

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STREET SEARCH PARTNERS, L.P.,)
a New Jersey limited partnership,)
Plaintiff,)
)
v.) C.A. No. 04C-09-191-PLA
)
RICON INTERNATIONAL, L.L.C.,)
a Missouri limited liability)
company, and ENVIRO BOARD)
CORPORATION, a Delaware)
corporation,)
Defendants.)

Submitted: May 2, 2006
Decided: May 12, 2006

UPON A & R INVESTMENT ASSOCIATES'
MOTION FOR REARGUMENT
DENIED.
DEFENDANT ENVIRO BOARD CORPORATION'S
MOTION TO DISMISS
GRANTED.

Jeffrey Podesta, *Pro Se*, for Street Search Partners.

Tanya Pino Jefferis, Esquire, Wilmington, Delaware, Attorney for
A & R Investment Associates, L.P., Raymond Nisivoccia and
Albert Passanante.

Joseph J. Bodnar, Esquire, Wilmington, Delaware, Attorney for Enviro
Board Corporation.

ABLEMAN, JUDGE

I have considered A&R Investment Associates' ("A&R") LP Motion for Reargument. Because the Court did not misapprehend the law or the facts in its previous decision, the Motion is **DENIED**. Furthermore, because a corporate entity may not appear without counsel in Delaware courts, and Plaintiff Street Search has failed to have substitute counsel enter an appearance after its original counsel withdrew, Defendant's Motion to Dismiss is **GRANTED**.

Facts

Plaintiff Street Search Partners LP ("Street Search" or "Plaintiff") loaned \$250,000 to Defendant Ricon International, LLC ("Ricon") with instructions for Ricon to re-loan the money to Enviro Board Corporation ("Enviro Board"). Enviro Board failed to repay the loan to Ricon, and, as a result, Ricon subsequently did not repay its related loan with Street Search.

Street Search filed its complaint against both Ricon and Enviro Board on September 22, 2004, alleging a variety of claims against each. Ricon has never entered an appearance, leaving Enviro Board the only defendant at bar. This Court dismissed all of Street Search's claims against Enviro Board, with the exception of an unjust enrichment claim, holding that no privity exists between Enviro Board and Street Search, and that Street Search was not an intended third party beneficiary of the loan contract between Enviro Board and Ricon.¹

¹ *Street Search Partners, LP v. Ricon Int'l*, 2005 WL 1953094 (Del. Super.).

Street Search then encountered financial difficulties, resulting in the withdrawal of its attorneys for Street Search's failure to satisfy outstanding legal invoices. This Court gave Street Search thirty days to engage substitute counsel and file a notice of substitution of counsel. The day before the deadline, the Court's assistant received a telephone call from an attorney (presumably A&R's counsel) requesting a short extension of the deadline, which was granted. Two days later, A&R filed a Motion to Intervene as assignees-in-interest for the purpose of pursuing Street Search's claims against the defendants. Attached to the motion was a contract indicating that Street Search, "for good and valuable consideration," had transferred all interest in its claims against Enviro Board and Ricon to A&R. Enviro Board filed a response, opposing A&R's intervention as "champertous."

The Court ruled from the Bench, denying the motion as champertous. Enviro Board then filed a Motion to Dismiss the action on the grounds that Street Search failed to comply with the Court order requiring substitution of counsel within thirty days, is unrepresented to date, and no other party exists to prosecute the action in Street Search's stead. The Court dismissed the action from the Bench as no one appeared as counsel for Street Search. This is the Court's decision on A&R's Motion for Reargument, and its reasons for granting Enviro Board's Motion to Dismiss.

Law

The standard for a Motion for Reargument pursuant to Superior Court Civil Rule 59(e) is that the court “misapprehended the law or facts” in its previous decision, such that the outcome would have been different if the court had been fully and correctly informed.² Such motion should not be used to merely “rehash the arguments already decided by the court.”³ Nor will the Court consider new arguments that could have previously been raised.⁴ The Court may dismiss an action pursuant to Rule 41(b) for failure of the plaintiff to prosecute or comply with any order of the Court.

Discussion

A. The Motion to Intervene

A&R moved to intervene in this action as a matter of right, and now argues that the Court’s denial of this request is an incorrect application of the law. Rule 24 permits third parties to intervene in litigation that directly affects a real interest held by that party. In order for the Court to grant such a motion, the applicant must show that it holds an interest that shares a common question of law or fact with the main action, that the interest will be directly and immediately affected by the litigation, and that either the applicant’s interest is not identical to that of a present party, or the representation provided by existing parties

² *Steadfast Ins. Co. v. Eon Labs Mfg., Inc.*, 1999 WL 743982 (Del. Super.)

³ *Cunningham v. Horvath*, 2004 WL 2191035 (Del. Super.).

⁴ *Plummer v. Sherman*, 2004 WL 63414 (Del. Super.).

at bar is inadequate to protect the applicant's interests. Where the applicant's interest is identical to that of one of the litigating parties, the applicant must make a compelling showing that representation is inadequate.⁵

In this case, A&R has petitioned to intervene, but has no right of its own to be joined in the action. Instead, A&R is attempting to assert Plaintiff's interest and step into Plaintiff's shoes, without actually becoming the party-in-interest. Rule 24 does not contemplate such a situation, but instead is intended to permit an interested party, who is not otherwise a party to the litigation, to join in a suit in order to protect its own rights.⁶ Because intervention permits the Court to effect what is essentially a joinder of interested parties,⁷ if the Court allowed A&R to intervene in this action, Street Search would remain the plaintiff party in interest asserting its claims, while A&R would be joined as an intervening interested party, also asserting Street Search's claims.

This result would not only be absurd, but also pointless. Even if A&R were permitted to intervene, the Court is still required to dismiss the action due to Street Search's failure to retain substitute counsel during the allotted time, resulting in Street Search's inability to maintain this claim. Dismissal is thus required because Delaware law does not permit legally distinct, artificial entities to be unrepresented by counsel

⁵ *Cheswold Aggregates, LLC v. Town of Cheswold*, 1999 WL 743302, at *2 (Del. Super.).

⁶ *See Bramble Transp., Inc. v. Sam Senter Sales, Inc.*, 294 A.2d 97 (Del. Super.).

⁷ *See White v. Metzger*, 159 A.2d 788 (Del. Super. Ct. 1960).

in court.⁸ Although A&R has tenaciously defended its position that this Court should permit intervention, the case must nevertheless still be dismissed for Plaintiff's failure to obtain counsel and prosecute its claim. As an intervenor, A&R would not have the right to prosecute Street Search's claims for it, but could only represent its own interests in the litigation between Street Search and the defendants. If Street Search does not prosecute its claim, A&R, as intervenor, could not maintain the suit in Street Search's stead because A&R has no claim of its own against Defendants.

Because the end result is the same whether the Court grants or denies the motion, the Court cannot fathom why Street Search has pursued its argument in the dogged manner it has. The Court can only speculate that A&R may have confused intervention and substitution, or that it knows that the Assignment did not effectively transfer all rights in the litigation that would enable A&R to become the actual party in interest. The Court suspects the latter over the former. Indeed, the Court must agree that the attempted assignment of interest fails to transfer Street Search's interest in its claims against Defendant. Still, as will be detailed below, even if the Court treats the Motion to Intervene as a Motion to Substitute, A&R's attempt to maintain this litigation fails.

⁸ *Poore v. Fox Hollow Enters.* 1994 WL 150872 (Del. Super.) (LLC provides limited liability such that member may not appear for the entity in court without proper legal representation); *Arbor Place LP v. Encore Opportunity Fund LLC*, 2002 WL 205681,) (holding that the law treats LLC and LP treated the same because Delaware's LLC Act was modeled on Delaware's LP Act).

B. The Assignment

Although A&R noticed and argued its motion as a Motion to Intervene, the substance of the motion may be evaluated as a motion to substitute parties. Attached to A&R's Motion to Intervene is an Assignment of Claims that purports to transfer Street Search's interest in its claims against Ricon and EnviroBoard "in connection with a Settlement" reached in New Jersey.⁹ In addition, affidavits have been submitted to the Court indicating that Plaintiff Street Search is unable to continue this litigation due to financial hardship. This motion may therefore be considered substantively as a Motion to Substitute, since the apparent intent is to permit A&R to step into Plaintiff's shoes so as to continue the litigation that Street Search cannot. As is illustrated below, however, even under a substitution analysis A&R cannot salvage this litigation.

Rule 25 permits the substitution of parties where one party transfers its interest during the pendency of the action. The Court has the discretion to allow substitution, dependent on whether there has been a proper transfer of interest in the litigation to an assignee.¹⁰ The

⁹ It is the Court's understanding that this litigation was initiated by A&R against Street Search in New Jersey prior to the filing of this action. The Court finds it remarkable that A&R's counsel would attempt to appear on behalf of Street Search during the hearing on the Motion to Dismiss, when the two are adversaries in New Jersey.

¹⁰ *Manubay v. Autumnwood Assocs., LP*, 1997 WL 383020 (Del. Ch.) (declining to permit a substitution where no transfer of interest had occurred); *see also Schock Bros. v. Raskin*, 1991 WL 166076 (Del. Super.) (noting that Rule 25 "does not require that anything be done after an interest has been transferred. The action may be continued by

question thus becomes whether the interest in this litigation has been properly assigned.

Enviro Board argues that the assignment is invalid because unjust enrichment is an equitable claim personal to Street Search, and therefore cannot be assigned. Generally, a chose in action, or the right to bring an action, is transferable if it is the type of claim that would survive the hypothetical death of the assignor and pass to his or her personal representative.¹¹ At common law, survivable actions are those that primarily affect property and property rights, while nonsurvivable actions are those in which the injury is personal, or specific to the person.¹² That common law rule was expanded by statute in Delaware under 10 *Del. C.* § 3701, which provides that “all causes of action, except actions for defamation, malicious prosecution, or upon penal statutes shall survive...” Enviro Board’s argument seems to imply that equitable claims are, by nature, personal. Although many equitable claims are personal, and therefore untransferable, claims for breach of fiduciary obligations and resultant unjust enrichment have been held to survive.¹³ A claim for unjust enrichment due to director misconduct likewise is survivable, and therefore, assignable.

or against the original party, and the judgment will be binding on his successor in interest even though he is not named.”).

¹¹ *Industrial Trust Co. v. Stidham*, 33 A.2d 159, 160-61 (Del.1942); *Garford Motor Truck Co. v. Buckson*, 143 A. 410, 411 (Del.Super.Ct.1927).

¹² *Hollett v. Wilmington Trust Co.*, 172 A. 763 (Del. Super. Ct. 1934); 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 51 (2005).

¹³ *In re Emerging Commc’ns, Inc. S’holders Litig.*, 2004 WL 1305745 (Del. Ch.); *Puma v Marriott*, 294 F. Supp. 1116 (D. Del. 1969).

Enviro Board also contends that the assignment is invalid because it is champertous. Champerty is “an agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds with the owner, if they prevail; the champertor to carry on the suit at his own expense.”¹⁴ The doctrine of champerty prohibits such agreements only in the case of “strangers” to the action – those who have no legal interest in the subject matter of the dispute, or those who have no relation to either of the parties to the dispute.¹⁵ An agreement is not champertous where the assignee has some legal or equitable interest in the subject matter of the litigation independent from the terms of the assignment.¹⁶

A&R contends that the assignment is not champertous because A&R is not a stranger to the litigation at bar. The interest A&R claims is a distant one. A&R is an investor in Street Search Advisors, LLC, which manages Plaintiff. A&R therefore maintains that it has an interest in the recovery of funds that may include investment principle it provided. This interest is sufficient, according to A&R, because no case law requires a direct interest to avoid champerty.

A&R’s contention that no case law requires a direct interest, that *any* interest is sufficient, is inapt. The law clearly requires a *legal*

¹⁴ *Gibson v. Gillespie*, 152 A. 589, 593 (Del. Super. Ct. 1928).

¹⁵ *Bayard v. McLane*, 3 Del. (3 Harr.) 139, 208 (1840).

¹⁶ *Drake v. Nw. Natural Gas Co.*, 165 A.2d 452 (Del. Ch. 1960).

interest in the litigation to avoid champerty.¹⁷ In this case, A&R's interest as the investor in Plaintiff's management company does not evidence a legal interest **in the loan or contract at issue here**. Likewise, A&R's concern regarding recovering money due it by Street Search as a result of litigation in New Jersey does not provide it with a legal interest in the subject matter of this suit.

The Court does note that A&R's position that its interest as an investor in Street Search's management company (and therefore, presumably also Street Search, secondarily) is belied by the litigation in New Jersey. It is clear to this Court that neither an investor, once removed, nor an adversarial party to the plaintiff in an action, may claim an interest in legal proceedings with which it otherwise has no connection.

A&R also maintains that the assignment is not champertous because any proceeds from the litigation will not be shared. Rather, A&R argues, the assignment provides that A&R will retain the entire amount of any judgment recovered against Defendants. During oral argument, however, counsel for A&R disclosed that Plaintiff and A&R have been involved in litigation in New Jersey, and have reached a settlement agreement in that action, for an undisclosed sum. According to counsel, any proceeds from this action would be applied against the debt Street

¹⁷ *Id.* (holding that Delaware courts do not find assignments champertous where the assignee had a “*legal or equitable interest* in the subject matter [at bar]” other than the assignment at issue) (emphasis added). Even this low threshold cannot be met here because A&R has no interest whatsoever in the loan or contract at issue in this case.

Search incurred with A&R under the settlement agreement. The assignment contract supports this claim, indicating that A&R will “pursue the Claims in connection with a Settlement [Agreement]...” Thus, although A&R would retain the full amount of any proceeds from this litigation, Street Search will enjoy a decrease in, or satisfaction of, the debt it owes to A&R. The result of this arrangement is effectively a division of any received proceeds.

Alternately, if the Court were to accept A&R’s claims that the assignment does not effectuate a division of the proceeds under the settlement agreement, the assignment would be unenforceable for lack of consideration. Every contract, to be enforceable, must contain good and valid consideration.¹⁸ Consideration generally consists of a benefit to a promisor, or detriment to a promisee.¹⁹ Delaware’s transactional perspective on consideration permits a court to inquire into, and find, consideration for an agreement anywhere in the transaction, regardless of whether it was labeled or spelled out in the contract.²⁰

The Court, in enforcing contracts, does have an interest in ensuring that consideration exists,²¹ even though, strictly speaking, the adequacy of the consideration is not generally a question for judicial

¹⁸ *Corletto v. Morgan*, 89 A. 738 (Del. Super. Ct. 1914).

¹⁹ *First Mortgage Co. v. Fed. Leasing Corp.*, 456 A.2d 794 (Del. 1982).

²⁰ *Equitable Trust Co. v. Gallagher*, 99 A.2d 49 (Del. Ch. 1953).

²¹ *Thai Tantalum Inc. v. Fansteel Inc.*, 1992 WL 172678 (Del. Ch.) (inquiring into the transaction where the contract indicated the consideration for the sale was \$1.00 and “other good and valuable consideration,” and finding that the “other valuable consideration appears to be the cancellation of a \$400,000 debt...”).

determination.²² A&R's Assignment of Claims indicates that it was executed "in connection with a Settlement..." and that the agreement was made "for good and valuable consideration." Thus, the consideration for the assignment appears to be the cancellation of debt accrued under the settlement agreement in the litigation between Street Search and A&R in New Jersey with funds to be obtained from this action. The Court is unsure whether the assignment was an asset bargained for in the settlement agreement, or otherwise, because counsel for A&R never provided the settlement agreement, in draft or other form, despite repeated requests from the Court.

If, indeed, the assignment was executed in consideration of A&R's action to recoup monies owed A&R by Street Search, and thereby cancel Street Search's debt to A&R, the assignment is champertous. If that is not the case, the assignment is unenforceable by this Court for lack of consideration. Either way, the Court cannot permit a substitution of A&R for Street Search because A&R is not the real party-in-interest in this case.

Conclusions

The Court did not misapprehend the facts or the law when it denied A&R's Motion to Intervene. A&R is not properly an intervenor because its interests in the litigation stems from an assignment of interest and A&R's interest, if any, is the same as Plaintiff's. A&R cannot

²² *Affiliated Enters., Inc. v. Waller*, 5 A.2d 257 (Del. 1939).

be properly substituted for Plaintiff because A&R does not have a valid assignment of interest. Accordingly, A&R's Motion for Reargument is **DENIED**.

Furthermore, since corporate entities must be represented by counsel in order to appear before the Court and prosecute a claim, and Street Search has never caused substitute counsel to enter an appearance, Enviro Board's Motion to Dismiss must be **GRANTED**.

IT IS SO ORDERED.

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary

cc: Jeffrey Podesta
Tanya Pino Jefferis, Esquire
Joseph J. Bodnar, Esquire