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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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.	DOCKET NO. A-000703-15T2 Civil Action

PLAINTIFFS' BRIEF AND APPENDIX IN SUPPORT OF MOTION TO DISMISS POINT I OF DEFENDANTS' BRIEF

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Plaintiffs filed their Complaint in this matter on December 5, 2011 (Da 1-40), which Defendants duly Answered (Da41-54). Plaintiffs subsequently amended their Complaint on June 26, 2012 (Da 55-100), which Defendants duly Answered (Da 101-116). Plaintiffs consisted of seven truckers who had provided services and equipment to Defendant Proud 2 Haul, Inc. ("PH") whose principal is Defendant Ivana Koprowski. Among Plaintiffs' allegations were that Defendants had violated the Truth-in-Leasing ("TIL") Regulations, 49 C.F.R. Part 376, as enforced by the Motor Carrier Act ("MCA"), 49 U.S.C. §§ 13901-2, 14102, 14704, and the common law of contracts by failing to pay fuel tax from on or about November 19, 2010 to on or about June 4, 2012, as required by the lease in effect during that period. A Class consisting of the past and present drivers and owner-operators who had leased their trucks to Defendants was certified on December 7, 2012 (Da 117-119).

Defendant Proud 2 Haul, Inc. ("PH") is a trucking company engaged in the interstate transportation of freight who has registered as an authorized carrier with the Federal Motor Carrier Safety Administration ("FMCSA"). Defendant Ivana Koprowski is the Chief Executive Officer, sole shareholder and sole director of Defendant PH. Defendant PH is in the business of making deliveries of sealed containers to and from the Port of New Jersey and the railroad yards to customers in the Northeast. Defendants specialize in same-day deliveries; in other words, all deliveries

are considered to be on an urgent basis. Defendant PH conducts its business through the leasing of the trucks and driving services of owner-operators, which has fluctuated between approximately 45 and 70.

As required by the TIL regulations, Defendant PH entered into a form written lease with every owner-operator member of the Class through May 27, 2012. Defendant PH had an initial version of the lease into which it entered with all the owner-operators (the "Initial Lease")(Pa1-Pa2), and a subsequent version of such a lease ("the Second Lease")(Pa3-Pa5), the latter of which was in effect from November 18, 2010, through at least May 26, 2012.

Under the Second Lease, Defendant PH "will provide all permitting necessary and will pay all fuel taxes." Fuel taxes are paid by the purchaser as part of the cost of the diesel fuel paid at the pump. Defendants had allowed the Class to use a credit card provided by Wright Express ("WEX") to purchase fuel for their trucks used in Defendants' interstate trucking operations. Beginning in approximately 2009 and continuing through approximately May 27, 2012, the majority of Class members used the WEX credit card to pay for fuel used in Defendants' freight operations. Each week, Defendants deducted the precise amount of the WEX fuel purchases from each Class member's pay; that deduction necessarily included the fuel tax. At no time did Defendants remit

back the fuel tax or any part of the fuel purchase to the Class who had used the WEX credit card.

After obtaining appropriate discovery from WEX, Plaintiffs moved for partial summary judgment against Defendants with regard to Defendants' failure to pay the fuel tax for those drivers who used the WEX diesel credit card during the period of the Second Lease (Pa6-Pa41). Defendants opposed this motion, filing both a lengthy response (Pa42-Pa72) and then without permission of the Court sur-response (Pa73-Pa74) but at no time raised any issue with regard to the propriety of Plaintiffs' calculations of the WEX fuel tax damages. Plaintiffs' motion was granted on August 30, 2013, in the amount of $382,753.17, $18,663.17 in prejudgment interest (Da 120-135) ("the WEX Fuel Tax Judgment"). On October 11, 2013, the Court granted Plaintiffs' motion for attorney's fees and costs on that motion in the amount of $275,462.30 in fees and $8,896.62 in costs, which was eventually embodied in a unified order (see Da 136-137).

However, Defendants did not require drivers to use the WEX credit card system, and some Class members did not; those Class members who did use the WEX card did not utilize for all their purchases. Under such circumstances, Class members must pay for their fuel purchases, including the fuel tax, out of their own pocket. Defendants had not reimbursed Class members for fuel taxes who purchased fuel on their own account during the period of

the Second Lease, and these purchases were not included in the WEX Fuel Tax Judgment.

However, Defendants did not require Class members to use the WEX credit card system, and some Class members did not. Additionally, at least some Class members who did use the WEX card did not utilize it for all their purchases of diesel fuel necessarily utilized in Defendants' operations. In those circumstances, the Class members must pay for their fuel purchases, including the fuel tax, out of their own pocket. Defendants had not reimbursed Class members for fuel taxes who purchased fuel on their own account during the period of the Second Lease, and these purchases were not included in the August 30, 2013, Order.

Following additional discovery, Plaintiffs moved for summary judgment on both liability and damages, including with regard to the non WEX fuel tax damages (Pa75-Pa76; Pa77-Pa79. Defendants duly opposed that motion, but did not claim that any portion of the claimed fuel tax was due to personal use. In its July 11, 2014 Order, the Court granted Plaintiffs summary judgment *inter alia* on the issue of liability under the MCA for the fuel tax for direct purchases. (Da 177 ¶6). On September 2, 2014, Defendants moved for reconsideration of the quantification Order (Da 164-175) of February 28, 2014 (Pa80-Pa82); that motion did not raise any issue as to the quantification of the fuel tax damages (Pa83-Pa104). That motion was denied on October 24, 2014 (Pa105-Pa116).

Thus, when the matter was called for trial in March, 2015, among the claims remaining to be tried was quantification of the amount of fuel tax during the period of the Second Lease paid by Class members on their own account. In this regard, Plaintiffs' submitted an expert report from Mark Gottlieb, CPA, quantifying these damages (Pa117-Pa131). With the assistance of the Court, the parties reached a settlement that provided for the entry of a judgment in favor of the Class on the WCL and WPA claims, and quantifying the damages, including the fuel tax damages paid by Class members on their own account, at 69.40% of the amounts calculated by Plaintiffs' expert. (Da 208-220).

ARGUMENT

DEFENDANTS POINT I ARGUMENT THAT A PORTION OF THE COURT'S AWARD TO THE CLASS ON FUEL TAXES WAS OVERSTATED IS BARRED BECAUSE IT WAS NEVER RAISED IN THE COURT BELOW

Raising the issue for the first time in this Court, Defendants claim as the first Point in their appeal (Db 20-30) that the WEX Fuel Tax Judgment improperly includes $20,602.95. This amount, they claim, is the portion of fuel taxes attributable to the Class's personal rather than business use of fuel purchases on the WEX credit card. Despite numerous opportunities to do so, Defendants never raised any such argument in the trial court, and hence Point I of their appeal should be dismissed, as "(i)t is a

well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." *Zaman v. Felton*, 219 N.J. 199, 226-27 (2014), citing Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 2:6-2 (2014), and *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973) (internal quotations and one citation omitted); see also *Saul v. Midlantic Nat. Bank/South*, 240 N.J.Super. 62, 82 (App.Div.), certif. denied, 122 N.J. 319 (1990) ("Normally, defenses not raised below cannot be considered on appeal. '[General] public importance alone will warrant a departure from that rule.'")

Defendants concede they did not raise any argument concerning the purported non-business use of the WEX card at any time in the trial court. Rather, their "argument in opposition to that motion [i.e. Plaintiffs' motion for partial summary judgment concerning the fuel tax damages] was that they were not liable for any 'fuel tax damages' at all. Defendants argued that both parties were mutually mistaken" and that Defendants were accordingly not liable for paying any fuel tax damages. Db at 10.

There is no question that Defendants had the opportunity in the trial court to put forward the facts of their claim regarding the non-business use of WEX fuel credit card. Indeed, the issue of

fuel tax damages for Class members who purchased diesel on their own account was a live issue for the trial, an issue on which Plaintiffs' expert quantified damages. Thus, the opportunity, indeed the necessity, of Defendants' addressing this quantification persisted up to the very moment before settlement. Defendants simply never raised this issue in the trial court.

Strikingly, Defendants make no explanation whatsoever of why their argument was not advanced at any time during the multiple motions and intense litigation of this matter in the Court below. *Felton* makes clear that there are narrow exceptions to the general rule precluding an appeals court from considering an issue not raised below. Defendants have made no argument, nor should one be permitted now, that the purported overstatement of damages in the WEX Fuel Tax Judgment goes to jurisdiction or is of great public interest. Even their more general assertion of a supposed requirement of exact damages under the MCA or under the common law of contracts simply does not fit the exceptions to the general rule reiterated by *Felton*. In responding to the instant motion, Defendants should not be permitted to bring forth such assertions for the first time in what is functionally their reply brief on this point. "It is well-settled that introduction of a new issue by way of a reply brief is improper." See *Musto v. Vidas*, 333 N.J. Super. 52, 69 (App.Div. 2000), citing *Selective Ins. Co. of Am. v. Hojnoski*, 317 N.J. Super. 331, 335 (App.Div.1998); *Interchange*

State Bank v. Veglia, 286 N.J. Super. 164, 188 (App.Div.1995), certif. denied, 144 N.J. 377 (1996); *City of Elizabeth v. Elizabeth Fire Officers Ass'n*, 198 N.J. Super. 382, 384 n.2 (App.Div.1985).

This Court should reject Defendants' attempts to use the parties' Settlement Agreement (Da 200-203) as a means of circumventing their failure to argue "exact damages" or present their claims as to the purported non-business use of the WEX credit card in responding to Plaintiffs' motion for partial summary judgment on the fuel tax issue. Nowhere does the Settlement Agreement state that Defendants may appeal an issue that they did not raise below or waive Plaintiffs' rights to insist on this legal requirement. Even assuming that Plaintiffs had explicitly agreed to this Court's hearing this particular appeal, which they most certainly did not, such an agreement by the parties cannot confer jurisdiction on this Court to consider an argument not made below. See *Sabella v. Lacey Township*, 204 N.J. Super. 55, 62 (App.Div. 1985)(citation omitted).

CONCLUSION

Defendants' Point I argument that a small portion of the WEX Fuel Tax Judgment was personal and was not exact damages was not raised to the Court below. There being no justification for Defendants' failure to do so, Defendants' appeal of WEX Fuel Tax Judgment should be dismissed.

RESPECTFULLY SUBMITTED

DAVID TYKULSKER, Esq.

Dated: February 29, 2016