLUTIONS, LLC,

Interested Party.

Civil Action

ORDER GRANTING INTERLOCUTORY INJUNCTIVE RELIEF

This matter, having been opened to the Court by motion of David Tykulsker & Associates, attorneys for plaintiffs and Class for the entry of an Order granting certain interlocutory injunctive relief as an alternative to certifying as final, per R.4:42-2, this Court's Order of August 30, 2013, as subsequently modified on October 25, 2013, granting the Class $382,753.68 in damages, and $18,663.12 in prejudgment interest (the "Fuel Tax Partial Summary Judgment") and this Court's Order of October 11, 2013, for attorney's fees and costs in the amount of $275,462.30 and $8,896.62 respectively (the "Fuel Tax Fees and Costs Order") , and the Court having considered the moving

papers, any opposition and reply papers submitted, the arguments of counsel, and good cause appearing,

IT IS this 22 day of November, 2013, **ORDERED and ADJUDGED** that

1. Plaintiffs' Motion be and hereby is granted.

2. Plaintiffs are deemed to have made out the requirements for interlocutory injunctive relief, it appearing that:

   a. Without the relief herein provided, there is a real and immediate danger of irreparable injury to plaintiffs if defendant Proud 2 Haul, Inc. ("PH") is allowed to sell its business, as the proceeds of any such sale may be readily dissipated; and

   b. By means of the Fuel Tax Partial Summary Judgment and the Fuel Tax Fees and Costs Order, plaintiffs have more than established a reasonable likelihood of success on the merits; and

   c. The balance of harms favors plaintiffs, as PH may continue to use its assets in general without encumbrance, and the sale is not barred, whereas without this relief, plaintiffs may be left effectively remedyless; and

   d. The public interest favors plaintiffs as this relief will vindicate the public interest in effective enforcement of the Truth-in-Leasing Regulations issued pursuant to the Motor Carrier Act and the common law.

3. Defendant PH is hereby enjoined that it must require, as a condition of the sale of the business or the assets of PH, that any purchaser shall be responsible for ~~all of PH's debts that arise out of this lawsuit.~~ the current judgment against Proud 2 Haul, limited to the fair market value of any Proud 2 Haul Assets purchased.

4. ~~Plaintiffs are deemed entitled to their reasonable attorney's fees and costs for the relief obtained herein. Plaintiffs shall withhold filing any motion for attorney's fees and costs until such time as the Court shall determine plaintiffs' anticipated summary judgment motion.~~

UNOPPOSED
NEITHER PARTY REQUESTED
ORAL ARGUMENT

L. Maron
LAWRENCE M. MARON, J.S.C.

For the Reasons set Forth in
The Attached Findings of Fact and
Conclusions of Law.

UNOPPOSED

Plaintiffs do not demonstrate an entitlement to fees and costs in their moving papers. Therefore fees and costs are denied. See New Jerseyans for a death Penalty Moratorium v. NJ Dep't of Corr, 185 NJ 137 (2005); McGuire v. City of Jersey City, 125 NJ 310, 326 (1991).

Oral Argument was Waived.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Chirino v. Proud 2 Haul Inc.

Docket: L-6191-11

Motion Returnable: 11/22/13

Relief Requested: Motion for Certification per R. 4:42-2

FACTS

- This is a class action suit brought by drivers against a motor vehicle carrier, Proud 2 Haul Inc..
- This Court entered an Order granting partial summary judgment on August 30, 2013.
    - The relief granted pertained to the issue of whether Proud 2 Haul was responsible for paying fuel taxes.
    - The Court found that Proud 2 Haul owed the class $382,753.68 in damages for the fuel taxes and awarded $18,663.12 in prejudgment interest.
    - The Court awarded attorney's fees based on a violation of the Truth in Leasing Regulations.
- This Court entered an Order on October 11, 2013 quantifying the amount of attorney's fees owed by Proud 2 Haul.
    - The Court awarded $275,462.30 in attorney's fees and $8,896.62 in costs.
- The Court's Orders of August 30 and October 11 have since been amended several times to correct errors in the forms of Order submitted by counsel and to permit the class to record its judgment.
- Class counsel indicates that co-Defendant, Ivana Kropowski, is seeking to sell Proud 2 Haul as part of an asset sale.
    - The class is, therefore, seeking to execute its judgment before the sale of Proud 2 Haul to avoid having a judgment against a judgment proof entity after the asset sale.
    - The class, accordingly, requests that this Court either certify the prior orders, which are currently viewed as interlocutory, as final. In the alternative, the class requests injunctive relief preventing the sale unless the successor corporation agrees to assume the judgment debts.

MOVANT'S ARGUMENT

- Certification is appropriate at this time because the grant of summary judgment on the issue below is separable from the other claims for relief and can be executed upon immediately.

- The Class, as the prevailing party on these issues, has no interest in appealing the decisions of this Court.
- The sale of Proud 2 Haul would render the judgment uncollectible because the successor corporation would not, normally, become liable for judgments entered against the selling entity.
- There is no just reason for delay in allowing the Class to enforce its judgment.
- Alternatively, an injunction requiring successors to Proud 2 Haul's assets to expressly assume Proud 2 Haul's potential judgment liability is appropriate.

OPPOSITION ARGUMENT

- No opposition was received to this motion.

REPLY

- No reply papers were received.

ANALYSIS

Movant requests that the Court certify its prior Orders as final, pursuant to R. 4:42-2 to permit the prompt enforcement of its judgment and to prevent Proud 2 Haul from rendering itself judgment proof by selling its assets.

R. 4:42-2 provides:

> If an order would be subject to process to enforce a judgment pursuant to R. 4:59 if it were final and if the trial court certifies that there is no just reason for delay of such enforcement, the trial court may direct the entry of final judgment upon fewer than all the claims as to all parties, but only in the following circumstances: (1) upon a complete adjudication of a separate claim; or (2) upon complete adjudication of all the rights and liabilities asserted in the litigation as to any party; or (3) where a partial summary judgment or other order for payment of part of a claim is awarded. In the absence of such direction, any order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice. To the extent possible, application for reconsideration shall be made to the trial judge who entered the order.

In the instant matter, the Class seeks to certify this Court's grant of partial summary judgment, and the resulting award of attorney's fees, as final. Therefore, the Class seeks relief

under subsection 3 of the Rule, which permits the Court to certify an Order that would be subject to enforcement under R. 4:59-1 as final "where a partial summary judgment or other order for payment of part of a claim is awarded."

The Court's analysis of the issue of whether certification is appropriate because there is no just reason for delay must begin with a discussion of the Appellate Division's admonitions to trial courts regarding the practice of certification.

Normally, an appeal may be taken to the Appellate Division as of right only upon the entry of a final judgment. R. 2:2-3(a)(1). A final judgment, "generally must 'dispose of all claims against all parties.'" Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 549-50 (App. Div. 2007) (quoting S.N. Golden Estates, Inc. v. Cont'l Cas. Co., 317 N.J. Super. 82, 87 (App. Div. 1998)). In the absence of this "final judgment rule", piecemeal appeals would be rampant. Id. at 550. Accordingly, where a judgment is not final, appeals are only permitted by leave of the Appellate Division, which is granted "sparingly". Ibid.; R. 2:2-4.

R. 4:42-2 provides a mechanism for trial courts to certify Orders that would be interlocutory as final. The Appellate Division has repeatedly expressed concerns over the use of R. 4:42-2 to expedite piecemeal appeals of interlocutory orders. Janicky, supra, 396 N.J. Super. at 551-52 (citing cases). The Court is mindful of the Appellate Division's admonition to trial courts not to use R. 4:42-2 to control the calendar of the Appellate Division by improperly certifying interlocutory Orders as final in an attempt to or provide an avenue for early appeal. The Court must, accordingly, be sure that relief is appropriate under R. 4:42-2 and that certification is not a party's attempt to secure an early appeal of this Court's Order.

As a preliminary matter, the Court finds that the Orders granting partial summary judgment and attorney's fees fall under the purview of R. 4:42-2(3). The Orders are subject to enforcement under R. 4:59-1, as the judgment is not void and there is no pending motion for reconsideration of these Orders. Additionally, the judgment is for a sum certain. Pressler & Verniero, Current N.J. Court Rules, comment 1.1 to R. 4:59-1 (citing Newstead Bldrs., Inc v. First Merch. Nat'l Bank, 146 N.J. Super. 295 (App. Div. 1977)). Accordingly, the Court must move to the second point of the R. 4:42-2 analysis, whether there is no just reason for delay.

The Appellate Division has stated that the "only intention of [R. 4:42-2] is to permit execution on a partial summary judgment fully adjudicating a separable claim for affirmative relief of all claims by or against a single party; its intention is not to provide a mechanism for interlocutory appellate review." Jacob v. Norris, Mclaughlin & Marcus, 247 N.J. Super. 266, 269 (App. Div. 1991) (internal quotations omitted). Here, that is precisely what the Class seeks. The Class seeks to execute a partial summary judgment that fully adjudicated the fuel tax issue and awarded attorney's fees. These Orders will not be affected or modified by any future relief granted in this matter. They are final adjudications on the merits of a discrete issue on which the Class prevailed. This request complies with the language of R. 4:42-2(3).

The reason the Class requests certification is not to appeal. Indeed, they are not an aggrieved party as they were successful on their claim before this Court. The Class seeks certification because Co-Defendant, Ivana Koprowski, who holds an ownership interest in Proud 2 Haul, is intending to sell Proud 2 Haul at an asset sale. The Class is fearful that a successor corporation would not be liable for the eventual judgment against Proud 2 Haul and the entity against which the Class secured a judgment would be a judgment proof shell. See Kefever v. K.P. Hovnanian Enterprises Inc., 160 N.J. 307 (1999) (stating the general rule that successor corporations are not liable for the selling entity's prior debts absent one of four specific circumstances).

Based on these circumstances, the Court finds that it would not be just to delay enforcement of a judgment on a discrete issue, for which the Class secured a large monetary award and for which there is no potential offsetting counterclaim pled. See Eli B. Halpern M.D. P.A. Pension Trust v. Tannenbaum, 207 N.J. Super. 314 (Law. Div. 1985). To delay enforcement would possibly permit the Defendant to sell its assets before ancillary claims are adjudicated and thereby prevent the Class from collecting a judgment that it is certain.

Accordingly, the Court finds that it is permissible to certify its Orders as final pursuant to R. 4:42-2 because the orders: 1) are subject to R. 4:59 enforcement 2) are grants of partial summary judgment and 3) deal with a discrete issue on which the Class prevailed. The only question remaining before the Court is, therefore, whether to certify the Orders or issue injunctive relief.

The concern weighing against granting certification is, of course, that while the Class has no interest in appealing, Defendants may well have that interest. While that issue is, of course, a concern both to this Court and the Appellate Division, it is the natural byproduct of the certification of any Order as final. The Court, by granting certification, would not, directly, be running afoul of the Appellate Division's admonitions that indicate trial courts should not grant certification in an attempt to control the appellate calendar or solely to permit the parties to raise premature appeals.

A similar issue to the one being considered by this Court was addressed by Judge Martin Haines in Eli B. Halpern, supra, 207 N.J. Super. 314. Judge Haines was faced with a situation where Plaintiff was entitled to a judgment of approximately $75,000. However, a pending counterclaim could not be dismissed on a motion for summary judgment and was, accordingly, still viable to offset the award. Accordingly, Judge Haines found that certification was potentially inappropriate and considered a "middle ground" not before explored in New Jersey. Judge Haines addressed whether the federal analogue to R. 4:42-2, FED. R. CIV. P. 62(h), which provides the option for the trial judge to "prescribe such conditions as are necessary to secure the benefit [of the interlocutory judgment]" so as to ensure the prevailing party could collect the judgment already awarded at the termination of the entire litigation. Halpern, supra, 207 N.J. Super. at 318. R. 4:42-2, did not provide for relief at the time of Halpern, and has not since been amended to explicitly provide trial courts with that discretion.

Judge Haines, similarly concerned with the Appellate Division's admonitions, determined that certification was inappropriate in light of the potential counterclaim that could extinguish or severely limit the amount of Plaintiff's judgment. However, the Judge indicated that "if plaintiffs prove a need to secure their judgment, this court may issue a restraining order preventing defendants' alienation of assets." Id. at 321. Judge Haines stated that this result would abate concerns about improvident certification "while providing plaintiffs with deserved security." Ibid.

In this case, the Class is situated differently from the plaintiff in Halpern because it has demonstrated a need to secure the judgment due to the potential sale of Proud 2 Haul's assets. Judge Haines' reasoning regarding the ability to ease the Appellate Division's concerns, while

providing security in judgments, is persuasive. Accordingly, this Court will consider whether injunctive relief is more appropriate than certification.

Injunctive relief is appropriate where the party seeking the injunction has demonstrated: "1) a reasonable probability of success on the merits, 2) that a balancing of the equities and hardships favors injunctive relief, 3) that the movant has no adequate remedy at law and that the irreparable injury to be suffered in the absence of injunctive relief is substantial and imminent and 4) that the public interest will not be harmed." See Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012) (numerals added); See also Crowe v. De Goia, 90 N.J. 126 (1982).

At the outset of these inquiries, the Court notes the differences between this case and Delaware River and Bay Authority v. York Hunter Construction, Inc., 344 N.J. Super. 361 (Ch. Div. 2001). In Delaware River, Judge Seltzer opined, when considering whether pre-judgment restraints on the alienation of assets was warranted, that "[l]ife is structured so that a litigant can't always get what is wanted. Equity should and does intervene when it can prevent the injury which would otherwise give rise to an action for money; it can not and should not intervene to insure that the money will be available." Id. at 368. Judge Seltzer further reasoned "pre-judgment restraint against the dissipation of assets is functionally equivalent to a pre-judgment attachment of those assets. The Legislature has already provided for that remedy in certain very limited circumstances delineated in the statutes providing for pre-judgment statutes. N.J.S.A. 2A:26-1 et. seq. No reason for expanding the reach of those statutes is readily apparent especially since the Legislature might have done so but did not." Ibid.

Here, the Court is not faced with the same factual circumstance. In Delaware Bay, the court was presented with a request for injunctive relief where no monetary judgment had been entered. In this case, summary judgment has already been granted in favor of the Class, creating an enforceable judgment for several hundred thousand dollars, similar to the facts in Halpern, supra. Accordingly, this Court is not wading into the "quagmire" feared by Judge Seltzer by considering injunctive relief. See ibid. The right to monetary relief is, in this matter, certain. Therefore, the Court in this case is faced with a situation akin to Halpern, not Delaware Bay, and may issue an injunction if one is appropriate.

The Court will next examine the four factors that must be demonstrated under Brown, supra.

Factor 1, the success on the merits, is easily resolved in favor of granting injunctive relief. Plaintiffs secured summary judgment on a claim and were awarded attorney's fees. No motion for reconsideration is pending or contemplated by the Court. Accordingly, the Class was successful on the merits and injunctive relief is not inappropriate for that reason.

Factor 2, the balance of the equities, is also resolved in favor of granting injunctive relief. Plaintiffs will be severely and irreparably harmed if Proud 2 Haul's assets are dissipated. The entity against which it has secured a judgment of several hundred thousand dollars will be reduced to a shell and the Class will find itself attempting to collect from an entity rendered judgment-proof. There is no indication that Plaintiffs would be able to circumvent the general rule, noted supra, that successor corporations are not liable to satisfy the debts of the entity from which they purchase assets. Accordingly, injunctive relief is not inappropriate for this reason.

Factor 3, whether the Class has an adequate remedy at law, is also resolved in favor of granting injunctive relief. Plaintiffs are put in an unenviable and untenable position with no adequate remedy at law. The Court finds that five potential courses of action arise if injunctive relief is not awarded; the Class may: 1) sacrifice their remaining claims, which have substantial potential value, and secure the Orders already entered as final 2) give Defendant substantial leverage in the course of negotiations to settle this matter, thus exposing the Class to a reduced award due to concerns that Proud 2 Haul is contemplating a sale of its assets 3) request that this Court certify the Orders as final pursuant to R. 4:42-2, thus opening the door to a piecemeal appeal process despite the admonitions of the Appellate Division in Janicky, supra (the course taken in this motion), 4) wait for this matter to culminate and hope that Proud 2 Haul's assets are not sold, or 5) proceed with this matter, permit Proud 2 Haul to sell its assets, and then attempt to set aside the conveyance or otherwise circumvent the rule that Proud 2 Haul's successor would not, generally, be liable for Proud 2 Haul's judgment debts. None of these courses of action is an adequate remedy or functions to advance the interest of justice. "[A] money judgment which is uncollectible is not an adequate remedy at law." Marsellis-Warner Corp. v. Rabens, 51 F. Supp. 2d 508, 531 (D.NJ 1999) (citing Third Circuit precedent). Accordingly, injunctive relief is not inappropriate for this reason.

Factor 4, potential harm to the public interest, is also resolved in favor of injunctive relief. The public has an interest in enforcing the Motor Carrier Act and the Truth in Leasing Regulations. While there is certainly an argument to be made that the public has an interest in promoting the free sale of assets, that interest does not override the substantial public interest in permitting aggrieved parties to secure judgments secured by prevailing plaintiffs on the merits of a cause of action. The Court does not find that the public interest is harmed by enforcing judgments that were lawfully obtained by preventing judgment debtors from dissipating their assets.

Based on the foregoing analysis, the Court finds that injunctive relief in this case is appropriate and, as in Halpern, supra, will mollify the concerns of the Appellate Division about the potential for abuse inherent in R. 4:42-2.

The Class requests injunctive relief stating that, as a condition of any sale of Proud 2 Haul's assets, the successor company shall be responsible for all of Proud 2 Haul's judgment debts arising out of this lawsuit. Specifically, the Class argues the injunction should "require, as a condition of the sale of the business, that any purchaser be responsible for all of [Proud 2 Haul's] debts that arise out of this lawsuit." Pla's Br. at 9.

The injunction requested affords more relief than is appropriate. The potential purchasers of Proud 2 Haul's assets should not be responsible for all of Proud 2 Haul's potential judgment debts arising out of this lawsuit. They should only be liable to the extent Proud 2 Haul would have been liable for the judgment already secured by this Court's grant of partial summary judgment. See Groupo Mexicano de Desarollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332 (1999) (declining to create prejudgment injunctions in light of the fact that that the Judiciary act of 1789 did not empower federal courts to create equitable remedies formerly unknown at common law). That is, the successors should only be required to assume the liability for Orders already entered against Proud 2 Haul, up to the fair market value of those assets they purchase. This is, essentially, the equivalent of certifying the current Orders as final pursuant to R. 4:42-2. By proceeding thusly, Plaintiff will have a remedy for recovering a judgment to which it is currently entitled, whether from Proud 2 Haul or its purchasers, without restricting Proud 2 Haul's sale in any other regard or requiring this Court to enter the "quagmire" noted by Judge

Seltzer in Delaware Bay by attempting to issue an injunction to secure payment of a claim that has, thusfar, not been adjudged successful by the Court.

Therefore, the Court will order that any sale of Proud 2 Haul's assets must be subject to an express contract requiring the purchasing entity or entities to assume liability for the current judgments against Proud 2 Haul, limited to the fair market value of any Proud 2 Haul assets they purchase.

CONCLUSION

In conclusion, the Court finds that injunctive relief is warranted and is a more appropriate course of action than certification. The injunctive relief granted will prevent any sale of Proud 2 Haul assets without an express contract requiring the purchasing entity or entities to assume liability for the current judgments against Proud 2 Haul arising from this litigation, limited to the fair market value of any Proud 2 Haul assets they purchase. This puts the Class in the same position as if the Court certified its prior Orders pursuant to R. 4:42-2. This motion was unopposed.